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A TREATISE
ON
THE LAW RELATING TO
INJUNCTIONS

By HOWARD C. JOYCE
OF NEW YORK CITY

IN THREE VOLUMES

VOL. II.



ALBANY, N. Y.
MATTHEW BENDER & COMPANY.
1909.

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Section 687. Enjoining fraudulent judgment.—The enforcement of a judgment which has been obtained by means of fraud on the part of the plaintiff may be restrained by injunction.¹ So it

1. *United States*.—*Sawyer v. Gill*, L. Co., 103 Ga. 707, 30 S. E. 690; Fed. Cas. No. 12,399. *Hitt v. Americus P. & L. W. & C. Co.*,
Delaware.—*Emerson v. Gray* (Del. 96 Ga. 788, 22 S. E. 926.
Ch. 1906), 63 Atl. 768. *Illinois*.—*Drake v. Sherman*, 179
Georgia.—*Dixon v. Merchants & M. Ill.* 362, 53 N. E. 628; *Schroer v.*

has been decided that where a judgment has been procured by artifice or concealment on the part of plaintiff, and the court of law is not able to give relief, a court of equity may by injunction prevent the plaintiff from using the judgment to the injury of the defendant, or if he has enforced the judgment, will hold him a trustee and compel him to account for the fruits of his fraud.² So where the plaintiff in an action on a note knew that it was a forgery as to one defendant, and yet permitted the other defendants to withdraw the pleas which had been put in for all the defendants and took judgment by default in the absence of the defendant whose name had been forged, he was held to have obtained the judgment by means of fraud as to such defendant, and was enjoined from

Pettibone, 163 Ill. 42, 45 N. E. 207;
Nelson v. Rockwell, 14 Ill. 375.

Indiana.—See *Rateliff v. Stretch*,
130 Ind. 282, 30 N. E. 30.

Missouri.—*Perry v. Siter*, 37 Mo.
273; *Wet v. Wayne*, 3 Mo. 16; *San-*
derson v. Voelker, 51 Mo. App. 328.

New Jersey.—*Tomkins v. Tomkins*,
11 N. J. Eq. 512.

Oregon.—*Huntington v. Crouter*,
33 Oreg. 408, 54 Pac. 208.

Texas.—*Park v. Casey*, 35 Tex.
536; *Babcock v. Marshall*, 21 Tex.
Civ. App. 145, 50 S. W. 728.

2. *Tomkins v. Tomkins*, 11 N. J.
Eq. 512, per Williamson, Ch.: "The
power of a court of equity to look
into the judgments of other courts
and relieve against them on the
ground of fraud, is well established.
It was affirmed in this court in *Glo-*
ver v. Hedges, 1 N. J. Eq. 119; *Boul-*
ton v. Scott, 3 N. J. Eq. 231; *Gif-*
ford v. Thorn, 9 N. J. Eq. 702; *Van-*
meter v. Jones, 3 N. J. Eq. 523.
There being some doubt about the cor-
rectness of a judgment for \$1,000 re-
covered by K. against P., and it be-
ing supposed that an appeal would
be taken, their attorneys entered into

a compromise that P. should pay
\$600 in satisfaction of the judgment,
which sum was paid, and the judg-
ment satisfied of record. Subse-
quently, K. moved to set the satisfac-
tion aside on the ground that he was
the sole owner of the judgment, and
that his attorneys had no authority
to compromise the same, and the mo-
tion was sustained. P. thereupon
brought an action to enjoin the col-
lection of the excess of \$600, and al-
leged that K. owned but half of the
judgment, and that his attorneys, who
effected the compromise, owned the
other half. Held, that the petition
stated a cause of action, and that P.
was entitled to equitable relief." *Phil-*
lips v. Kuhn, 35 Neb. 187, 52 N. W.
881, per Maxwell, C. J.: "The rule
is that where a judgment has been
procured by plaintiff's artifice or con-
cealment, a court of equity will grant
appropriate relief. *Griffith v. Rey-*
nolds, 4 Gratt. 46; *Pratt v. Northam*,
5 Mason, 95; *Fish v. Lane*, 2 Hayw.
(N. C.) 342. See, also, *Spencer v.*
Vigneaux, 20 Cal. 442; *Holland v.*
Trotter, 22 Gratt. 136."

enforcing it against him.³ And in an action by the receiver of an insolvent corporation to set aside judgments against it upon the ground that they were fraudulently obtained on fictitious claims, a preliminary injunction restraining defendants from interfering with the proceeds of the execution sales, will not be disturbed where a month after the last advance alleged to have been made by the judgment creditor, and four months after the first advance, no entry appeared on the books of the corporation disclosing any such loans.⁴ A judgment will also be enjoined for fraud and deceit on the part of the plaintiff's attorney by which defendant was prevented from making a meritorious defense, which he otherwise would have made.⁵ And where a judgment is founded on a false return of process its enforcement may be enjoined,⁶ as may also a judgment on the ground of collusion to defeat the lien of a holder of a purchase money mortgage, though by Code he may await the sale of the land under the judgment and attack the judgment as collusive when the fund is brought into court, and claim the fund.⁷

§ 688. **Same subject.**—If the result aimed at and reached by a judgment is fraud, the judgment is not protected in a court of equity because the forms of law have been observed in obtaining it.⁸ And fraud perpetrated by means of a judgment is no more entitled to immunity than a fraud perpetrated by means of a deed or mortgage.⁹ And if a judgment, though founded upon a just debt, is entered not for the purpose of securing or collecting the debt, but for the purpose of being used as a cover to protect the defendant's property from his other creditors, it will be denounced as a fraud and set aside as would any other fraudulent

3. *Rowland v. Jones*, 2 Heisk. (Tenn.) 321.

4. *Pierce v. Mayer*, 13 N. Y. Supp. 343.

5. *Thompson v. Laughlin*, 91 Cal. 313, 317, 27 Pac. 752.

6. *Emerson v. Gray* (Del. Ch. 1906), 63 Atl. 768.

See, also, *Huntington v. Crouter*, 33 Oreg. 408, 54 Pac. 208, holding

that a judgment so obtained may be enjoined though the plaintiff was not responsible for the false return.

7. *Dixon v. Merchants & M. L. Co.*, 103 Ga. 707, 30 S. E. 690.

8. *Metropolitan Bank v. Durant*, 22 N. J. Eq. 35; *aff'd* 24 N. J. Eq. 556.

9. *Jones v. Naughtright*, 10 N. J. Eq. 298.

device.¹⁰ But a court of equity will not, on the application of a defendant in a judgment at law, who has had a fair opportunity to be heard upon a defense, over which the court pronouncing the judgment had full jurisdiction, enjoin the enforcement of the judgment simply on the ground that it was unjust. Equity limits its interference with the enforcement of a judgment at law to cases where that appears which clearly shows it to be against conscience to execute the judgment, and of which the injured party could not have availed himself in a court of law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents.⁴

§ 689. **Enjoining judgments fraudulently altered; foreign judgments.**—Where a judgment was obtained and execution issued and levied on property sufficient to satisfy the debt, but was returned on plaintiff's order, and subsequently the record was fraudulently changed, and the amount of the judgment increased, without the judgment debtor's consent, an injunction was granted to prevent the collection of the judgment and relieve against the fraud, and it was held that in such a case of fraud, a court of equity would not be ousted of its jurisdiction by a statute

10. *Mechanics' Nat. Bank v. Burnet Mfg. Co.*, 33 N. J. Eq. 486.

11. *Phillips v. Pullen*, 45 N. J. Eq. 5, 16 Atl. 9; *aff'd* 45 N. J. Eq. 830, 18 Atl. 749. In this case the chancellor cited and relied on *Powers v. Butler*, 4 N. J. Eq. 465; *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Moore v. Gamble*, 9 N. J. Eq. 246; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Holmes v. Steele*, 28 N. J. Eq. 173. In *Mechanics' Nat. Bank v. Burnet Mfg. Co.*, 33 N. J. Eq., *Van Fleet, V. C.*, said: "Courts of equity sometimes give relief against judgments at law, but only where it is shown that the defendant was ignorant of the facts on which his defense rests, until after the time for making defense at law

had passed; or that he was prevented from making defense by the artifice or fraud of his adversary, or by accident unmixed with negligence or fraud on his part, or that his defense is a matter of pure equity cognizance. But in cases where the grievance he attempts to urge is one that the court which pronounced the judgment is competent to hear and decide, and he has either urged it there unsuccessfully or has negligently omitted to do so, this court can give no relief. *Reeves v. Cooper*, 12 N. J. Eq. 223; *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Holmes v. Steele*, 28 N. J. Eq. 173." See, also, *Emerson v. Gray* (Del. Ch. 1906), 63 Atl. 768.

which conferred a similar jurisdiction upon courts of law.¹² And if a judgment has been changed by collusion of the parties to it for the purpose of defrauding a third person, the latter may have its collection enjoined.¹³ Again, when an error occurs in the proceedings leading to a judgment, or in the judgment itself, it can ordinarily be corrected only by a proceeding taken in the case either by motion for new trial or review, or by appeal; but if the matter complained of grows out of unlawful proceedings subsequent to the judgment, the remedy by injunction is appropriate.¹⁴ For while a stranger to a judgment cannot enjoin it merely to give him an opportunity of showing it to be erroneous, this rule will be modified as to a creditor who is seeking to prevent collusive combinations between his debtor and third parties.¹⁵ And where a judgment was recovered in Illinois on the transcript of the record of a judgment in another State, and the latter judgment was subsequently reversed, it was held that the collection of the judgment recovered in Illinois would be there enjoined.¹⁶

§ 690. **Fraudulent promises and compromise.**—A judgment debtor is entitled to an injunction restraining the execution of a judgment at law, if he was prevented from making his defense by fraudulent conduct of the judgment creditor.¹⁷ And where a judg-

12. *Babcock v. McCamant*, 53 Ill. 214.

13. *Hardy v. Broadus*, 35 Tex. 668.

14. *Wills Point Bank v. Bates*, 76 Tex. 329, 13 S. W. 309. And see *Roberts v. Miles*, 12 Mich. 297. A judgment of a New York city District Court was dated and entered by the clerk as of August 24th, which was within the statutory eight days after final submission, but, in fact, the judgment was not filed with the clerk until August 27th, which was too late. The defendant therein had no actual notice of the facts until September 15th, when plaintiff issued execution. It was then too late to ap-

peal from the judgment, if the true date thereof was August 24th. Held, that the execution should be enjoined. *Patterson v. Naehr*, 6 N. Y. Supp. 513, 16 Civ. Pro. 449.

15. *Mayes v. Woodall*, 35 Tex. 687.

16. *McJilton v. Love*, 13 Ill. 486.

17. *Kelley v. Kriess*, 68 Cal. 210, 9 Pac. 129, per Searls, C.: "We are of opinion the facts as stated in the complaint show that plaintiff was, by the wrongful acts of defendant, placed in a position from which he could only be relieved by a court having equity jurisdiction, and in an independent action instituted for that purpose. The action upon the prom-

ment by default has been taken after an agreement to submit the matter in dispute to arbitration, and at a time when the defendant had a right to suppose the legal proceedings to be at an end, its collection may be enjoined.¹⁸ And where, after an action was instituted, the parties compromised and settled, and the plaintiff promised to dismiss the action, and the defendant, relying on the stipulation, took no further steps to make his defense, but plaintiff, without notice to defendant, took judgment, it was held that the execution sale under the judgment should be enjoined.¹⁹

issory note was pending for a much larger amount than was due. The natural course of plaintiff would have been to defend the action, but he is assured by the defendant that there is no occasion for him to do so, for the reasons—1. That the defendant does not expect to get judgment for more than is due; 2. That he has ample property of Flynn under attachment to satisfy the demand; 3. That defendant did not expect or intend to ever look to plaintiff for any portion of said claim. Plaintiff, relying upon these statements, did not answer. Judgment was taken by the defendant for the full amount of the note, but this did not concern plaintiff particularly, for he knew the property attached was ample to satisfy such judgment. Then the attachment was released, but *non constat* that defendant was going to violate his promise not to interfere with or look to plaintiff, and it was not until the threatened writ of execution upon the judgment, in violation of these promises, that his danger became imminent. It was then too late to move in the court, where the former judgment was rendered, for relief. He had been lulled into repose by false promises, and should not suffer by their breach.” And see *Wagner v. Shank*, 59 Md. 313; *Pearse*

v. Olney, 20 Conn. 544; *Hahn v. Hart*, 12 B. Mon. 426; *Webster v. Skipwith*, 26 Miss. 341; *Baker v. Redd*, 44 Iowa, 179.

18. *Bresnahan v. Price*, 57 Mo. 422.

19. *California Beet Sugar Co. v. Porter*, 68 Cal. 369, 9 Pac. 313, per *McKee, J.*: “In *Lapham v. Campbell*, 61 Cal. 296, we held that where a complaint against a judgment fraudulently taken shows sufficient reasons why the statutory remedy by motion has not been resorted to, the action is maintainable. And subsequently, in *Baker v. O’Riordan*, 65 Cal. 368, 9 Pac. 232, it was taken that a judgment taken by fraud and without notice to the injured party is absolutely void. A judgment taken in such circumstances is not taken through mistake, inadvertence, surprise, or excusable neglect, within the meaning of section 473 of the Code, and the party against whom such a judgment is taken has the right to an original action to have it annulled by the judgment of a court of equity. It has been held in *Bibend v. Kreutz*, 20 Cal. 109; *Ketchum v. Crippen*, 37 Cal. 223; and *Ede v. Hazen*, 61 Cal. 360, that so long as the statutory remedy by motion to set aside a judgment exists, the assistance of a court of equity cannot be invoked. But

§ 691. Enjoining judgment entered in violation of agreement.

—Upon a bill in equity praying that the defendant may be enjoined against enforcing a judgment at law which he has obtained against complainant in violation of an agreement between them on the subject and without complainant's knowledge, it has been held that it is not a sufficient reason for refusing the injunction that the defendant has not threatened to enforce the judgment, since it is indispensable to the complainant's security that it should be discharged, and defendant's refusal to discharge it is equivalent to a threat to enforce it.²⁰ And a judgment obtained in violation of an agreement of compromise, by which an appearance to the action was prevented, is such a fraud as entitles the party against whom the judgment is taken to have it vacated and set aside. In such a case a court of equity has an inherent power to afford injunctive relief, which has not been impaired by the provisions of the Indiana Code in respect to the review of judgments.²¹

none of those cases involved the question of a judgment fraudulently taken against an injured party and execution by a sale of his real property."

20. *Chambers v. Robbins*, 28 Conn. 552. And see *Pearce v. Olney*, 20 Conn. 544, where a judgment was enjoined which had been in violation of a promise by the plaintiff's attorney that nothing further should be done without notice to defendant, and after a considerable time defendant supposed the action had been abandoned. And see the similar case of *Brake v. Payne* (Ind.), 37 N. E. 140.

21. *Nealis v. Dicks*, 72 Ind. 374, per Elliott, J.: "The Legislature did not mean that the statute should be invoked by one who has obtained a judgment by fraud. . . . A bill of review was not the appropriate remedy, under the old chancery practice, against a judgment obtained by fraud, and it is evident that our Code did not mean to enlarge the office of a bill of review, but that it did

mean to provide substantially the same remedy. Courts of equity relieved against judgments obtained by fraud, not by bill of review but by original bill, generally by injunction. *Carrington v. Holabird*, 17 Conn. 530; *Greene v. Haskell*, 5 R. I. 447; *Pearce v. Olney*, 20 Conn. 543; *Chambers v. Robbins*, 28 Conn. 552. The complaint shows that Hamilton's judgment was obtained by fraud. The facts pleaded bring the case fully within the rule declared by the adjudged cases. . . . A judgment obtained in violation of an agreement, and by which an appearance is prevented, will not be allowed to stand. *Molyneux v. Huey*, 81 N. C. 106; *Hibbard v. Eastman*, 47 N. H. 507; *Allen v. Maclellan*, 12 Pa. St. 328; *Hall v. Holmes*, 30 Md. 558; *Hurlburt v. Reed*, 5 Mich. 30; *Rogers v. Gwinn*, 21 Iowa, 58; *Dobson v. Pearce*, 12 N. Y. 156; *Cannan v. Reynolds*, 5 El. & Bl. 301. Our own court has recognized this doc-

§ 692. Same subject.—Where no special proceeding under the Code is available, equity will enjoin the enforcement of a judgment by default, taken in fraud of a promise to defendant to dismiss.²² The power of a Circuit Court to set aside an execution sale on account of fraud is confined to the return term of the execution, after which relief can be had only in a court of equity.²³

§ 693. Enjoining collection of fraudulent judgment for costs.—Where a defendant in a suit before a justice of the peace pays the claim, and enters into a stipulation for a dismissal at the costs

trine. *Johnson v. Unversau*, 30 Ind. 435; *Stone v. Lewman*, 28 Ind. 97. And see *Ward v. Quinlivan*, 57 Mo. 425. And see, also, *Greenwaldt v. May*, 127 Ind. 511, 27 N. E. 158, where a judgment for costs entered in violation of an agreement for dismissal was enjoined."

22. *Cadwallader v. McClay*, 37 Neb. 359, 55 N. W. 1054, per Irvine, C.: "There can be no doubt that a judgment taken contrary to an agreement of this character, relied upon by the defendant, would be vacated if taken in the District Court, under section 602 of the Code. That section does not apply to justices of the peace, and the plaintiff is therefore entitled to proceed in equity to avoid the judgment. See *Black, Judgments*, § 373, and cases there cited." Plaintiffs prayed an injunction against the sale of their property under execution by a constable, and alleged that actions were brought against them on two drafts accepted by them, and it was agreed that the cases should be tried together, but that separate verdicts should be returned; that the jury returned but one verdict, "for the amount sued for," on which two judgments were entered, under which two executions issued, and were

levied on the property; that the constable refused to accept the forthcoming bond, with ample security, tendered by plaintiffs, and was proceeding to sell the property; and that he and his sureties were insolvent. Defendant denied that any agreement had been made as to separate verdicts in the actions against plaintiffs, and alleged that they refused to allow the verdict to be amended. He denied that he and his sureties were insolvent, and alleged that the security tendered by plaintiffs on their forthcoming bond was not sufficient. Held, that it was within the discretion of the court to refuse the injunction. *Bentley v. Crenshaw*, 85 Ga. 871, 11 S. E. 650.

23. *Hall v. Moore*, 68 Miss. 527, 10 So. 74, per Campbell, J.: "We regret that the state of the law is such as to deny relief to the appellant, who seems to have been greatly wronged; but it was decided in *Hopton v. Swan*, 50 Miss. 545, that the powers of a Circuit Court to afford such relief is confined to the return term of the execution, after which relief can be had only in chancery. . . . As long as two sets of courts are maintained to do what one might do as well, the established rules as

of plaintiff, and subsequently causes witnesses to be subpoenaed, and costs to be taxed against plaintiff, a judgment therefor is invalid, as obtained by fraud, and, since a justice has no jurisdiction to review his own judgment, there is no remedy at law, and equity will enjoin its collection.²⁴

§ 694. **The fraud must be in the procurement of the judgment.**

—The fraud which will authorize a court of equity to grant relief by injunction against a judgment, must be fraud in the procurement of the judgment, and not merely fraud in the cause of action on which the judgment was founded, and which could have been interposed as a defense, unless its interposition as such defense was prevented by the fraud of the plaintiff.²⁵ Objections relating to the regularity of a judgment at law, or to the validity of the instrument on which it is founded, constitute no ground for the interference of equity. A judgment at law can be impeached in equity for fraud in its procurement, but not for fraud in the instrument on which it is founded. If the instrument was without consideration or invalid, or if the judgment was illegal, the remedy for the aggrieved party is by application to the court in which it

to the time of division between them, where happily they can be traced, as in this case, must be respected.”

24. *Greenwaldt v. May*, 127 Ind. 511, 27 N. E. 158, per Elliott, J.: “As the judgment for costs was obtained by fraud, equity will enjoin its collection, for the justice of the peace had no authority to review his own judgment on the ground of fraud. A justice of the peace has no equity jurisdiction, and cannot set aside or annul his judgment, except in the mode provided by statute, and the statute does not authorize him to review a judgment. *Ainsworth v. Atkinson*, 14 Ind. 538; *Snell v. Mohan*, 38 Ind. 494; *Richards v. Reed*, 39 Ind. 330; *Doyle v. State*, 61 Ind. 324; *Brown v. Goble*, 97 Ind. 86. If

the original action has been brought in a court invested with jurisdiction to correct or review its own judgments we should have a very different question. Here, however, the appellee could not secure relief before the justice of the peace, and we must adjudge that it can be awarded him by equity, or else we must adjudge that he is remediless. The case of *Martin v. Pifer*, 96 Ind. 245, is not in point, for the reason that in this case the judgment was obtained by fraud and was entered after the action had been dismissed.”

25. *Payne v. O'Shea*, 84 Mo. 129; *White v. Boyce*, 6 N. Y. St. R. 19. See, also, *Watts v. Frazer*, 80 Ala. 186; *Brownell v. Storm Lake Bank*, 63 Iowa, 754, 19 N. W. 788; *Shufeldt*

was entered or by writ of error.²⁶ The acts for which a court of equity will enjoin or annul a judgment must have relation to fraud extrinsic or collateral to the matter tried by the court of law, and not to a fraud in the matter on which the judgment was rendered.²⁷ The fraud must have occurred in the very concoction or procuring of the judgment, not known to the opposite party at the time, and for not knowing which he is not chargeable with negligence.²⁸ And ordinarily the fraud must be actual and positive and not merely constructive.²⁹

§ 695. Facts of fraud are essential; inferences insufficient.—Where payment of the proceeds of an execution sale is sought to be restrained, on the ground that the judgment was obtained by fraud and collusion on a cause of action which did not exist, the injunction affidavits must not be inferential, but must positively deal with the particular facts from which the inference of collusion is made.³⁰

§ 696. Requisite allegations of fraud.—Where a creditor, after suit, accepts money from the debtor in full settlement of his demand, the debtor may enjoin the enforcement of a judgment taken against him in his absence, and a complaint stating the payment, its acceptance in full settlement, and the entry of the judgment in the debtor's absence, sufficiently states the facts constituting the

v. Gandy, 34 Neb. 32, 51 N. W. 302.

26. Stratton v. Allen, 16 N. J. Eq. 229.

27. United States v. Throckmorton, 98 U. S. 68, 25 L. Ed. 93.

28. Mayor, etc., of the City of New York v. Brady, 115 N. Y. 599, 614, 22 N. E. 237; Stillwell v. Carpenter, 2 Abb. N. C. 263.

29. Ross v. Wood, 70 N. Y. 10.

30. Attaching creditors of a corporation sought to restrain payment of proceeds of sales, on execution, of the property of the corporation, on the ground that the judgments under which such sales were made were re-

covered by procurement of its president, in violation of N. Y. Rev. Stat., part 1, ch. 18, title 4, § 4, forbidding an insolvent company to make any transfer of property in contemplation of insolvency. Their affidavits averred that, from statements of the president and his attorney, and from a list of creditors submitted by the corporation, a part of the debts for which the judgments were recovered were not due, and that the president had procured a suit against the corporation to be brought by his wife for a debt not in such list. Such statements were not set forth, and were

fraud by which the judgment was obtained.³¹ In such a case it is not laches for the debtor not to answer in the suit and not to attend in court, and to rely upon the creditor's taking no further proceedings in the suit, and the creditor's entry of judgment in a suit which he has fully settled, is a fraud which entitles the debtor to injunctive relief.³²

§ 696a. **Judgment through unauthorized appearance of third person.**—A defendant may be granted an injunction against the enforcement of a judgment where it appears that it was rendered in consequence of the unauthorized appearance of a third person for him.³³ The doctrine, however, is not accepted in all jurisdictions, it being in some held that a petition to stay proceedings and asking that the judgment be opened up and the petitioner allow to defend is the proper remedy.³⁴ And in others it is held that an injunction should only be granted where it appears that the enforcement of the defendant's remedy at law for damages against the one so appearing will be inadequate owing to such persons inability to answer for the damages.³⁵

§ 697. **When judgment not enjoined on ground of fraud.**—Where fraud or mistake in connection with the transaction upon which the claim, which was the foundation of the judgment, arose, could have been set up as a defense against the action at law, equity will not enjoin the enforcement of the judgment rendered

met by opposing affidavits stating the facts. Held, that the injunction could not be sustained. *Dickson v. Mark Mayer*, 58 Hun, 610, 12 N. Y. Supp. 651.

31. *Gates v. Steele*, 58 Conn. 316, 20 Atl. 474, per Thayer, J.: "The voluntary acceptance of the money by Steele, in full settlement, operated to discharge both debt and costs. *Canfield v. School District*, 19 Conn. 529; *Ayer v. Ashmead*, 31 Conn. 447; *Buell v. Flower*, 39 Conn. 462. The receipt in full could have been pleaded in

bar to the further maintenance of the suit. *Beam v. Barnum*, 21 Conn. 200; *Aborn v. Rathbone*, 54 Conn. 444, 8 Atl. 677."

32. *Gates v. Steele*, 58 Conn. 316, 20 Atl. 474.

33. *Truett v. Wainwright*, 9 Ill. 418; *Campbell v. Edwards*, 1 Mo. 324.

34. *Hollinger v. Reeme*, 138 Ind. 363, 36 N. E. 1114, 46 Am. St. Rep. 402, 24 L. R. A. 46.

35. *Bunton v. Lyford*, 37 N. H. 512, 75 Am. Dec. 144.

in that action.³⁶ And a judgment at law rendered upon an account stated is conclusive as to the fairness of the account, except that it is subject to appeal. A law court being as competent to try the question of fraud as a court of equity, the latter court will not afford injunctive relief against the judgment, even though if the question were open there might be ground for such relief, and though, also, such relief might be broader than the mere establishment of a defense on the ground of fraud.³⁷ Again, where a plaintiff in attachment chose to sue by a foreign attachment when de-

36. *United States*.—Marine Ins. Co. v. Hodgson, 7 Cranch, 332, 3 L. Ed. 362; *Pacific R. Co. v. Missouri Pac. R. Co.*, 12 Fed. 641.

District of Columbia.—Mason v. Jones, 7 D. C. 247.

Illinois.—Crumpton v. Baldwin, 42 Ill. 165.

Indiana.—State v. Holmes, 69 Ind. 577.

Mississippi.—Allen v. Hopson, 1 Freem. Ch. 276.

Nebraska.—Norwegian Plow Co. v. Bollman, 47 Neb. 186, 66 N. W. 292, 31 L. R. A. 747.

New York.—Le Guen v. Gouverneur, 1 Johns. Cas. 436, 1 Am. Dec. 121.

North Carolina.—Partin v. Luterloh, 59 N. C. 341.

37. *Edmanson v. Best*, 57 Fed. 531, 6 C. C. A. 471, per Woods, J.: "It is not now an open question whether the settlement between these parties was fair, or was brought about by false and deceitful means. We agree with the court below that the question was lawfully tried and determined in the case at law and is not open to reconsideration by a court of equity. Though the declaration in the suit at law made no mention of the contract of settlement, it was competent for the plaintiff in the action to introduce it, as he did. in

proof of his demand. *Chit. Pl.*, 341; *Packet Co. v. Sickles*, 24 How. 342; *Wilson v. King*, 83 Ill. 236; and the instrument not being under seal, and, under the Illinois practice, even though it had been under seal, the defendant had the right to show in defense, as he attempted to do, that it was obtained by fraud or was without consideration. *Greenl. Ev.*, § 135; *Wilson v. King*, *supra*. The issue having been made and tried in that way, the judgment rendered became conclusive until set aside by the court which rendered it or by an appellate court. It is not material that the defense was of such a nature that, if the question were open, there might be ground for a suit in equity. It was a proper defense to the action at law, and, having been interposed and determined, the judgment is conclusive proof that the fraud attempted to be proved was not committed. While the relief obtainable in equity, if the fraud were proven, would be broader than the mere establishment of a defense in the action at law, the law court was quite as competent as a court of equity to try the question of fact; and, it having been so determined that there was no fraud, the question of the extent of relief obtainable in another court if the fraud were provable is immaterial. If it

defendant was not a resident of the State instead of by summons when defendant might have been found within the State, both modes of suit being provided by law, the choice of the former from motives of self interest does not prove fraud on the part of plaintiff, and does not present any ground for an equity court to set aside a conveyance to plaintiff made by the auditor of the attachment suit. But where the plaintiff in such a case, without the knowledge of defendant, obtained judgment and purchased the land under his execution, equity will restrain plaintiff from alienating the land so purchased until defendant, who has a defense under the statute of limitations, has an opportunity to apply to the Supreme Court, whence the attachment issued, to open its judgment and let him in to defend.³⁸

§ 698. **Cumulative statutory remedy for fraud, etc.**—A statutory provision authorizing courts to vacate for fraud their own judgments, rendered at a previous term, is held to be cumulative, and does not exclude an original action in a court of general equity jurisdiction to enjoin the collection of a judgment obtained by fraud.³⁹ Thus, where the payee of a note, with warrant of attorney attached, took judgment on it, though it had been paid, without notice to the makers, it was held that they could enjoin its collection by suit in another court of general equity jurisdiction, on the ground that the court rendering the judgment had not acquired jurisdiction of them.⁴⁰ Under the provision of the Alabama Code, that the landlord of any building “shall have a lien

were true, as asserted, that the court held that the defense could not be made at law, that was an error upon which the complainant should have asked a new trial, and, if necessary, should have taken a writ of error.”

38. *Herbert v. Herbert*, 50 N. J. Eq. 467, 25 Atl. 401.

39. *Darst v. Phillips*, 41 Ohio St. 514; *Coates v. Chillicothe Bank*, 23 Ohio St. 415.

40. *Darst v. Phillips*, 41 Ohio St. 514, per Martin, J.: “The fraud charged was one upon the court as well as upon the judgment defend-

ants. It amounts to this, that the steps evidencing the jurisdiction and cause of action were falsely and fraudulently simulated, without the knowledge of the defendants or opportunity for knowledge, and that Darst was at the time subjecting their property to seizure by the sheriff of Lucas county. The vital fact is that there was no cause of action. The payment of the debt revoked the power and left the cognovit without any support and there was no jurisdiction actually acquired.”

on the goods, furniture and effects belonging to the tenant for his rent, which shall be superior to all other liens, except "taxes, it is held such lien exists independently of the action in attachment provided for its enforcement by section 3070, and, where other creditors of the tenant have attached his goods, the fact that the landlord also attached for rent does not bar an action in equity to enforce such lien against the proceeds of sale under the attachments, as superior to the attachment liens, since the codal remedy by attachment does not supersede the pre-existing remedy by injunction, but is cumulative to it.⁴¹

§ 699. **Enjoining foreign judgments for fraud.**—The power of a court of equity to relieve against fraudulent judgments is not limited to judgments recovered in the courts of the same State, but may be exerted against judgments recovered in the courts of other States.⁴² So where an action was brought in Connecticut on a judgment recovered in New York, and the defendant in the judgment filed a bill on the equity side of the Connecticut court, alleging that the judgment was procured by fraud, and it being so adjudged, the prosecution of the action on the judgment was enjoined, and it was held in a subsequent action by the assignee of the judgment brought in New York that, though the foreign injunction was without efficacy in New York, yet that the Connecticut decree that the judgment was fraudulent was operative in the New York forum, and conclusive upon the parties everywhere, so as to prevent the assertion of any claim by any one under the fraudulent judgment.⁴³ So a judgment procured by fraud in one State will not be enforced in another, and in a court of equity it

41. *Carman v. Alabama Nat. Bank*, 101 Ala. 189, 13 So. 581.

42. *Pearce v. Olvey*, 20 Conn. 544; *Doughty v. Doughty*, 27 N. J. Eq. 315; *Davis v. Headley*, 22 N. J. Eq. 115, 123; *Dobson v. Pearce*, 12 N. Y. 156.

43. *Dobson v. Pearce*, 12 N. Y. 156, 167. In *Pearce v. Olney*, 20 Conn. 544, a judgment was obtained

in New York, in violation of a promise to defendant that the suit should not be proceeded with without further notice to him. The Connecticut court held this surprise upon defendant to be tantamount to fraud, and so declared the judgment to be fraudulent and void, and restrained further proceeding upon it.

makes no difference whether the fraud set up is defense, or is in support of a suit in equity to restrain proceedings on the judgment.⁴⁴

§ 700. **Federal injunctions against fraudulent State judgments.**
—A Federal Circuit Court, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may enjoin a party from enforcing a judgment fraudulently obtained by him in a State court, if the circumstances are such as to justify such relief, had the judgment been rendered by the Federal court itself.⁴⁵

44. *Davis v. Headley*, 22 N. J. Eq. 115, by the chancellor: "That fraud will avoid a judgment of another State is laid down by Story and many other authorities. Story Conf. of Laws, § 591. Courts of equity will set aside judgments of their own State and of other States on this ground. *Moore v. Gamble*, 9 N. J. Eq. 246; *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Glover v. Hedges*, 1 N. J. Eq. 119; *Powers v. Butler*, 4 N. J. Eq. 465."

45. *Marshall v. Holmes*, 141 U. S. 589, 597, 12 S. Ct. 62, 35 L. Ed. 870. In this case Harlan, J., after citing the leading case of *Barrow v. Hunton*, 99 U. S. 80, 85, 25 L. Ed. 407, and *Johnson v. Waters*, 111 U. S. 640, 667, 4 S. Ct. 619, 28 L. Ed. 547, and *Arrowsmith v. Gleason*, 129 U. S. 86, 101, 9 S. Ct. 237, 32 L. Ed. 630, where the principle of that case was applied, said: "These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original independent suit because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the State court to set aside or vacate the judgments in question, it may, as between the parties before it, if the

facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a State court. It would simply take from him the benefit of judgments obtained by fraud." In *Barrow v. Hunton*, *supra*, the court said: "If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review or an appeal, the United States courts could not properly entertain jurisdiction of the case. Otherwise the Federal courts would become invested with power to control the proceedings in the State courts or would have appellate jurisdiction over them in all cases where the parties are citizens of different States. Such a result would be totally inadmissible. On the other hand, if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and according to the doctrine laid down in *Gaines v. Fuentes*, 92 U. S. 10,

§ 701. **Mistake as ground for injunction.**—In some cases it is decided that the enforcement of a judgment may be enjoined on the ground of mistake.⁴⁶ So where a bill to set aside a decree entered on the compromise of a suit brought by plaintiffs against the administrator of their guardian and his sureties, on the ground of mutual mistake and surprise on the part of plaintiffs, alleged that at the time of making the compromise defendants were in possession of papers belonging to the estate, to which plaintiffs were not allowed access; that plaintiffs were led to believe that the compromise would save long litigation, which would result in no advantage to them; that plaintiffs have discovered judgments for large amounts due the estate in adjoining counties, of which both plaintiffs and defendants were ignorant at the time of the compromise, and which formed no part thereof, it was held that the bill showed a cause of action.⁴⁷ Under a Kentucky statute providing that “unless, in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which he is by law required to make a statement in writing, either in the form of a certificate, return, or otherwise, shall be called in question except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer,” a person against whom a judgment for a fine has been rendered under an indictment, may maintain a suit to restrain its enforcement, on the ground that the sheriff made a mistake in returning the summons served on petitioner, when in fact he was not served.⁴⁸

§ 702. **When mistake not ground for injunction.**—Though in some cases the enforcement of a judgment may be enjoined on the ground of mistake,⁴⁹ yet in most cases it is decided that mistakes,

23 L. Ed. 524. the case might be within the cognizance of the Federal courts.”

46. *Lindley v. Cravens*, 2 Blackf. (Ind.) 426; *Bird v. Chaffin*, 21 N.C. 55.

47. *Epes v. Williams' Adm'r*, 89 Va. 794, 17 S. E. 235. In this case the court recognized the authority of *Wheeler v. Smith*, 9 How. (U. S.) 55, 13 L. Ed. 44.

48. *Bramlett v. McVey*, 91 Ky 151, 15 S. W. 49. Without the statute it seems the rule would be different and that the officer's return could not be the subject of a collateral attack. *Taylor v. Lewis*, 2 J. J. Marshall (Ky.), 400; *Shoffet v. Menifee*, 4 Dana (Ky.), 150.

49. See section 701 herein.

errors or mere irregularities in the entry of a judgment is not a ground for such relief.⁵⁰ So equity will not grant an injunction to restrain the collection of a judgment because of a mere defect or mistake in the papers served,⁵¹ or in the return on the summons⁵² where a party has intentionally or negligently stood by and permitted the plaintiff to proceed to judgment. And where a senior mortgagee was informed by a clerk in the office of plaintiff's attorney that he was made a party to an action by a junior mortgagee to foreclose, merely because he held a judgment lien junior to plaintiff's mortgage, and for that reason alone, he had no right to rely on such statement, as against the allegations of the complaint that his mortgage was junior to plaintiff's, and cannot invoke the power of a court of equity to set aside the judgment on the ground of mistake.⁵³ 'And where an application was made to enjoin the proceedings under a levy and sale, where a portion of the lot of land in controversy was described correctly as to the number, the portion of the lot from which it was taken, and the boundaries, but there was a mistake as to the district, it was held that, as the mistake did not avoid the levy, and that, notwithstanding its existence, the land might be readily identified, the injunction should not issue.⁵⁴ Again, the fact that a defendant in an action

50. *United States*.—*Skirving v. Nat. Life Ins. Co.*, 59 Fed. 742, 8 C. A. 241.

California.—*Logan v. Hillegass*, 19 Cal. 200.

Indiana.—*Pittsburg, C. & St. L. R. Co. v. Elwood*, 79 Ind. 306; *Cooper v. Butterfield*, 4 Ind. 423.

Nebraska.—*Petelka v. Fitle*, 33 Neb. 756, 51 N. W. 131.

New York.—*Whittemore v. Judd L. & S. O. Co.*, 10 N. Y. Supp. 737.

51. *Woods v. Brzezinski*, 57 Conn. 471, 18 Atl. 252; *Gallup v. Manning*, 48 Conn. 25.

52. *Peoria, D. & E. R. Co. v. Dugan*, 32 Ill. App. 351.

53. *English v. Aldrich*, 132 Ind. 500, 31 N. E. 456, per Coffey, J.:

"The case falls within that class where the mistake is to be accounted the misfortune of the party rather than the wrong of his adversary, and one in which a strong case indeed must be made to warrant the interference of a court of equity. *Ratliff v. Stretch*, 130 Ind. 282, 30 N. E. 30; *Davis v. Barton*, 130 Ind. 399, 30 N. E. 512."

54. *Bogges v. Lowery*, 78 Ga. 539, 3 S. E. 771, per Hall, J.: "The number was right, the portion of the lot from which it was taken was right, and the boundaries were also correctly set forth, and the only mistake was the description of the district where the land lay, notwithstanding which the land might be

to quiet title suffers a default in reliance on representations by plaintiff's attorney that the lands claimed in the complaint are not so described as to include any belonging to him, does not prevent a purchaser from plaintiff from relying on the decree as correctly defining the quantity and location of the land, though defendant is in possession of a portion thereof; and it is error to permit the decree to be opened to prove the mistake, of which the purchaser had no knowledge when he acquired the title.⁵⁵

§ 703. Judgment not enjoined for mistakes of law; counsel's mistake.—Ignorance and mistake of the law are not ground for injunctive relief where a party had an opportunity to protect himself from their consequences in another forum. Thus, a judgment at law will not be enjoined where the defendant at law failed to make a defense from ignorance of the nature of the proceeding against him and a misapprehension of the steps it was necessary to take.⁵⁶ And a party cannot have a judgment against him enjoined because through mistake of his counsel his available defenses were omitted.⁵⁷

§ 704. Judgment enjoined for court's mistake.—If a meritorious bill of exceptions is dismissed because of a mistake made by the certifying judge, and without the fault of counsel, the enforce-

readily identified; for these reasons the court would not enjoin the sheriff from proceeding to execute the process. This case falls directly within the principle of *Rogers v. Rogers*, 78 Ga. 688, 3 S. E. 451, and *Harris v. Hull*, 70 Ga. 831. *Falsa demonstratio non nocet.*"

55. *Craig v. Major* (Ind.), 35 N. E. 1098, per Hackney, J.: "It has been held by a long and unbroken line of decisions in this State, that equity will grant no relief from the mistakes or secret claims of one against another who has innocently invested his money in acquiring equities equal or superior to those sought to be relieved against. *Flanders v. O'Brien*, 46 Ind. 284; *Barnaby v.*

Parker, 53 Ind. 271; *Busenbarke v. Ramey*, 53 Ind. 499; *Wainwright v. Flanders*, 64 Ind. 306; *Tuttle v. Churchman*, 74 Ind. 311; *Rooker v. Rooker*, 75 Ind. 571; *Milner v. Highland*, 77 Ind. 458; *Huffman v. Copeland*, 86 Ind. 225; *Taylor v. Morgan*, 86 Ind. 295; *Gray v. Robinson*, 90 Ind. 527; *Ritter v. Cost*, 99 Ind. 85; *Indiana B. & W. Ry. Co. v. Bird*, 116 Ind. 217, 226, 18 N. E. 837."

56. *Meem v. Rucker*, 10 Gratt. Va. 506. And see *Hubbard v. Martin*, 8 Yerg. (Tenn.) 498; *Shricker v. Field*, 9 Iowa, 366; *Broken Bow v. Broken Bow Waterworks Co.*, 57 Neb. 548, 77 N. W. 1078.

57. *Hambrick v. Crawford*, 55 Ga. 335; *Brown v. Wilson*, 56 Ga. 534.

ment of the judgment may be enjoined until the matters set up in the bill of exceptions can be heard.⁵⁸ And where a judgment of condemnation was rendered by a justice of the peace in a case of attachment upon a judgment of more than three years' standing, and the former judgment was entered by mistake without fault on the part of the attachment debtor, he was entitled to have it enjoined.⁵⁹ And where, by mistake, a magistrate failed to mark the name of counsel appearing for defendant, and judgment by default was obtained against him, and he, under ignorance of the facts, let the time for appeal lapse, it was held that he, on filing his bill and alleging the mistake, and that he did not owe the debtor, was entitled to have the levy under the judgment restrained until the hearing upon all the facts and evidence.⁶⁰ A judgment at law may be enjoined on the ground of a mistake and miscalculation by the jury, which, if discovered in time, would have furnished good ground for a new trial.⁶¹ When there has been an error committed in issuing a writ *feri facias* for more than the plaintiff is entitled to under the judgment, the right to enjoin is limited to the amount for which it has been erroneously issued.⁶² It is not enough for a party to allege that a mistake or omission did not occur through his fault, but he must set forth the facts showing how the mistake occurred, so that the court may see that there was no fault or want of diligence on his part.⁶³

§ 705. **Same subject; court's error.**—The mere fact that errors of law were committed by the court in connection with the trial of the case and leading to the rendition of the judgment is not a ground for an injunction against the judgment, as in such a case the party aggrieved has an adequate remedy at law.⁶⁴ So it is no ground for enjoining the enforcement of a judgment that there

58. Kohn v. Lovett, 43 Ga. 179.
In such a case the judgment will not be enjoined if the party made no effort to have the mistake corrected in due season. Smith v. Fouche, 55 Ga. 120.

59. Weikel v. Cate, 58 Md. 105.

60. Brewer v. Jones, 44 Ga. 71.

61. Rust v. Ware, 6 Gratt. (Va.)

62. Barrow v. Robichaux, 14 La. Ann. 207.

63. Simmons v. Martin, 53 Ga. 620.

64. *Illinois*.—Commercial Union Assur. Co. v. Scammon, 133 Ill. 627, 23 N. E. 406.

Indiana.—Hart v. O'Rourke, 151 Ind. 205, 51 N. E. 330.

were errors in respect to the admission or exclusion of evidence, the remedy in such case being by motion for new trial or by appeal.⁶⁵ And proceedings under a judgment in attachment will not be enjoined on account of an alleged error of law by the trial court to which no exception was taken.⁶⁶

§ 706. **Accident as ground for injunction.**—Where a judgment is not sought to be enjoined in order to prevent a cloud upon title, an injunction will not be granted merely because the judgment may be wrong; and the failure, from accident, to obtain a new trial or to effect an appeal, is not sufficient to warrant an interference with the judgment, unless some injustice or hardship is made to appear.⁶⁷ And a judgment at law will not be enjoined merely because an accident prevented the losing party from pressing a motion for a new trial based on technical errors occurring at the trial, even though they may be sufficient to warrant a reversal of the judgment on appeal;⁶⁸ but it would be otherwise if the court adjourned and the term lapsed before the motion for a new trial

Nebraska.—Fox v. McClay, 48 Neb. 820, 67 N. W. 888.

New Jersey.—Holmes v. Steele, 28 N. J. Eq. 173; Boulton v. Scott, 3 N. J. Eq. 231.

New York.—Jessurum v. Mackie, 24 Hun, 624; Ayres v. Lawrence, 63 Barb. 454.

Oregon.—Nicklin v. Hobin, 13 Oreg. 406, 10 Pac. 835.

Texas.—See Houston, E. & W. T. R. Co. v. Ellisor, 14 Tex. Civ. App. 706, 37 S. W. 972.

65. *United States.*—Edmanson v. Best, 57 Fed. 531, 6 C. C. A. 471.

Alabama.—Hart v. Life Ass'n, 54 Ala. 495.

New Jersey.—Vaughn v. Johnson, 9 N. J. Eq. 173.

North Carolina.—Stockton v. Briggs, 58 N. C. 309.

South Carolina.—Hunt v. Coachman, 6 Rich. Eq. 286.

Wisconsin.—Merritt v. Baldwin, 6 Wis. 439.

66. *Barr v. Carpenter*, 16 R. I. 724, 19 Atl. 392, per Stiness, J.: "Complainants seek by this bill to restrain the defendant from proceeding further under the judgment of the common pleas in regard to the attachment. In other words, they seek to correct an alleged error of an inferior court in a suit at law to which they are parties. This cannot be done. If the Court of Common Pleas erred in its rulings upon a question of law, which is all that is set forth in the replication to the plea, the usual complete and proper remedy is by exception or petition for new trial. It would produce great confusion to allow alleged errors of law to pass without exception, and then to become the ground of proceedings in equity."

67. *Galbraith v. Barnard*, 21 Or. 67, 26 Pac. 1110.

68. *Whitehill v. Butler*, 51 Ark. 343.

could be made and disposed of.⁶⁹ And a party who has obtained a judgment after a full investigation by a competent tribunal will not be forced by a court of equity to submit to a new trial unless justice imperatively demands it.⁷⁰

§ 707. **Where legal remedy for accident and mistake.**—In an action to enjoin the enforcement of a judgment for the partition of real estate, it was alleged that complainant could not avail himself in the partition suit of a former judgment in his favor and establishing his title to the land in question, because of the accidental omission of the description of the land from the judgment, and because the complaint had been lost from the judgment record; it was held that he was not entitled to an injunction because he might have asked for a continuance in the partition suit in order to have the lost complaint substituted, and the substituted complaint would have supplied the defect in the judgment for quieting title, and thus his defense in the partition suit would have been made out.⁷¹

69. *Johnson v. Branch*, 48 Ark. 535, 3 S. W. 819.

70. *Whitehill v. Butler*, 51 Ark. 241, 343, 11 S. W. 477; *Harkey v. Tillman*, 40 Ark. 551. A judgment on a note was enjoined where a written agreement between maker and payee was lost, without which the maker could not make his defense at law. *Vathir v. Zane*, 6 Gratt. (Va.) 246. And see *Wilson v. Davis*, 1 Marshall, 219. Sickness is an accident which will excuse defendant from making his defense. *Rowland v. Jones*, 2 Heisk. (Tenn.) 321.

71. *Ratliff v. Stretch*, 130 Ind. 282, 30 N. E. 30, per Miller, J.: "If the appellant, in his choice of remedies, thought best to rely on his legal rights and to appeal from the judgment rather than make application for a continuance on the ground of surprise, we think that he must, after the length of time that has elapsed, stand by his election. The cases cited by him do not render him

much assistance in the position he is compelled to assume in this case. In *Brown v. Goble*, 97 Ind. 86, the judgment, though it appeared to be valid, was in fact void. *Vathir v. Zane*, 6 Gratt. (Va.) 246, the only case cited where the enforcement of a judgment was enjoined, because an instrument in writing, which was necessary to the maintenance of the plaintiff's case, was lost at the time of the trial, was decided in 1849 in a State where courts of equity existed and retained jurisdiction separate and apart from the common law courts. We are satisfied that it would inaugurate an unsafe practice and one well calculated to produce instability in titles if judgments could be set aside and their enforcement enjoined because one of the parties, on account of the absence of a witness, or loss of an instrument in writing, did not have sufficient evidence to maintain his case." And see *Fletcher v. Warren*, 18 Vt. 45, 48; *California Beet Sugar Co. v. Porter*, 68 Cal. 369, 372, 9 Pac. 313."

AGAINST EXECUTION SALES OF REALTY.

CHAPTER XXIV.

AGAINST EXECUTION SALES OF REALTY.

- SECTION 707a. Executions generally—No injunction where adequate remedy at law.
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737. Appeal from decree enjoining realty execution.

Section 707a. Executions generally; no injunction where adequate remedy at law.—It is a general rule that an execution whether against real or personal property, will not be enjoined where there is an adequate remedy at law.¹ So in a recent case it is decided that a petition to stay an execution must, in order to entitle the complainant to the relief sought, show that the legal remedy has been exhausted by appeal or error.² And where the matters alleged as the ground for an injunction against the enforcement of an execution were available as a defense to the action in which the judgment was rendered, the enforcement of the execution will not be enjoined.³ And where relief against an execution can be obtained by a motion to the court that issued it an injunction will not be granted.⁴ And in Georgia it has been decided that an injunction will not be granted where a party can obtain relief by an affidavit of illegality,⁵ which procedure is authorized by the

1. Alabama.—*Triest v. Enslen*, 106 Ala. 180, 17 So. 356.

Arkansas.—*Arkadelphia Lumber Co. v. Asman* (Ark. 1906), 95 S. W. 134; *Driggs & Co. v. Norwood*, 49 Ark. 136, 4 S. W. 448, 4 Am. St. Rep. 30.

Connecticut.—*Johnson v. Connecticut Bank*, 21 Conn. 148.

Illinois.—*Fahs v. Roberts*, 54 Ill. 192; *Grampp v. McBrearty*, 109 Ill. App. 277; *Commercial Nat. Bank v. Stoddard*, 70 Ill. App. 79.

Kentucky.—*Poston v. Southern*, 7 B. Mon. 289.

Maryland.—*Chappell v. Cox*, 18 Md. 513.

Minnesota.—*O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148.

Nebraska.—*Minton v. Palmer* (Neb. 1907), 112 N. W. 610.

New York.—*Newcomb v. Irving Nat. Bank*, 51 Hun, 220, 4 N. Y. Supp. 37.

Rhode Island.—*Hearn v. Canning*, 27 R. I. 217, 61 Atl. 602.

Texas.—*Wilson v. Cook* (Tex. Civ. App.), 91 S. W. 236.

Virginia.—*Randolph v. Randolph*, 6 Rand. 194.

West Virginia.—*Kuhn v. Mack*, 4 W. Va. 186.

2. Minton v. Palmer (Neb. 1907), 112 N. W. 610.

3. Wilson v. Cook (Tex. Civ. App. 1906), 91 S. W. 236.

4. California.—*Green v. Thomas*, 17 Cal. 86.

Georgia.—*Leonard v. Collier*, 53 Ga. 387.

Indiana.—*Cline v. Lowe*, 3 Ind. 527.

Minnesota.—*O'Brien v. Larson*, 71 Minn. 371, 74 N. W. 148.

Mississippi.—*Ricks v. Richardson*, 70 Miss. 424, 11 So. 935.

North Carolina.—*Walker v. Gersley*, 83 N. C. 429.

Pennsylvania.—*Nelson v. Guffey*, 131 Pa. St. 273, 18 Atl. 1073.

Virginia.—*Crawford v. Thurmond*, 3 Leigh, 85.

5. Mathews v. Gelder (Ga. 1907), 58 S. E. 649; *Hitchcock v. Culver*, 107 Ga. 184, 33 S. E. 35; *Gunn v. Woolfolk*, 66 Ga. 682; *Flournoy v. Silman*, 59 Ga. 195.

Code.⁶ If, however, it appears that the remedy at law is inadequate a sale under an execution in such a case may be enjoined.⁷

§ 707b. **Executions generally; where execution void on face.**—Where an execution is void upon its face it is a general rule that a court of equity will not exercise its powers to restrain a sale thereunder, the remedy generally being in the court in which the execution was issued.¹⁸ So in a case in Florida it was decided that where an execution issued upon a judgment of the justice of the peace was void upon its face the justice should upon proper application decide the question, and if he should refuse to do so the Circuit Court would compel him to hear and decide it and that if he then decided wrong an appeal would be the proper remedy.⁹ And in a case in Minnesota it is decided that notwithstanding an execution against real estate was void upon its face a case for an injunction was not presented. The court declared in this case that the execution being void upon its face and upon the face of the record in the action in which it assumed to be issued a sale thereunder, though it might occasion some annoyance, would create no cloud upon plaintiff's title since it would be void for reasons apparent upon the record and upon the face of the proceedings.¹⁰ And where the execution is one which is void upon its face it is decided that a court of equity will not interfere to restrain a sale thereunder on the ground that such sale will cast a cloud upon the title.¹¹

§ 707c. **Executions generally; sale of complainant's property on execution against another.**—It seems to be a general rule that a court of equity will not interfere to restrain the sale under execu-

6. Ga. Civ. Code, 1898, § 2765.

7. *Kester v. Schuldt* (Idaho, 1906), 85 Pac. 974.

8. *Wordehoff v. Evers*, 18 Fla. 339; *Williams v. Wright*, 9 Humph. 493. See *Henderson v. Hoy*, 26 La. Ann. 156.

Where a judgment is rendered without jurisdiction an execution

issued thereon may be enjoined. *Schiele v. Thede* (Iowa), 1905), 102 N. W. 133.

9. *Wordehoff v. Evers*, 18 Fla. 339.

10. *Hanson v. Johnson*, 20 Minn. 194.

11. *Hanson v. Johnson*, 20 Minn. 194.

tion of either real or personal property on the ground merely that such property belongs to the complainant and that the execution was not issued against him but against a third party. This rule is based on the principle that in such cases there is an adequate remedy at law.¹² And the fact that the one seeking to enforce a judgment by execution against the property of a person other than the judgment debtor has stood by and permitted an expenditure of money thereon by such person has been held to be no ground for the granting of an injunction to restrain the sale.¹³ But where the remedy which a party has at law is inadequate a court of equity will grant an injunction restraining such a sale,¹⁴ as in the case of the sale of the stock of goods of a merchant, where the damages cannot fully compensate him for the loss sustained.¹⁵ And it has been decided that a sale of land may be enjoined on the ground that such sale is likely to cast a cloud upon the title of the com-

12. United States.—*Van Norden v. Morton*, 99 U. S. 378, 25 L. Ed. 453.

California.—*Markley v. Rand*, 12 Cal. 275.

Florida.—*Shalley v. Spellman*, 19 Fla. 500.

Indiana.—See *Allen v. Winstandley*, 135 Ind. 105, 34 N. E. 699. But see *Bishop v. Moorman*, 98 Ind. 1, 49 Am. Rep. 731.

Kentucky.—*Bouldin v. Alexander*, 7 T. B. Mon. 424.

Maryland.—*Frazier v. White*, 49 Md. 1.

New Jersey.—*New Jersey & S. R. Co. v. Smith* (N. J. 1905), 60 Atl. 757; *White v. Smith* (N. J. 1904), 58 Atl. 817; *Dawes v. Taylor*, 35 N. J. Eq. 40.

New York.—*Osborn v. Taylor*, 5 Paige Ch. 515.

North Carolina.—*Bostic v. Young*, 116 N. C. 766, 21 S. E. 552.

Texas.—*Magoffin v. San Antonio Brew. Assn.* (Tex. Civ. App. 1905), 84 S. W. 843.

Virginia.—*Miller v. Crews*, 2 Leigh, 576.

See, also, §§ 722-724 herein.

Burden of proof where it is alleged that property levied on is not that of the judgment debtor. See *Hickey v. Davidson* (Iowa, 1906), 105 N. W. 678.

13. *West Jersey & S. R. Co. v. Smith* (N. J. 1905), 60 Atl. 757.

14. *United States.*—*Watson v. Sutherland*, 5 Wall (U. S.) 74, 18 L. Ed. 580.

Indiana.—*Allen v. Winstandley*, 135 Ind. 105, 34 N. E. 699.

Kansas.—*Gale Mfg. Co. v. Sleeper* (Kan. 1905), 79 Pac. 648.

New York.—*Sickels v. Combs*, 10 Misc. R. (N. Y.) 551, 32 N. Y. Supp. 181.

West Virginia.—*Baker v. Rinehard*, 11 W. Va. 238.

15. *Watson v. Sutherland*, 5 Wall. (U. S.) 74, 18 L. Ed. 580; *Sickels v. Combs*, 10 Misc. R. (N. Y.) 551, 32 N. Y. Supp. 181.

plainant.¹⁶ And where the only right which a complainant has in property about to be sold under execution in such a case is a right merely to its use, it is held that equity will interfere to protect such right.¹⁷

§ 707d. **Same subject; vendor and vendee.**—The general rule stated in the preceding section has been held to apply in the case of vendor and vendee and in many jurisdictions an injunction will not be issued to restrain the sale, under an execution against the vendor, of real property in the possession of the vendee, the remedy at law being held adequate.¹⁸ And the rule has also been followed in the case of personal property,^{18a} as has also the exception that an injunction may be granted where the remedy at law is inadequate.¹⁹ In other jurisdictions, however, this rule is not followed in respect to real property, it being held that an injunction may be issued to restrain the sale on the ground that it will cast a cloud on the title of the complainant.²⁰ And where it is shown that there was fraud or collusion between the vendor and vendee equity will not interfere to protect the title of such vendee.²¹

§ 707e. **Executions generally; where no judgment or illegal judgment.**—Where there is no judgment upon which an execution can issue it is decided that the execution defendants are entitled to an injunction restraining the sheriff from seizing and selling

16. *Bishop v. Moorman*, 98 Ind. 1 49 Am. Rep. 731; *Burrell v. Adams*, 26 Pa. Super. Ct. 635.

See § 724 herein.

17. *Orr v. Pickett*, 3 J. J. Marsh (Ky.), 269.

18. *Alabama*.—*Gunn v. Harrison*, 7 Ala. 585.

Mississippi.—*Yates v. Mead*, 65 Miss. 89, 3 So. 651.

New Jersey.—*Swayze v. Hacketts-town Nat. Bank*, 44 N. J. Eq. 9, 13 Atl. 670; *Sheldon v. Stokes*, 34 N. Eq. 87.

South Carolina.—*Wagner v. Regnes*, 10 S. C. 259.

Texas.—*Mann v. Wallis*, 75 Tex. 611, 12 S. W. 1123.

18a. *Lewis v. Levy*, 16 Md. 85.

19. *McFarland v. Dilly*, 5 W. Va. 135.

20. *Martin v. Hewitt*, 44 Ala. 418; *Wilson v. Matheson*, 17 Fla. 630; *Groves v. Webber*, 72 Ill. 606; *Linnell v. Battey*, 17 R. I. 241, 21 Atl. 606; *Merriman v. Polk*, 5 Heisk (Tenn.), 717; *Goodell v. Blumer*, 41 Wis. 436.

21. *Lewis v. Dinkgrave*, 24 La. Ann. 489; *Welde v. Scotten*, 59 Md. 72; *Coolidge v. Forward*, 11 Oreg. 118, 2 Pac. 292.

their property under execution.²² And where it is not apparent from the record that a judgment is void it is decided that such fact may be shown by extrinsic evidence and that where it is so established an injunction may be granted restraining a sale under an execution issued thereon.²³ But in a case in Pennsylvania it is held that where property levied upon and sold under a judgment alleged to be void for want of jurisdiction, is in the possession of the complainant, an injunction will not be granted to restrain the purchaser from securing possession of the same, it being declared that in such a case the complainant needs no aid from chancery to protect him against the assertion of the purchaser's title.²⁴

§ 707f. **Execution sales of realty; generally.**—An injunction to restrain the sale of land will not be granted in the absence of a showing of an intention or threat to sell the same.²⁵ And defects in the execution which amount only to mere irregularities are held not to be a ground for enjoining a levy of the same.²⁶ Nor will an execution sale of land be enjoined where there is an adequate remedy at law.²⁷ And the fact that the judgment or process is alleged to be invalid is held to be no ground for enjoining the levy of an execution issued upon such judgment in the absence of a showing that the complainant is not equitably bound to the judgment creditor for any amount, or, in case he claims to be bound for a less amount than that of the judgment, in the absence of a tender of such amount in the bill.²⁸ Where, however, the remedy

22. *Ewell v. Jackson* (Ky. C. A. 1908), 110 S. W. 860, so holding in the case of an unsigned judgment which was held to be no judgment at all.

23. *Henman v. Weathermer*, 110 Mo. App. 191, 85 S. W. 101.

24. *Sebring v. Joanna Heights Assn.*, 2 Pa. Dist. Rep. 629. Examine § 711 herein.

25. *Spokane v. Amsterdamse Trustees*, 18 Wash. 81, 50 Pac. 1088.

26. *Dunson v. Spradley* (Tex. Civ. App.), 40 S. W. 327. Compare *Citizens' Nat Bank v. Interior Land &*

I. Co., 14 Tex. Civ. App. 301, 37 S. W. 447, holding that an application to vacate an advertisement of sale for alleged defects therein and to enjoin the making of the sale is properly made to the court rendering the judgment.

27. *Geers v. Scott* (Tex. Civ. App.), 33 S. W. 587, so holding where the seizure was a trespass of such a character as to give the owner an adequate remedy at law.

28. *Tompkins v. Lang*, 74 Ill. App. 500.

at law is inadequate an injunction to restrain the sale of land under an execution will be granted.²⁹

§ 708. **Enjoining execution sale of homesteads.**—The purchaser of a homestead, though not in possession, may enjoin a sale thereof on an execution issued on a judgment rendered against the grantor while he owned and occupied the premises;³⁰ and in such a case the complaint need not show that the premises were the grantor's homestead at the time of the issuing of the execution and its levy.³¹ And a wife who was not made a party to a suit to foreclose a mortgage on a homestead may, in an action by her and her husband, obtain an injunction restraining the sale of the homestead.³² And where a deserted wife, who has obtained a judgment against her husband, levies on the homestead subject to prior mortgages, which are foreclosed and the property bought in by the wife, equity will entertain a bill to enjoin a resale under, and compel satisfaction of, other mortgages, paid, but not satisfied of record, of which the husband's brothers, colluding with him, have obtained an assignment, and are attempting to enforce under the former decree.³³ Equity will also enjoin the forced sale of a

29. *Radzuweit v. Watkins*, 53 Neb. 412, 73 N. W. 679.

30. *Smith v. Zimmerman*, 85 Wis. 542, 55 N. W. 956; *Pier v. Fond du Lac*, 38 Wis. 479; *Goodell v. Blumer*, 41 Wis. 436, 442.

31. *Smith v. Zimmerman*, 85 Wis. 542, 55 N. W. 956, per Pinney, J.: "The only objection made is that the complainant does not show that the premises were the homestead of the Sanborns at the time of the issuing of the execution and its levy. This was not necessary. The execution and sale under it are but the means of carrying into effect the lien given by the statute. The statute makes judgments liens on land of the debtor, and no levy or seizure by the sheriff was necessary, and in practice there is no such thing as a levy

of execution on real estate. All that is necessary to make a regular sale upon execution issued upon a judgment is to publish the notice of sale as required by the statute, and make the sale at the time mentioned in the published notice. *Shafer v. Phoenix Ins. Co.*, 53 Wis. 361, 10 N. W. 381; *Hammel v. Queen's Ins. Co.*, 54 Wis. 72, 11 N. W. 349. The seizure is already made when the execution comes to the sheriff's hands. *Wood v. Colvin*, 5 Hill (N. Y.), 230. No entry of the levy upon the execution is necessary to perfect the sale. *Colt v. Insurance Co.*, 54 N. Y. 595."

32. *Willis v. Whitead*, 59 Kan. 221, 52 Pac. 445.

33. *Eaton v. Eaton*, 68 Mich. 158, 36 N. W. 50.

homestead to pay debts, since such sale, though invalid, would create a cloud upon the title.³⁴

§ 709. **Same subject.**—As before seen, where a valid homestead is about to be levied on and sold, an injunction will be granted to prevent a cloud from being cast on the title, for though the sale would be void under the statute, yet, as the judgment and execution are valid, the invalidity of the sale could only be shown by extrinsic evidence in ejectment for the land by the purchaser under execution.³⁵ And the purchaser of a homestead from the head of a family may enjoin the sale of the land under a judgment against his vendor to prevent a cloud on his title.³⁶ But a sale on execution, under a judgment against a firm, of the homestead of one of its members, which had been conveyed before the judgment creditors had done anything to fix a lien on the land, and of which conveyance they had notice when they levied their execution, will not be enjoined, as the possession of the grantee will not be disturbed by the sale, and he has an ample remedy in trespass to try title.³⁷ In South Carolina, as in many other States, though

34. *Webb v. Hayner*, 49 Fed. 601; *Id.*, 605, per Maxey, J.: "The remaining ground of objection is that a court of equity will not restrain the sale of a homestead, but remit the party complaining to his remedy at law. This objection presupposes that a sale of the homestead, owing to its invalidity, would convey no title to the purchaser, and therefore equity should not interpose its restraining hand. Reference to the following cases will show that injunction is the proper remedy to prevent the threatened sale of a homestead under circumstances disclosed by the bill in this suit. *Gardner v. Douglass*, 64 Tex 76; *Van Ratchiff v. Call*, 72 Tex. 491, 10 S. W. 578; *Fink v. O'Neil*, 106, U. S. 272, 27 L. Ed. 196. And see *Johnson v. Griffin Banking Co.*,

55 Ga. 691; *Colley v. Duncan*, 47 Ga. 668; *Brown v. Thornton*, 47 Ga. 474.

35. *Roth v. Insley*, 86 Cal. 134, 24 Pac. 853, per Foote, C.: "The authorities seem to assert, where such necessity might exist, of the introduction in an action of ejectment of such extrinsic evidence that a sale as here proposed would cast a cloud upon the title to the property and entitle the owner to have it enjoined as was done in the present instance. *Pixley v. Huggins*, 15 Cal. 127; *Culver v. Rogers*, 28 Cal. 526; *Cohen v. Sharp*, 44 Cal. 29; *Porter v. Pico*, 55 Cal. 565."

36. *Ketchin v. McCarley*, 26 S. C. 1, 11 S. E. 1099. See, also, *Cantrell v. Fowler*, 24 S. C. 424.

37. *Mann v. Wallis*, 75 Tex. 611, 12 S. W. 1123.

a judgment debtor remain passive, the exemption of his homestead exists and must be respected; and even though he stand by and see it sold without objection, he is not thereby estopped from afterwards claiming his homestead.³⁸ And the fact that an entire tract of land is claimed by the owners thereof as a homestead when they are only entitled to a part of such tract is not a ground for denying an injunction restraining the sale thereof under a decree of foreclosure.³⁹ Again, property liable to levy and sale at the date of the rendition of a judgment can be impressed with the rights of a homestead before a levy or sale, and it is immaterial how short a time before the sale this is done; and then if a sale of the homestead is threatened under legal process an injunction is the proper remedy.⁴⁰ On a motion for temporary injunction to restrain the levy of an execution upon premises claimed as a homestead, it is not error for the court to refuse to determine on affidavits the correctness of an allegation that a portion of the premises in question is not exempt.⁴¹

§ 710. Enjoining execution where judgment is cloud on title.

—Where the effect of a sale of land under an execution would be to create a cloud upon the title equity will in many cases interfere and by injunction restrain the sale.⁴² So where a vendor's lien was foreclosed, and the judgment assigned, and thereafter the vendor released his lien of record, but the judgment, though in

38. *Myers v. Ham*, 20 S. C. 522. And see *Elliott v. Mackorell*, 19 S. C. 238; *Homestead Assoc'n v. Enslow*, 7 S. C. 1.

39. *Willis v. Whitead*, 59 Kan. 221, 52 Pac. 445.

40. *Irwin v. Lewis*, 50 Miss. 363; *Trotter v. Dobbs*, 38 Miss. 198.

41. *Farley v. Hopkins*, 79 Cal. 203, 21 Pac. 737.

42. *United States v. Provident Life & T. Co. v. Mills*, 91 Fed. 435; *Walker v. Colby Wringer Co.*, 14 Fed. 517.

California.—*Roth v. Insley*, 86 Cal.

134, 24 Pac. 853; *Porter v. Rico*, 55 Cal. 165.

Colorado.—*Crawford v. Lamar*, 9 Colo. App. 83, 47 Pac. 665.

Delaware.—*Sharp v. Tatnall*, 5 Del. Ch. 302.

Florida.—*Budd v. Long*, 13 Fla. 288.

Illinois.—*Bennett v. McFadden*, 61 Ill. 334.

Indiana.—*Zimmerman v. Makepeace*, 152 Ind. 199, 52 N. E. 992.

Massachusetts.—*O'Hare v. Downing*, 130 Mass. 16.

fact paid to the assignee, was not so released, it was held that since the judgment was on its face a valid and subsisting lien on the land, requiring extrinsic and parol evidence to defeat it, equity would enjoin execution thereunder, and order its cancellation as a cloud on the title.⁴³ And an injunction will be granted to restrain

43. *Texas Land Co. v. Worsham* (Tex.), 23 S. W. 938, per Neill, J.: "A sale of land under judicial process, which will confer no title, and the effect of which will be to cloud the title of others, should be enjoined. But no generally accepted test, applicable to all cases, as to what will constitute such a cloud upon title as to authorize the interference for its prevention by a court of equity has ever been established, at least in this State. Elsewhere the test seems to be, where a sale, if made, would create a title under which the purchaser could, in ejectment, recover against the true owner, unless the latter placed his own title in evidence, or by some other means established the invalidity of the purchaser's title, then such is a cloud on the title of the true owner. And in accordance with this test it has been held in other States that if an execution against a person who had once been the owner of the property be levied upon it, and it be no longer liable to levy and sale under such execution, the present owner of the property may, in equity, prevent his title being clouded by such sale. But if the title to be created by a sale is such that its invalidity can be determined from inspection, or that the true owner need offer no evidence to protect himself from it, then it is not a cloud on his title, and the sale will not be enjoined. See note and authorities cited to *Carlin v. Hudson*. 12 Tex. 202, 62 Amer. Dec. 521. In

Carlin v. Hudson, it was held that an injunction would not be granted to restrain a sale on execution of land which the judgment debtor has conveyed to the party applying for the writ, for the reason that it was not indispensable to secure him in the enjoyment of his property, or preserve his title to it, or to prevent gross and irremediable injustice in respect to such property, and that the proposed sale of the land as the property of complainant's vendor could not operate to dispossess the plaintiff, or deprive him of its enjoyment, or defeat his title, or embarrass him in the prosecution of his legal remedies for any injury to his title or possession. This decision has ever since been followed by our Supreme Court. In cases where the property sought to be sold under execution against the husband was a homestead, or had been dedicated as such, our courts have exercised their equitable jurisdiction, at the instance of the wife, and sometimes at the instance of the husband, to restrain the sale upon the ground that it would be a cloud upon title. In such cases, the title to the property at the time of the levy being in the name of the husband, a sale of it under execution against him would apparently vest title in the purchaser at execution sale, and it would require extrinsic evidence under such sale—which is the true principle upon which the equitable jurisdiction of courts of chancery vests—to prevent

an execution sale at the suit of a prior mortgagee, whose mortgage was wrongfully marked "Satisfied" by a person without authority from him, and who took a subsequent mortgage on the faith of a contract with the mortgagors that the prior mortgage should remain in force until the entire debt was satisfied, since the rights of the mortgagee are not evidenced in whole by title of record, and the execution sale would place a cloud on his title.⁴⁴ And where plaintiff seeks in equity, not merely to enjoin the enforcement of an alleged illegal judgment, but also to prevent a cloud being cast upon the title of his realty, the fact that the judgment was rendered without jurisdiction is a sufficient ground for equitable relief.⁴⁵ A married woman is also entitled, in order to prevent a cloud upon her title, to an injunction to restrain a sheriff from selling, under an execution in which her husband is the debtor, property which she, by clear and decisive proof, establishes to be her separate property, because she would be compelled to show, in an action of ejectment, by proof outside of the deed, that such property was her separate property, in order to defeat a recovery.⁴⁶ Equity will not, however, interfere to enjoin the sale of land under execution issued on a judgment in which the owner of the land was not a party nor privy, inasmuch as such a judgment is absolutely void.

a cloud from being cast upon title to real property. And it is confined to instances where the proceeding complained of appears to be valid on its face but is in fact void or invalid for some reason or another which can only be shown by extrinsic evidence."

44. *Ivory v. Kempner*, 2 Tex. Civ. App. 474, 21 S. W. 1006, per Pleasants, J.: "Ordinarily, when an execution or order of sale is levied on property of a defendant in execution, the sale cannot be enjoined by a creditor of defendant who holds a lien on the property levied on which is prior to the judgment. But while this is the general rule, it is well established that the sale will be enjoined when it would place a cloud

upon the creditor's title. The Supreme Court of this State has held that an injunction will be granted to restrain an execution sale when the evidence on which the right of the complainant depends is not of record, nor shown in the papers through which the right depends. *Mann v. Wallis*, 75 Tex. 614, 12 S. W. 1123; *Van Rateliff v. Call*, 72 Tex. 492, 10 S. W. 578; *Gardner v. Douglass*, 64 Tex. 76." *British & Amer. Mort. Co. v. Long*, 113 N. C. 123, 18 S. E. 165.

45. *White v. Espey*, 21 Or. 328, 28 Pac. 71. And see *Sharpe v. Tatnall*, 5 Del. Ch. 302.

46. *Tibbetts v. Fore*, 70 Cal. 242, 11 Pac. 648.

so far as the rights of the owner are concerned, and casts no cloud on his title.⁴⁷

§ 711. **Same subject; possession must be alleged.**—Possession is essential to equitable jurisdiction to prevent a cloud upon title, where the complainant's title is legal, for if he is not in possession he has a full and adequate remedy at law.⁴⁸ And an averment of possession by the complainant is essential to a bill brought by one claiming the legal title to land to enjoin a judicial sale upon the ground that the sale would cast a cloud upon his title.⁴⁹ And it is no ground for an injunction against the sale of a lot under execution, for laying curbing and pavement in front of it by the city, that complainant in the bill claims such lot, and is suing defendant in execution, who is in possession of the lot, to recover the same.⁵⁰

§ 712. **Enjoining cloud on title of insolvent's assignee.**—Under a Code provision that an insolvent may make an assignment for the benefit of creditors, with or without their consent, and that they must either avail themselves of the assets without preference or not at all, it is decided that a creditor whose claims were subsisting credits upon which action had been begun at the time of the assignment, and who assented to the assignment, cannot sell any of the assigned property on execution, and that such sale may be enjoined as casting a cloud upon the title of the insolvent's assignee, though the creditor's judgment was obtained subsequent to the assignment.⁵¹

47. *Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343.

48. *Cavedo v. Billings*, 16 Fla. 261. See *Provident Life & T. Co. v. Mills*, 91 Fed. 435.

49. *Bevill v. Smith*, 25 Fla. 209.

50. *McPhee v. Veal*, 76 Ga. 656, per Jackson, C. J. "If the complainant was confident the land was he ought to pay the debt for paving his, and it his title was good to it, the front of it; if it was not his lot, he had no interest in the sale of it,

and no right to intermeddle. He could not, on a sort of chance to win in a suit, have the writ of injunction to stop its sale under lien execution."

51. *Wilhoit v. Cunningham*, 87 Cal. 453, 25 Pac. 675, per Gibson, C.: "The object of the law is to enable a debtor, through his assignee, to dispose of his property for the benefit of his creditors. This object would be defeated if one of the creditors could ignore the assignment and sell the property to satisfy his particular

§ 713. **As to lands under administration.**—Where lands of an intestate are about to be sold under a judgment against the administrator, and it appears that such sale may endanger the collection of other claims not in judgment, a preliminary injunction may issue on the complaint of the latter creditors restraining the sale.⁵² And a party holding an authentic deed of sale, perfect on its face, executed by the decedent, is not required to stand by and see the property sold at judicial sale as the property of the vendor's succession, under an order of sale provoked by his administratrix, which could only be sustained by proof that the sale was a pure simulation. He may rightfully enjoin such a sale.⁵³

§ 714. **Writ of possession.**—Where plaintiffs in ejectment have recovered judgment, and, on a new trial being granted, have again recovered judgment, and the court has refused to grant another new trial, an injunction will not be granted defendant in ejectment, restraining the issue and execution of a writ of possession, where the facts shown are the same as appeared in the ejectment cases, though new parties were made co-defendants, who, however,

claim. Such a sale would, if it could be made, deprive the assignees of the property, or if it would not, still the sale would cloud the title of the assignees, because in any action they might have to prosecute for the removal of the cloud so cast, the evidence of the purchaser's title would show that such latter title was derived from the assignor, to overcome which the assignees would have to prove that the judgments were obtained in actions commenced before the deed of assignment was made, upon debts covered and provided for by the deed of assignment. *Pixley v. Huggins*, 15 Cal. 127; *Porter v. Pico*, 55 Cal. 165; *Roth v. Insley*, 86 Cal. 134, 24 Pac. 853. Such a cloud, it is evident, would prevent them from disposing of the property to the advantage of the creditors in the per-

formance of their trusts."

52. *Bollman v. Wamer*, 38 S. C. 464, 17 S. E. 223.

53. *Thompson v. Herring*, 45 La. Ann. 991, 13 So. 398, per Fenner, J.: "It seems to us very clear that, upon the face of the title conferred on them by the authentic act of sale, plaintiffs were not bound to stand by and see that title ignored, and the property conveyed thereby sold at a judicial sale as the property of another, and that they were fully authorized to enjoin such proceedings, which could only be sustained on clear proof that the sale was a pure simulation. If the sale were a real transaction, whatever its character, the administratrix would be bound to secure its judicial revocation on compliance with whatever obligations it might impose, before she could law-

claimed nothing for themselves.⁵⁴ But where the plaintiff, in an action of ejectment, recovered judgment on the sole ground that the defendant, being his tenant, was estopped to deny his tenancy, and a third party claimed also as landlord of the same tenant under a superior title, recognized as such by the trial court but of which he was not allowed the advantage in the action, an order enjoining dispossession of the grantee of such third party under the writ of possession, is properly granted, as the only matter concluded by the judgment is that the defendant was not the tenant of the third party, but of the plaintiff, and therefore the third party is not estopped from setting up his superior title, which was not judicially passed upon, as a shield against the writ of possession.⁵⁵ And equity will enjoin the execution of a writ of possession in ejectment against a husband, where the wife was not a party and claims the land as her separate estate, leaving the parties to test their titles at law.⁵⁶ And one in possession of land who was not a party to the suit and who does not claim under one a party thereto, may obtain an injunction restraining the execution of a writ of possession for such land.⁵⁷ Again, where a writ of possession contained an order directing the removal of a part of a structure on the land of defendant, it was decided that the sheriff would be enjoined from carrying such order into effect where it appeared that the writ of possession was awarded for only a part of defendant's land and that the part for which it was awarded was so described that it could not be located.⁵⁸

fully disregard it, and sell the property as that of the succession. *Lawler v. Cosgrove*, 39 La. Ann. 490, 2 So. 34."

54. *Robinson v. Veal*, 78 Ga. 301, per Jackson, C. J.: "It would be wonderful if equity should arrest and annul a judgment at law, a thing that she requires strong equities to authorize upon grounds so fragile as are set up here." And see the important case of *Johnson v. Christian*, 128 U. S. 374, 9 S. Ct. 87, 32 L. Ed. 412, where a judgment in ejectment was

enjoined because the defense was equitable and therefore not available in the action at law.

55. *Moulton v. McDermott*, 93 Cal. 660. And see *Sampson v. Ohleyer*, 22 Cal. 207; *Hickman v. Dale*, 7 Yerg. (Tenn.) 149.

56. *Bushong v. Rector*, 32 W. Va. 311.

57. *Bennett v. Preston* (W. Va. 1906), 63 S. E. 562.

58. *Hicks v. Brinson*, 100 Ga. 595, 28 S. E. 380.

§ 715. **Same subject; non-resident; no service.**—Equity will enjoin the execution of a writ of possession based upon a judgment in ejectment against a non-resident defendant not served by publication, his tenant in possession not having been served.⁵⁹ But an injunction will not be granted to restrain the execution of a writ of possession, based on alleged error in the judgment on which the execution issued, and on a judgment in complainant's favor for possession of a tract of land of which the land in question is a part, the final decision of which is pending on appeal,⁶⁰ for a court of equity does not interfere with judgments at law in order to correct errors in them.⁶¹ And a bill to enjoin a sheriff from ejecting plaintiff from a house and premises under a writ, is insufficient when it charges that defendant, in whose favor the writ issued, "has illegally, wrongfully, and unjustly procured a writ" to eject plaintiff, without showing the nature of the writ, or filing a copy, or stating in what right the premises are demanded, or how he holds.⁶²

§ 716. **Enjoining ejectment judgment as against equitable lessee.**—Where decedent made a parol lease of land to complainant, putting him in possession, taking the rent for the entire period, giving a receipt providing that, if either decedent or his wife desired, they might redeem from the lease by refunding the amount paid for the unexpired time, and they having died without offering to redeem, decedent's administrator, in an action of ejectment,

59. *Charter Oak Life Ins. Co. v. Cummings*, 90 Mo. 267, 2 S. W. 397, per Sherwood, J.: "The statute is express that the action shall be brought against the person in possession of the premises claimed. This means the actual possession, the possession in fact. *McDowell v. King*, 4 Dana (Ky.), 67; *Atwell v. McLure*, 4 Jones (N. C. Law), 371. Under the facts stated this was not the case, nor did the judgment in the ejectment suit recite that defendant was in possession of the premises. . . . But

the judgment, though void, will be enjoined by a court of equity, which will not permit such a fraudulent abuse of legal process to go unrestrained." See *Goodnough v. Shepard*, 28 Ill. 81; *Banks v. Parker*, 80 N. C. 157.

60. *Rosenberger v. Bowen*, 84 Va. 660.

61. *Dey v. Martin*, 78 Va. 1; *Slack v. Wood*, 9 Gratt. (Va.) 40.

62. *Lamm v. Burrell*, 69 Md. 272, 14 Atl. 682.

recovered the land, with damages for its detention, it was held that the complainant could maintain a suit in equity to be restored to possession for the unexpired term; and that the administrator could be compelled to account for the money collected of complainant in the ejectment suit, and also for the rents and profits after complainant's ouster, and could be enjoined from the further collection of the judgment in the ejectment suit.⁶³

§ 717. Enjoining order for forcible entry, etc.—An injunction cannot issue to restrain, pending an appeal, the execution of a warrant based on a final order in forcible entry and detainer proceedings, there being neither fraud, collusion, nor want of jurisdiction on the part of the court which entertained the proceedings.⁶⁴ And an injunction staying proceedings by a landlord under the

63. *Trammell v. Craddock*, 100 Ala. 266, 13 So. 911, per Coleman, J.: "In an action of ejectment in a court of law, the legal title must prevail. The lessee not having a legal title to the lease, but only an equity, he could not successfully defend the action at law. His equity, as shown by the averments of the bill, is perfect, and upon proof will be protected in a court of equity. A court of chancery, having jurisdiction to protect his equitable title, will retain the case and settle all the questions involved in the litigation. The bill shows that complainant is entitled to an account, and the administrator (respondent) is accountable for all moneys collected by him in the ejectment suit, and the complainant is entitled to recover the rents and profits accruing since he was ousted under the writ of possession in the ejectment suit. The decree of the chancery court is affirmed."

64. *Koster v. VanSchaick*, 11 Daly (N. Y.), 205, per Van Brunt, J.:

"There is no pretense in the case at bar of fraud or want of jurisdiction, but simply that the magistrate has committed errors in the proceedings which renders them void. Prior to the adoption of the Code these errors could be reviewed only by certiorari; now they can be reviewed upon appeal, but I can find no authority given to the court by the Code, nor can I find that the court, prior to the adoption of the Code, had claimed any power to restrain by injunction the execution of the warrant in such proceedings except for fraud or want of jurisdiction. In fact, the section of the Revised Statutes above referred to prohibits such intervention, and section 2265 of the Code is equally positive in its terms, except that it reserves the right to a stay in certain cases and to an injunction in certain other cases mentioned in subdivision 2, neither of which subdivisions authorize this court to issue the injunction now prayed for."

statute, for the removal of a tenant, will not be granted, unless it appears that the magistrate has no jurisdiction, or that the proceedings are fraudulent or collusive.⁶⁵

§ 718. **Protecting wife's separate real estate.**—It is a general rule that an injunction will be granted to prevent a sale of the property of the wife of the debtor where the wife's title thereto is clear.⁶⁶ So a married woman is entitled to an injunction to restrain a threatened sale, under an execution against her husband, of real property purchased in her name during coverture and with her separate property.⁶⁷ And a married woman in possession of her separate real estate may maintain a bill in equity against a purchaser at a sheriff's sale on a judgment against her husband who persists in bringing ejectment suits not in good faith and taking voluntary nonsuits, but with the purpose of compelling payment of the debt.⁶⁸ But an execution issued against the separate estate of a married woman, upon the finding of a justice of the peace, will not be summarily stricken off, nor the collection thereof enjoined; the proper remedy being by appeal.⁶⁹

§ 719. **Same subject; voluntary conveyance by husband to wife.**—A wife will not be granted an injunction to restrain a sale, under execution, of land conveyed to her by her husband where such conveyance was without consideration and was made pending the suit against him.⁷⁰ So where, pending a suit against a husband,

65. *Sherman v. Wright*, 49 N. Y. 227.

66. *Idaho*.—*Young v. First Nat. Bank*, 4 Ida. 323, 392, 39 Pac. 557.

Louisiana.—*Barrow v. Stevens*, 27 La. Ann. 343.

Missouri.—See *Neeley v. Bank of Independence*, 114 Mo. App. 467, 89 S. W. 907.

New Jersey.—*Cass v. Demarest*, 37 N. J. Eq. 393.

North Carolina.—*Smith v. Bank of Wadesborough*, 57 N. C. 303.

Pennsylvania.—*Hoffer v. Girard Bank*, 1 Del. Co. R. (Pa.) 182; *Brown v. Atkinson*, 9 Kulp. 164.

But see *Purington v. Davis*, 66 Tex. 455, 1 S. W. 343.

67. *Tibbetts v. Fore*, 70 Cal. 242, 11 Pac. 648. In such a case the wife is entitled to an injunction to prevent a cloud on her title. *Moore v. Jones*, 63 Cal. 12.

68. *Thompson's Appeal*, 107 Pa. St. 559.

69. *Fenstermacher v. Xander*, 116 Pa. St. 41. See *Spencer v. Jones* 85 Va. 172, 7 S. E. 180.

70. *Good v. Merkowitz*, 35 Mo. App. 658. See *Simson v. Bates*, 10 Phila. (Pa.) 66; *Barnes v. Barnes*, 16 Pa. Co. Ct. R. 534.

he conveyed land through a third person to his wife, without any valuable consideration, and after judgment against him, execution thereon was levied on his interest in the land, it was held, that the wife was not entitled to an injunction to restrain the sale on execution.⁷¹

§ 720. **Enjoining levy on land intended to be conveyed to debtor's wife.**—An existing debt of a husband to his wife is such a good consideration for his conveyance of land to her, as to warrant reformation in her favor, and to entitle her to an injunction as against a subsequent levy for a debt of the husband on land which was intended to be conveyed by the deed, the mistake in such a case being one of fact which equity will reform, unless it was caused by unconscionable negligence.⁷²

71. *Good v. Merkowitz*, 35 Mo. App. 658, per Thompson, J.: "This case should have been disposed of on demurrer to the petition. It cannot be supported on any just conception of equity jurisdiction. In this State an injunction will not be granted to restrain a sale of land under an execution on the ground that the sale will cast a cloud on the title of the true owner, where the plaintiff would have a full and adequate remedy at law in defending an action of ejectment. *Drake v. Jones*, 27 Mo. 428; *Kuhn v. McNeil*, 47 Mo. 389; *Witthaus v. Bank*, 18 Mo. App. 181, 184; *Parks v. Bank*, 31 Mo. App. 12, 16. Much less will an injunction be granted at the suit of A. to restrain a sale of the right, title and interest of B., in land which may be owned in fee simple by A., by an antecedent legal title; for such a sale does not, upon any conception, cast a cloud upon the title of A. *Witthaus v. Bank*, 18 Mo. App. 181, 184. Here the wife is seeking an injunction to restrain a sale of her husband's in-

terest in land which he has conveyed to her prior to the judgment. If the conveyance to her is good the husband retains no interest in the lands which is vendible in execution. Rev. Stat., § 3295, and she is not harmed by the sale of his supposed interest under an execution against him. On the other hand, if the conveyance to her is bad, as being in fraud of her husband's creditors, they would, under a rule well settled in this State, have the right to sell whatever interest in the land he might have, and the purchaser at the sale would have the right to maintain a suit in equity to set aside the conveyance. *Lionberger v. Baker*, 88 Mo. 447; affirming S. C., 14 Mo. App. 353; *Haskell v. Whyte*, 12 Mo. App. 585. This remedy of the creditor cannot be headed off by an injunction proceeding on the part of the grantee of the debtor."

72. *Comstock v. Coon*, 135 Ind. 640, 35 N. E. 909, per McCabe, J.: "It has been held by this court that contracts which

§ 721. Enjoining judgment for failure of title or consideration.

—Equity will enjoin the collection of a judgment on the purchase money bonds given to a vendor who has a contract in writing with one who has a clear legal title to the land, whereby this legal owner has agreed to convey to him this land, upon condition that the vendor shall convey to such owner another tract of land, and make him a title thereto free from all incumbrances, if he is unable to make such conveyance, and others are in the adversary possession of the tract of land claimed by plaintiff, and have been for many years, and plaintiff never has been in possession of such

would be sustained at law if made by a husband with a trustee for the benefit of the wife, will be upheld in equity if made directly between husband and wife. *Sims v. Rickets*, 35 Ind. 181; *Thompson v. Mills*, 39 Ind. 528; *Bank v. Kimble*, 76 Ind. 195; *Wilson v. Wilson*, 113 Ind. 415, 15 N. E. 513. A husband may not only voluntarily perform a contract to repay money borrowed from his wife, but equity will compel performance. *Proctor v. Cole*, 104 Ind. 373, 3 N. E. Rep. 106, 4 N. E. 303; *Goff v. Rogers*, 71 Ind. 459. But it is only necessary here to maintain the sufficiency of the complaint that there was a consideration for the conveyance sought to be corrected. As already observed, this was not an action to compel specific performance, or in any other way to enforce a contract between husband and wife, but simply to have mistakes in a conveyance corrected. The questions of possession, and the statute of frauds, so much discussed by counsel, have no bearing on the sufficiency of the complaint. Nor was it necessary to allege that she had performed any contract, as she was not seeking to enforce a contract, or to recover damage for the breach of a contract. It is last

contended that the evidence is insufficient to establish the alleged mistake, because the evidence fails to show that any word or words were inserted in the deeds that were intended to be left out, or that any word or words were left out that were intended to be inserted. Therefore, it is contended that, if mistake there was, it was a mistake of law in supposing that the words of the deed were legally sufficient to convey the land intended. There are many instruments to which these principles are strictly applicable, but they are not applicable to the words or description in the deeds in question here. In the case of *Baker v. Pyatt*, 108 Ind., at page 66, 9 N. E. 112, this court, in a case precisely like this, said: 'The mistake here, we think, was a mistake of fact. The purpose was to describe a tract of land owned by the father, and which he intended, and was attempting, to convey to the son. The mistake was in applying to the tract a description that did not describe it at all, but an entirely different tract. They supposed that the description used in the deed described the tract intended to be conveyed, and in that they were mistaken. Whether or not the description used covered the tract

land.⁷³ And a judgment for purchase money will be enjoined, where one who has entered into a contract to sell land, subsequently parts with both the legal and equitable title to the land, so that he is wholly unable to convey it.⁷⁴ And where the defendant has agreed to convey to complainant a tract of land, and give him possession on a certain day, and gets a judgment on complainant's bond for the purchase money, a court of equity will enjoin the judgment and compel him to make allowance for the value of any part of the land he may fail to give complainant possession of on the day appointed for delivery thereof.⁷⁵ But a judgment for purchase money will not be enjoined because of a mere apprehension of the failure of the vendor's title.⁷⁶ And an injunction will not lie against a judgment for purchase money, on the ground of difficulty of obtaining title from the vendor's infant heirs, if the purchaser neglected to pay the money in the vendor's lifetime and to demand a conveyance from him, and if the heirs are not made parties to the bill.⁷⁷

§ 722. Enjoining execution on third person's property.^{77a}—In West Virginia it has been decided that a bill will not lie to restrain the sale of personal property which is owned by a third person, and not by the execution debtor, unless it is shown that irreparable damage will result from the sale.⁷⁸ Nor will an injunction be allowed in that State to restrain the sale of real estate under an execution issued for a private debt, for such a sale would be an absolute

intended to be conveyed we think was a question of fact, and as to that fact there was a mistake. It was a fact, too, about which the parties might easily be mistaken, without being guilty of such negligence as ought to defeat a reformation of the deed.' This case is precisely applicable to the facts and circumstances of the case at bar, and is decisive of the point as to mistake, and the sufficiency of the evidence to establish such mistake."

73. *Vanseoy v. Stinchcomb*, 29 W. Va. 263, 11 S. E. 927.

74. *Buchanan v. Lorman*, 3 Gill (Md.), 51.

75. *Hilleary v. Crow*, 1 Harris & J. (Md.) 542.

76. *Truly v. Wanzer*, 5 How. (U. S.) 141, 12 L. Ed. 88.

77. *Prout v. Gibson*, 1 Cranch C. C. 389.

77a. As to general rule, see § 707c herein.

78. *Baker v. Rinehard*, 11 W. Va.

nullity which would not cast even a cloud upon the owner's title.⁷⁹ But in Indiana it is decided that an injunction will lie to arrest the sale of plaintiff's land on execution issued against a third person, and the execution creditor cannot raise the objection that the bill fails to state a cause of action because it alleges that the debtor has no interest in the land; and therefore the sale will not affect the owner's title.⁸⁰ And a party who concedes that an execution sale which he is threatening to make, would result in no benefit to him, and might embarrass and complicate the title of complainant,

238; *White v. Stender*, 24 W. Va. 615.

79. *Dunn v. Baxter*, 30 W. Va. 672. Where an officer is about to levy on property claimed by plaintiff by virtue of an execution against a third person, plaintiff cannot obtain an injunction against such levy until he has, by giving the officer notice of his claim, afforded him an opportunity to abandon the levy. *Hinkle v. Baldwin*, 93 Mich. 422, 53 N. W. 534.

80. *Scobey v. Walker*, 114 Ind. 254, 15 N. E. 674, per Mitchell, C. J.: "Whatever diversity of opinion there may be in other jurisdictions concerning the right of a landowner to invoke the jurisdiction of a court of chancery for the purpose of arresting a threatened sale of his land, upon an execution issued against the property of a third person, the right to do so must be considered as settled beyond controversy in this State. *Bishop v. Moorman*, 98 Ind. 1; *Petry v. Ambroscher*, 100 Ind. 510; *Thomas v. Simmons*, 103 Ind. 538; *Walter v. Hartwig*, 106 Ind. 123." A garnishee denied having any property or money belonging to defendant, but a traverse to his answer was sustained. A new trial being denied, he took a bill of exception, but gave no *supersedeas* bond. Plaintiff, who was insolvent, recovered judgment. It was held that

a temporary injunction, restraining the levy of an execution on property in the hands of the garnishee was properly granted at the suit of one who claimed to own the property, and who offered to give bond to protect all parties from any damages that might be thereby sustained. *Hitt v. Ehrlich*, 89 Ga. 824, 15 S. E. 770. A petition by a telegraph company alleged that defendant claimed to have obtained judgment against another company, by virtue of which he caused execution to be levied on part of plaintiff's property, and that he had caused such property to be sold at a nominal figure; that he claimed to own the property so sold, and that he threatened to take forcible possession of it, so as to prevent plaintiff from operating its line; and that to satisfy the remainder of the judgment defendant threatened to seize and sell other portions of plaintiff's line, thus causing irreparable injury. Plaintiff further alleged that it was the exclusive owner of the property referred to, and that it had no connection with the alleged judgment debtor, and asked for an injunction against defendant. It was held that the petition was good on demurrer. *Southwestern Telegraph & Telephone Co. v. Howard*, 3 Tex. Civ. App. 338, 22 S. W. 524.

will not be heard to object to the jurisdiction of a court of equity to enjoin the sale.⁸¹

§ 723. **Same subject; exceptions.**—Unless one's title will be put in jeopardy by a threatened sale of land under an execution against a third person, the sale will not be enjoined.⁸² And where a purchaser of land did not allege, in his bill to enjoin its sale, under judgments against a former owner, that such purchaser's grantor was misled by the judgments appearing satisfied of record, and it appeared that he had not yet paid the purchase money and could recoup the amount of the judgments from it, and so be uninjured, he was not entitled to an injunction.⁸³ And in New Jersey it is decided that where a bill is filed, under the statute, "to compel the determination of claims to real estate in certain cases, and to quiet the title to the same," an allegation that defendant, by virtue of a judgment and execution at law against complainant's grantor, has seized on and is about to sell lands to which complainant has the legal title, presents no equitable ground for enjoining such sale, as such a sale will not be prejudicial to him.⁸⁴ Equity, also, will not enjoin a sale under an execution against a third person where plaintiff's only equity is that of a *bona fide* purchaser.⁸⁵ And equity will not enjoin a creditor from levying

81. *Otis v. Gregory*, 111 Ind. 504, per Mitchell, J.: "It is regarded as against conscience that one party should persist in holding a deed or other instrument against another of which he can make no possible use except as a means of embarrassing his adversary. *Huston v. Roosa*, 43 Ind. 517; *Hardy v. Brier*, 91 Ind. 91."

82. *Purinton v. Davis*, 66 Tex. 455.

83. *Yeates v. Mead*, 65 Miss. 89.

84. *Swayze v. Hackettstown Nat. Bank*, 44 N. J. Eq. 9, 13 Atl. 670. per McGill, Ch.: "The cases do not present a single ground that will warrant the use of the writ of injunction. If the complainants are

right in their construction, a sale under the execution will not be prejudicial to them. *Freeman v. Elmen-dorf*, 7 N. J. Eq. 475; on appeal, 7 N. J. Eq. 655; *American Dock Co. v. Trustees*, 32 N. J. Eq. 428; on appeal, 35 N. J. Eq. 181; *Sheldon v. Stokes*, 34 N. J. Eq. 87. I fail to perceive that the statute (quoted in the text) affords any ground which will justify the use of the writ of injunction to stay an attempt to perfect a claim which the defendant pronounces illegal and seeks to have set aside. Compare *Havens v. Thompson*, 23 N. J. Eq. 321."

85. *Manistique Lumbering Co. v. Lovejoy*, 55 Mich. 189.

on land in which he avers that his debtor has an interest.⁸⁶ But the sale of a wife's land by the husband's creditor may be enjoined where the wife's title is clear, and the sale would be in violation of a clear and express statutory prohibition.⁸⁷

§ 724. **Same subject; to prevent cloud on title.**—A court of equity in the exercise of its inherent powers may, in order to prevent a cloud upon the title to land, restrain a sale thereof by the sheriff under a judgment against a former owner which never became a lien upon the land, as, for example, where before a judgment is docketed in a certain county, land of the judgment debtor there situate has been purchased by a third person in good faith but no conveyance has been executed.⁸⁸ And this rule has been applied under a Wisconsin statute which provides that the owner of a homestead may convey it, and that such conveyance shall not render it liable to a sale on execution.⁸⁹ And an injunction will lie to restrain the sale of land under an execution when the equitable title thereto has passed from the execution debtor by payment of the purchase money to him under contract of sale before the rendition of judgment, and an executed deed for the land has been made and recorded before the sale.⁹⁰ The owner of land upon which a sheriff is about to levy on an execution obtained in a suit to which he was not a party may also have the levy enjoined, as likely to cloud his title.⁹¹

86. Walker's Appeal, 112 Pa. St. 579.

87. Reeser v. Johnson, 76 Pa. St. 313.

88. Pier v. Fond du Lac, 38 Wis. 470; Hamilton v. Fond du Lac, 25 Wis. 490; Siegel v. Supervisors, etc., 26 Wis. 70; Milwaukee Iron Co. v. Town of Hubbard, 29 Wis. 51.

89. Goodell v. Blumer, 41 Wis. 436.

90. Parks v. People's Bank, 97 Mo. 130, per Barclay, J.: "The equitable title of plaintiffs being complete before the judgment and supplemented by a deed of the legal title before the

execution sale, the case was brought within the facts of Black v. Long, 60 Mo. 181, and within the rule of Davis v. Ownsby, 14 Mo. 170. The latter decision declared that a creditor by obtaining judgment acquired thereby no estate in the debtor's lands, and that a valid deed made before such judgment and recorded before the execution sale thereunder, would be notice to a purchaser thereat and would defeat him. That construction of our laws regarding judgment liens and conveyances was made in 1851. It has been approved in many later cases."

91. Bishop v. Moorman, 98 Ind. 1.

§ 725. Enjoining sale of land where judgment or debt paid.—

A party may be entitled to an injunction to prevent the enforcement of an execution on the ground that the debt or judgment upon which the execution was issued has been paid or satisfied.^{91a} So a complaint to enjoin a sale under execution, alleging that plaintiff in execution had receipted the same, and that the judgment had been paid in full and returned satisfied three years before complainant bought the land and took possession, was held to present sufficient equity.⁹² And where, for fourteen years, a decree for the sale of land has remained unexecuted, and an injunction is asked for on the ground that the debt, for which the sale was ordered, has been paid, while a perpetual injunction will not issue until the facts have been investigated, a temporary injunction, pending the investigation, will issue. The lapse of time is a circumstance entitled to great weight.⁹³ A vendee who has bought land subject to a mortgage, which the vendor has agreed to pay, and who has given his note for the purchase money, is, when sued on such note, also entitled to an injunction restraining the execution of judgment in such suit until the vendor has paid the mortgage debt, where a decree of foreclosure has been rendered on the mortgage, and the vendor is insolvent.⁹⁴ And where it appeared that the owner of certain land confessed judgment in favor of his brother, the defendant; that he and the attorney who acted in taking the judgment represented to one who was about to advance money upon a mortgage on the land that the judgment had been paid, and the attorney then entered a satisfaction of record as attorney of defendant; that, relying upon such representations and satisfaction, the money was loaned on the mortgage; that plaintiff afterwards purchased the land at a sale under a foreclosure of the mortgage, and had no notice of defendant's claim; that

91a. *Carpenter v. Phoenix Elec. L. & C. Co.*, 21 R. I. 145, 43 Atl. 539.

92. *Whitehill v. Fauber*, 97 Ind. 169.

93. *Buster v. Holland*, 27 W. Va. 510.

94. *Gillett v. Sullivan*, 127 Ind.

327, 26 N. E. 827, per Olds, C. J.: "To permit the appellant to enforce the collection of her judgment in this case by execution would be permitting the appellant to make an unfair use of the legal forms and leave appellee remediless. See *Ricker v.*

defendant afterwards, without notice to plaintiff, had the satisfaction of his judgment set aside, and sought to sell the land on execution, it was held that the facts entitled plaintiff to have the sale enjoined.⁹⁵ And the fact that the one against whose land an execution issued is secured by a contract of indemnity is held to be no ground for denying an injunction restraining the sale of the land under such execution where the one seeking to enforce it has no right to do so.⁹⁶ But property in the sheriff's possession under a legal writ, at the instance of a privileged and judgment creditor, cannot be seized and sold to the detriment of such creditor, but only the debtor's interest subject thereto; and the purchaser of such interest cannot enjoin the previous execution.⁹⁷

§ 726. Enjoining execution on land where judgment collusive.

—Upon the application of a judgment creditor for an injunction against the sale of a judgment debtor's land under execution by another creditor, on the ground that defendant's judgment was by collusion allowed to be taken for a greater amount than was due, and that the sale would seriously impair plaintiff's rights, the injunction will be continued until the hearing, when the facts are

Pratt, 48 Ind. 73; *Arnold v. Curl*, 18 Ind. 339; *Fehrle v. Turner*, 77 Ind. 530."

95. *Wheeler v. Alderman*, 34 S. C. 533, 13 S. E. 673, per Melver, J.: "It will be observed that the plaintiff in this case bases his claim for protection upon the ground that he is an innocent purchaser for valuable consideration without notice, which is peculiarly an equity doctrine. 2 Pom. Eq. Jur., § 738; and also charges fraud and collusion between the creditor, against whose judgment he is seeking protection, and his judgment debtor. It is therefore clearly distinguishable from the cases of *Green v. Bank*, 10 Rich. Eq. 27; *Brown v. Dickinson*, 10 Rich. Eq. 408; *Wilson v. Hyatt*, 4 S. C. 369; and

Gillam v. Arnold, 32 S. C. 503, relied upon by appellant. The plaintiff here does not rely upon a mere legal right, which he does not need the aid of a court of equity to enforce, as in the cases just named, but his reliance here is upon a pure equity, which does require the aid of a court of equity to enforce. The present case is more analogous, though not strictly so, to the case of *Martin v. Martin*, 24 S. C. 416, where a purchaser of land with covenant of warranty was allowed to invoke the aid of equity to protect himself from a prior mortgage held by his grantor."

96. *Plummer v. Talbot*, 20 Ky. Law Rep. 30, 50 S. W. 1097.

97. *Henry v. Tricou*, 36 La. Ann. 519.

left in doubt, and it appears that defendant cannot suffer serious injury by the delay.⁹⁸ But delay or laches on the part of one who seeks to enjoin a sale under an execution on the ground of collusion in connection with the rendering of the judgment may preclude him from the right to an injunction.⁹⁹

§ 727. **Enjoining sale under judgment by one not a party to judgment.**—A sale under a judgment for the foreclosure of a lien would not create a cloud on the title, or affect the rights of one owning the fee and in actual possession, but not a party to the judgment; and equity will not enjoin the sale at his instance.¹ And an injunction will not be granted to prevent an execution

98. *Bost v. Lassiter*, 105 N. C. 490, 11 S. E. 329, distinguishing *Long v. Jarratt*, 94 N. C. 445, where the relief sought could be had by motion in the original action, as allowed by statute. Compare *Smith v. Fort*, 105 N. C. 446. And as to the propriety of continuing a temporary injunction in such cases of doubt, see *Whittaker v. Hill*, 96 N. C. 2; *Turner v. Cuthrell*, 94 N. C. 239; *Harrison v. Bray*, 92 N. C. 488. See, also, *City of Alma v. Loehr*, 42 Kan. 368, 22 Pac. 424.

99. *Foley v. Guarantee Trust & S. D. Co.*, 74 Fed. 759, 21 C. C. A. 78.

1. *San Francisco Archbishop v. Shipman*, 69 Cal. 586, per McKee, J.: "One who is not a party or privy to a judgment is not affected by it. Neither the judgment nor an execution sale of land affected by it can change his rights in the land or create a cloud upon his title. A deed resulting from such a sale would be void as to him. *Fonda v. Sage*, 48 N. Y. 173. . . . If, in an action of ejectment, founded upon a judgment, execution sale and sheriff's deed, it would devolve upon the owner in possession of the land sought to be recovered, to prove the invalidity of

the proceedings resulting in the deed, or to show a superior title in himself from the same source of title, the proceedings would be held to cast a cloud on the title. Where such proof is unnecessary, no shade would be cast by the proceedings. *Pixley v. Huggins*, 15 Cal. 127; *Hickman v. O'Neal*, 10 Cal. 293; *Cohen v. Sharp*, 44 Cal. 29; and a court of equity will not interfere to enjoin them. *San Francisco v. Beideman*, 17 Cal. 444; *Hollister v. Sherman*, 63 Cal. 38; *Taylor v. Underhill*, 40 Cal. 471; *Schuyler v. Broughton*, 65 Cal. 252. The cases of *Shattuck v. Carson*, 2 Cal. 588; *Guy v. Hermance* 5 Cal. 74; *Alverson v. Jones*, 10 Cal. 9; *Hager v. Schindler*, 29 Cal. 55; *Ramsdell v. Fuller*, 28 Cal. 37, are not in conflict with these views. In each of those cases equity interposed to enjoin a sale of land under an execution issued on a money judgment recovered against the person from whom the plaintiff in the action derived title to the land before the recovery of the judgment; and the relief was granted upon the ground that the sale if consummated would result in a deed which would create a cloud

sale of land upon the mere possibility of its casting a cloud over the title of one in actual possession of land under an unchallenged title.¹

§ 728. **Enjoining execution sale in order to protect mechanics' liens.**—A judgment creditor whose judgment is subsequent to a statutory mechanics' lien, will be enjoined from removing a building subject to the lien if the security would be insufficient without such building.³ In another case complainants had obtained a judgment establishing a lien against a building, and an equitable interest in the land belonging to the owner of the building, but not against the estate of the owner of the fee. Their lien was also declared superior to that of two mortgages on the land. It was held that complainants were entitled to an injunction against the sale of the entire property under another judgment establishing a lien against both the building and the fee estate in the land in favor of other materialmen, but inferior to the mortgages, which judgment had been purchased in the interests of the mortgagees, as such sale would discharge complainants' lien against the building and the equitable estate in the land, and compel them to share *pro rata* with the other lien claimants in the proceeds, as provided by the revised statutes, after the satisfaction of the claims of the mortgagees and the consequent reduction of their security.⁴ But a sale under a mechanics' lien will not be enjoined at the suit of a junior lien-holder who had notice of such prior lien.⁵

upon the plaintiff's title, because in an action against him founded upon such a deed it would be necessary for him to prove that he had acquired the title of the judgment debtor before the recovery of the judgment."

2. *Hartman v. Reid*, 50 Cal. 485; *Schroeder v. Gurney*, 73 N. Y. 430; *Sanders v. Yonkers*, 63 N. Y. 489; *Petit v. Shepherd*, 5 Paige (N. Y.), 493.

3. *Barber v. Reynolds*, 33 Cal. 497.

4. *Hazelhurst v. Sea Isle City Hotel Co.* (N. J. Eq. 1892), 25 Atl.

201. As to the priority of the purchase money mortgages over the liens, see *Bank v. Sprague*, 20 N. J. Eq. 13; *Strong v. Van Deursen*, 23 N. J. Eq. 369; *Macintosh v. Thurston*, 25 N. J. Eq. 242, 246. And as to the priority of the liens over the other mortgage, see *Whitenack v. Noe*, 11 N. J. Eq. 413; *Cement Co. v. Morrison*, 13 N. J. Eq. 133; *Whitehead v. First Meth. Church*, 15 N. J. Eq. 135.

5. *Winn v. Henderson*, 63 Ga. 365.

§ 729. **Same subject.**—A sheriff's sale of land to enforce a judgment subjecting it to a mechanics' lien, will not be enjoined at the suit of the owner, who did not contract for the erection of the building, and who was not made a party to the mechanics' lien proceeding, as the purchaser at the sale will acquire no title as against him.⁶ And a sale under a judgment in an action to enforce a mechanics' lien, will not be enjoined on the ground that it is void for want of jurisdiction, as appears from facts necessarily matters of record in the lien case, as in such case plaintiff cannot be injured by the sale.⁷ But where the holder of a mechanics' lien purchased the land, and assumed several mortgages thereon, and paid a part of them, and a judgment was subsequently rendered in favor of a third person against the original owner of the land, at a term of court commenced before the conveyance was made, and in an action pending at the beginning of the term, it was held that, though the judgment creditor was entitled to have the land sold on execution, subject to the rights of the purchaser of the land, founded on the mechanics' lien and the mortgage liens, yet, where the judgment creditor has the land levied on appraised, and advertised for sale, without reference to such liens, injunction against the judgment creditor and the sheriff is the proper remedy to protect said purchaser's rights.⁸

§ 730. **Judgments on contract where exemption from liability.**—A sale of land under execution will not be enjoined on the ground that it is within the exemption from liability for debts founded on contract, unless it is alleged by plaintiff or found by the court that the judgment on which the execution issued was founded on contract.⁹

6. *McCormick v. Riddle*, 10 Mont. 467, 26 Pac. 202; *Chumasero v. Vial*, 3 Mont. 376; *Story v. Black*, 5 Mont. 26, 1 Pac. 1; *Princeton Min. Co. v. First Nat. Bank*, 7 Mont. 530, 19 Pac. 210.

7. *Russell v. Interstate Lumber Co.*, 112 Mo. 40, 20 S. W. 26.

8. *Bowling v. Garrett*, 49 Kan.

504, 31 Pac. 135. And see *Plumb v. Bay*, 18 Kan. 415; *Richardson v. Hockenbuhl*, 85 Ill. 124; *Young v. Hill*, 31 N. J. Eq. 429.

9. *Goldthait v. Walker*, 134 Ind. 527, 34 N. E. 378, per Hackney, J.: "It is only upon contracts, express or implied, that the right of exemption is secured, and in pleading such

§ 731. **Enjoining excessive levy.**—A levy of an execution on real estate will not be enjoined on the ground that it is excessive, for if such a levy could be excessive, the remedy would be by motion to quash it; but as only so much land can be sold, if a division can be made of entire tracts, as will pay the execution and costs, no damage is likely to result, and if it should, the sheriff would be liable for the injury.¹⁰ In Louisiana it has been decided that an excessive seizure does not justify a resort to an injunction, for the Code of Practice prescribes the remedy by an application to the judge who issued the writ, for an appraisement of the property seized, and, if necessary, a reduction of the seizure.¹¹ But in Georgia a temporary injunction restraining the purchaser of land on execution from disturbing the possession of the debtor was held to be properly granted where the evidence that the debtor had notice of the sale, that the levy was excessive, and that the purchaser acted innocently and in good faith was conflicting.¹²

§ 732. **Executions affecting remainders.**—An injunction to restrain a levy of execution on a contingent remainder in land should not be granted.¹³ For a contingent remainder is not the subject of execution, and the sheriff's sale of it would pass nothing, and when the remainder should fall in after the sale upon the happening of the contingency, the remainderman would hold the land as if there had been no sale.¹⁴ And where land is given to testator's

right, or in finding the facts upon which to predicate such right, it must appear that the contract was of the character authorizing it, and a general allegation of the existence of such right is insufficient. *Russell v. Cleary*, 105 Ind. 502, 5 N. E. 414; *Huseman v. Sims*, 104 Ind. 317, 4 N. E. 42; *State v. McIntosh*, 100 Ind. 439; *Guerin v. Kraner*, 97 Ind. 536; *Berry v. Nichols*, 96 Ind. 290; *Boesker v. Pickett*, 81 Ind. 554; *Thompson v. Ross*, 87 Ind. 157; *Keller v. McMahan*, 77 Ind. 62; *Over v. Shannon*, 75 Ind. 355; *State v. Melogue*, 9

Ind. 196. See, also, *Donaldson v. Banta* (Ind.), 29 N. E. 362."

10. *Palmer v. Gardiner*, 77 Ill. 143. See *Moore v. Barksdale* (Va.), 25 S. E. 529.

11. *Hefner v. Hesse*, 29 La. Ann. 149, construing Art. 652 of the code of practice. The same rule observed in *Lambeth v. Sentell*, 38 La. Ann. 691.

12. *Brunner v. Royal*, 89 Ga. 776, 15 S. E. 689.

13. *Bristol v. Hallyburton*, 93 N. C. 384.

14. *Watson v. Dodd*, 68 N. C. 528.

daughter for life only, with remainder in fee to her children, a child is not in the lifetime of the mother entitled to an injunction to restrain a sale of the land as her property, by virtue of an execution against her under a levy embracing the fee, and not restricted to an estate for her life only, the sheriff's advertisement of the intended sale being as comprehensive as the levy, since a sale by the sheriff, and a conveyance thereunder would pass only such an estate as defendant in execution has, and the son's interest in the fee would not be affected thereby.¹⁵

§ 733. Enjoining collection of purchase money where judgments are liens.—In Virginia and West Virginia, the collection of the purchase money of land may be enjoined on the ground of default of title, after the vendee has taken possession under conveyance from the vendor with general warranty, if the title is questioned by a suit, either prosecuted or threatened, or if the vendee can clearly show that the title is defective.¹⁶ The courts of West Virginia are, however, reluctant to interpose by injunction, unless peculiar grounds of equitable interference exist, such as insolvency or fraud on the part of the grantor. Thus, a grantor conveyed by warranty, and with covenant that the land "shall not be subject to any liability from incumbrances now thereon," when at the time there were recorded judgment liens on the land. It was held that equity would not enjoin the collection of a judgment for purchase money against the grantee, unless the bill showed that the grantor had no other lands sufficient to satisfy the judgment liens, or was pecuniarily unable to pay them.¹⁷

§ 734. Where no summons or notice served.—A court of equity will enjoin as being absolutely void, and not merely set aside the apparent lien on realty of a judgment rendered in a garnishment proceeding, where no summons or notice was served

15. *Stone v. Franklin*, 89 Ga. 195, 15 S. E. 47.

16. *Wamsley v. Stalnaker*, 24 W. Va. 214; *Clarke v. Hardgrove*, 7 Gratt. (Va.) 399; *Ralston v. Miller*,

3 Rand. (Va.) 44; *Grantland v. Wight*, 5 Munf. 295; *Koger v. Kane*, 5 Leigh, 606; *Renick v. Renick*, 5 W. Va. 291.

17. *Wamsley v. Stalnaker*, 24 W.

on the garnishee, and he was not examined, and in fraud of his rights, a sum was found due from him to the principal debtor, to whom he was not in fact indebted.¹⁸ But an injunction will not lie to restrain the collection of a money judgment as taken without notice, when the injunction petition was filed while the remedy by motion for a new trial was still open and it is not shown that such remedy was not adequate, for in such a case the petition for an injunction is substantially a suit for a new trial.¹⁹

§ 735. Enjoining executions beyond jurisdiction of court.—

Proceedings to enjoin the acts of an officer beyond his territorial jurisdiction, or the sale of property on an execution without the jurisdiction of the court rendering the judgment, are not an interference with the officers or process of a court. Thus, judgments in civil actions rendered in the United States court of Indian Territory cannot be enforced by execution in Oklahoma and the United States marshal of said territory has no authority to sell real estate in Oklahoma on an execution issued from said court. Such judgments must be reduced to judgment in Oklahoma before they can be enforced there. The execution and acts of the marshal are void in Oklahoma, and may be enjoined by the District Court of Oklahoma.²⁰

Va. 214. And see *Beale v. Seiveley*, 8 Leigh (Va.), 673; *Maynard v. Mosely*, 3 Swanst. 651.

18. *Cobbey v. Wright*, 34 Neb. 771, 52 N. W. 713. And see *California Beet Sugar Co. v. Porter*, 68 Cal. 369, 9 Pac. 313.

19. *Hamblin v. Knight*, 81 Tex. 351, 16 S. W. 1082. In *Bryorly v. Clark*, 48 Tex. 345, the court said: "It is true, as contended by appellant, that equity may grant a new trial after a motion for a new trial has been overruled. But when the more direct remedy of a second or amended motion is equally available, there is no excuse for resorting to the circuitous remedy of a separate suit.

The petition, as a petition for a new trial, fails to show a sufficient excuse for not having made the same showing by motion." The correctness of this opinion was recognized in *Hamblen v. Knight*, 60 Tex. 36, 40.

20. *Needles v. Frost*, 2 Okla. 19, 35 Pac. 574, per Burford, J.: "In the absence of special statutory authority, executions cannot run beyond the county where the judgment is rendered, or beyond the jurisdiction of the court that rendered judgment. An execution may be valid and regular upon its face, and issued upon a valid judgment, as appears to be in the case at bar; yet if the officer attempts to execute the writ beyond his

§ 736. Pleading; requisite allegations; facts not conclusions.

—In a suit to enjoin a sheriff's sale of land, an allegation in the complaint that the sale will result in great and irreparable injury and damage to the owner is not admitted by demurrer, as such allegation is a conclusion of law, and not the statement of a fact.²¹ And an averment in a petition to enjoin the sale of land under an

jurisdiction, his acts will be void, and he may be enjoined. But were we to concede the position of counsel for appellant—that the court of Indian Territory retains its jurisdiction over Oklahoma for the purpose of collecting its judgments, as well as for rendering them—it would not avail them anything in this case, for in that event, to authorize the marshal of Indian Territory to execute the process in this jurisdiction, it would be necessary that the writ should show upon its face that it was issued upon a judgment rendered in a cause which was commenced in said court prior to May 14, 1890; and nothing appears in the case at bar to show that fact. We are bound to give full faith and credit to the judgments of that court when properly authenticated transcripts are brought before us, which show that the court had jurisdiction of the parties and subject matter; but this rule does not extend to executions in the hands of an officer. If a writ appears to have issued from a court beyond the jurisdiction where it is sought to be executed, or it is being executed by an officer foreign to the jurisdiction where the property is situated, in either event the party affected may have his remedy by injunction in proper cases. At common law the writs of each court were only capable of enforcement within the territorial limits of its jurisdiction. 1 Freem.

Ex'ns, §§ 104, 198, 199. Judgments obtained in one State are, in another State, or in an independent territorial jurisdiction, only contract debts, and they do not, *per se*, authorize the issue of final process or the exercise of auxiliary jurisdiction. They do not have the force and effect of domestic judgments, except for the purposes of evidence. They have no extra-territorial force as judgments, for no court can enforce its process of orders beyond the limits of its territorial jurisdiction. Hence, the holder of a judgment, desiring to enforce it in another territory, must sue upon it in the latter jurisdiction as the evidence of debt, and recover a judgment of the latter territory, and, as such, it will be collected and enforced by the laws of the jurisdiction where last rendered. Black. Judgm. 862; Claffin v. McDermott, 12 Fed. 375; McElmoyle v. Cohen, 13 Pet. (U. S.) 312, 10 L. Ed. 177."

21. McCormick v. Riddle, 10 Mont. 467, 26 Pac. 202; Boley v. Griswold, 2 Mont. 447. As to the general rule that the facts showing irreparable injury must be stated in order that the court may see the apprehensions are well founded, see Carlisle v. Stevenson, 3 Md. Ch. 499; Mechanics' Foundry v. Ryall, 75 Cal. 601, 17 Pac. 703; Waldron v. Marsh, 5 Cal. 119; Thorn v. Sweeney, 12 Nev. 251; Crisman v. Heiderer, 5 Col. 589.

execution, that the petitioner "has personal property, subject to execution, sufficient to satisfy said debt," does not show that he had such property at the time of the levy, so as to make it the duty of the officer to levy thereon instead of on land, and the petition is insufficient if it does not aver that he had such property at the time of the levy.²² And where a person seeking an injunction against an execution sale of property asserts the right to designate the property upon which the execution may be levied, it is held that the petition is objectionable in failing to designate the property upon which he wishes the execution to be levied.²³ Again, where a person seeks to enjoin a sale of property alleged to be his under an execution against another it is held to be no defense to his petition to allege that the property was assigned to the complainant after the judgment upon which the execution issued was rendered, in the absence of an allegation that the assignment was fraudulent.²⁴

§ 737. **Appeal from decree enjoining realty execution.**—In Indiana it has been decided that an appeal from an order enjoining the levying of an execution on real estate is to the Supreme Court, and not to the appellate court of that State.²⁵

22. *Anderson v. Oldham*, 82 Tex. 228, 18 S. W. 557; *Ross v. Lister*, 14 Tex. 469; *Cook v. De la Garza*, 13 Tex. 431.

23. *Stone v. Tilley* (Tex. Civ. App. 1906), 95 S. W. 718.

24. *Rickey v. Rowland* (Iowa, 1906), 107 N. W. 423.

25. *Wood v. Hughes* (Ind. App.), 32 N. E. 594, per Reinhard, J.: "This action was brought by the appellees against the appellant to enjoin him from levying an execution upon

and making the same out of certain real estate of the appellees. There was a finding for the appellees and an order and decree enjoining the execution as prayed for. A motion for a new trial was overruled, and this appeal was taken from that and other rulings upon the trial. We are of the opinion that the jurisdiction of this appeal is in the Supreme Court. Acts 1891, page 39, § 1; *Ex parte Sweeney*, 126 Ind. 583, 27 N. E. 127."

CHAPTER XXV.

AGAINST EXECUTION SALES OF PERSONALTY.

SECTION 738. Enjoining sale of exempt property.

739. Sale not enjoined where legal remedy adequate.

740. Not enjoined where remedy therefor in damages.

741. Execution not enjoined where there is a statutory remedy.

742. Incumbrancer's injunction against execution.

743. Execution sale of paraphernal property.

744. Enjoining sale of personalty in *custodia legis*.

745. Staying execution pending appeal.

746. Damages for enjoining execution process.

Section 738. Enjoining sale of exempt property.—While in ordinary cases of a wrongful levy of an execution on personal property the proper remedy is not by injunction, but by motion to have the levy discharged, or by an action of replevin to take it out of the hands of the sheriff;¹ yet such an injunction may be granted where there are sufficient grounds for the equitable jurisdiction of the court. Thus it has been held that a city may restrain its execution creditors from selling the exempted city water works or the equivalent of such property in the stock of a corporation.² And an injunction is properly issued to prevent the sale under an execution issued on the judgment of a justice of the peace of property exempt by law from a forced sale. And jurisdiction once having attached should be exercised to finally determine the rights involved under the issues made.³ And where an

1. *Van Norden v. Morton*, 99 U. S. 378, 25 L. Ed. 453.

2. *New Orleans v. Morris*, 105 U. S. 600, 26 L. Ed. 1184.

3. *Stein v. Freiberg*, 64 Tex. 271; *Alexander v. Holt*, 59 Tex. 205; *Willis v. Gordon*, 22 Tex. 243; *Bourke v. Vanderlip*, 22 Tex. 221; *Witt v. Kaufman*, 25 Tex. (Supp.) 384; *Sayles' Tex. Stat.*, art. 2335, provides that current wages for personal ser-

vice shall be exempt from attachment or execution. Plaintiff, a resident of Texas, was indebted to defendant, also a resident of Texas, and was employed by a corporation doing business in Texas, and also in Missouri. Defendant, in order to secure payment of his claim, brought suit against plaintiff in Missouri, and garnished his wages in the hands of the corporation. Held, that injunc-

execution against an insurance company is directed to the sheriff of another county, who attempts to levy on property which is exempt under Kansas statutes, the company having its place of business in the same county, may apply to the court of that county to prevent the unlawful sale, and is not obliged to proceed in the court from which the execution issued.⁴ A judgment foreclosing a landlord's lien on certain chattels is conclusive as against a claim that such chattels are exempt in a subsequent suit by the debtor to restrain a sale of them on execution under such judgment.⁵

§ 739. **Sale not enjoined where legal remedy adequate.**—It may be stated generally that the levy of an execution upon personal property will not be enjoined in the absence of a showing that such property has some peculiar value to the complainant or that he will sustain an irreparable injury for which there is no adequate remedy at law.⁶ So in Indiana it has been decided that a sale under execution, of personal property belonging to a person other than the judgment debtor, will not be enjoined unless such property has a special value, rendering compensation in damages impossible, or unless the sale would result in consequential damages, or the claim of one party involves or depends on some equitable interest, since in all other cases section 1266 of the Indiana Re-

tion would lie to restrain defendant from prosecuting his claim in Missouri by a garnishment of wages exempt by the laws of Texas. *Moton v. Hull*, 77 Tex. 80, 13 S. W. 849.

4. *Naill v. Kansas Farmers' Fire Ins. Co.*, 47 Kan. 223, 27 Pac. 854, per *Curiam*: "If a general judgment is rendered against a debtor, his exempt property cannot be taken or sold upon an execution issued on such a judgment, whether he answered the original petition or not. *Sproul v. Atchison Bank*, 22 Kan. 336; *Reed v. Umbarger*, 11 Kan. 206; *Robinson v. Wilson*, 15 Kan. 595; *Rasure v. Hart*, 18 Kan. 340; *In re Jones*, 2 Dill. 343. If property is

specifically appropriated by the statute for the use or payment of a certain class of claims or judgments only, it cannot be used against the objection of the debtor for the payment of every judgment. Such property is exempt excepting for the purposes expressly prescribed by the statute."

5. *Hammer v. Woods* (Tex.), 24 S. W. 942. And see *Monks v. McGrady*, 71 Tex. 134, 8 S. W. 617; *Teal v. Terrell*, 48 Tex. 491.

6. *Boone v. Van Gorder*, 164 Ind. 499, 74 N. E. 4.

See, also, cases cited in this and following sections.

vised Statutes of 1881, provides an adequate remedy for recovering possession of the property by the person entitled to it.⁷ And

7. *Allen v. Winstandly*, 135 Ind. 105, 34 N. E. 699, per Hackney, J.: "In *Henderson v. Bates*, 3 Blackf. 460, a case wherein Henderson sought to enjoin the sale of his personal property for the payment of executions against others. The court said: 'It is also as well settled that chancery will not entertain a bill when personal property is the subject matter, unless in some peculiar cases, nor will it interpose and enjoin the sale of personal property taken in execution, either on the ground that it is not the property of the defendant in the execution, but belongs to a third person, or that it belongs to the complainant, unless it be shown that if the property were sold the complainant would be without remedy at law.' The peculiar cases in which it is there said that equity will interfere are those in which, from the peculiar character of the property, damages may not adequately compensate its loss to the owner. In *Sidener v. White*, 46 Ind. 588; *Trueblood v. Hollingsworth*, 48 Ind. 537; *Hollingsworth v. Trueblood*, 59 Ind. 542; and *Anderson v. Crist*, 113 Ind. 65, 15 N. E. 9—the property of one was sought to be sold to pay the debt of another, and it was held that injunction would lie to restrain such sale. In the first of these cases the relief was proper, as an incident to the enforcement of an equitable right in the plaintiff to require the remaining property of the debtor to be sold before applying that purchased and held by the plaintiff from the debtor. In the other three cases the property of a *cestui que trust* was offered for sale to pay the debt of the trustee individually.

The remedy in equity was proper, because of the peculiar guardianship of trust interests by courts of chancery. The cases of *Elson v. O'Dowd*, 40 Ind. 300; *Stout v. La Follette*, 64 Ind. 365; *Bank v. Cockrum*, 80 Ind. 355; *Bank v. Hargrove*, Id. 364; *Nicholson v. Stephens*, 47 Ind. 185; *Eversole v. Cook*, 92 Ind. 222; *Burch v. Dooley*, 123 Ind. 288, 24 N. E. 110; and *Greenwaldt v. May*, 127 Ind. 511, 27 N. E. 158—were all cases where sales of personal property were enjoined. In no one of these was the property taken that of a third person, but in every instance was that of the debtor. In every case the relief by injunction was incident to an equitable remedy, and involved the validity of tax levies, judgments, or other liens, or was necessary to maintain the custody of such property in the court. In neither of these lines of cases was the question made or considered that is presented by the present case, nor did the court at all times state the rule under which equitable relief was extended. These omissions are not reasons for the contention that in this State we have departed from the doctrine of *Henderson v. Bates*, *supra*. Of the cases in this State where injunctions against the sale of personal property have been sustained, there is but one other than those above cited that we have found, and that is *Denny v. Denny*, 113 Ind. 22, 14 N. E. 593, where a widow sued to stay the sale of corn by the administrators of her husband's estate, she having chosen such corn as part of her statutory allowance. It was alleged, in addition to the facts we have stated, 'that if it

in New York it has been decided that equity will not enjoin a sheriff from proceeding under a levy, at the instance of the judg-

should be sold she would be left without necessary feed for her animals, and that other corn could not then be readily procured.' The court said: 'This presented a state of facts which made it apparent that the complainant had no other complete and adequate remedy.' Whatever else may be said of this conclusion, it cannot be maintained that the theory of *Henderson v. Bates*, *supra*, has been wholly abandoned in this State, for the distinguished judge who wrote that opinion manifestly had in mind the rule that, where an adequate remedy at law existed, equity would give no relief. Whether replevin would lie, and furnish adequate relief, seems not to have been presented or considered, and the remedy in damages appears not to have been looked upon with favor. It is said, further: 'If it be conceded that the plaintiff might have maintained a suit on the bond, it does not necessarily follow that she must have permitted the corn, to which she had a clear legal right, to be sold. She was not bound to take the chance of obtaining other corn, or of leaving her animals to suffer for want of feed.' Her appeal to equity rested upon the threatened loss of necessary feed for her animals, and was deemed sufficient. We do not look with favor upon the contention that the appellee should have stood by, and, after a sale of his property, sought redress in damages. Such remedy was once thought adequate, and is yet so held by some courts, but the modern and most approved rule is that, if no other remedy exists, that will not be deemed adequate. Mr. Pomeroy says in section 1354, vol. 3,

of his excellent treatise on Equity Jurisprudence: 'Judges have been brought to see and acknowledge, contrary to the opinion held by Chancellor Kent, that the common-law theory of not interfering with persons until they have actually committed a wrong, is fundamentally erroneous, and that a remedy which prevents a threatened wrong is, in its essential nature, better than a remedy which permits the wrong to be done and then attempts to pay for it by the pecuniary damages which a jury may assess. The ideal remedy, in any perfect system of administering justice, would be that which absolutely precludes the commission of a wrong, not that which awards punishment or satisfaction for a wrong after it is committed.' Judge Mitchell evidently so viewed the question in *Denny v. Denny*, *supra*. Appellee's counsel urge upon us the contention that since the Code, with its blending of the rules of practice and pleading in suits in equity and actions at law, a choice of remedies may be had by the party seeking relief. We do not understand that the principles of equity and the rules of the common law have lost their distinguishing characteristics in the adoption of the Code. One court, under a simplified system of pleading, applies to the cause such principles as belong to the relief demanded. The court has no power to apply equitable principles to a cause for which the law has defined and prescribed relief, nor to apply statutory remedies where equity only provides the remedy. Nothing more was intended by noting in *Champ v. Kendrick*, 130

ment debtor's assignee for the benefit of creditors, no ground for the injunction being stated except that the remedy at law would

Ind. 553, 30 N. E. 788, that 'the distinction in pleading and practice in actions at law and suits in equity has been abolished, and all courts are courts of law and equity.' The complaint before us does not allege that the property is of a peculiar value to the owner, nor does it appear that the threatened sale would result in consequential or collateral damages, and no fact is averred indicating that the plaintiff may not freely pursue the statutory remedy in replevin. The statute specially designed for the relief of persons whose personal property is taken in execution for the debt of another provides that 'when any personal goods are wrongfully taken or unlawfully detained from the owner or person claiming the possession thereof, or, when taken on execution or attachment, are claimed by any person other than the defendant, the owner or claimant may bring an action for the possession thereof.' Rev. Stat., 1881, § 1266. If he will have immediate delivery of the property, his affidavit must state 'that the same has not been taken for a tax assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or, if so seized, that it is, by statute, exempt from such seizure.' Wherein the statutory remedy is less adequate, or is not as plain, practical, and efficient, as that by injunction, we have not been advised by appellee's able counsel, and our investigation has not disclosed. By the statutory remedy, possession could have been restored or special bond given for the return of the property,

while the remedy sought left the property in the hands of the sheriff to perish, or to cost more in support than its worth, with but the right of action on the sheriff's official bond, and the uncertain means of establishing the extent of the owner's losses. If it were not the rule that the existence of a legal remedy is a denial of equitable relief, it is perfectly clear that replevin is the better remedy; but, when we are confronted with that rule authority should not be necessary to establish the adequacy of the remedy under the statute. However, we are not without direct authority upon this point. In 1 Pom. Eq. Jur., § 177, after discussing the rule as to real property, the author says: 'In like manner, the concurrent jurisdiction does not embrace suits by the legal owner to recover possession of a chattel, except in the few cases where the chattel has a certain special, extraordinary and unique value, impossible to be compensated for by damages, nor suits merely to determine the legal title to chattels between adverse claimants, where the claim of neither party involves or depends upon any equitable interest or feature. In all ordinary controversies concerning the legal ownership or possession of chattels, the common-law actions of replevin or trover furnish a complete and adequate remedy.' In support of this proposition are cited the following cases: *Bowes v. Hoeg*, 15 Fla. 403-408 (recovery of possession of a chattel); *Long v. Barker*, 85 Ill. 431 (to determine legal title to chattels); *McCullough v. Walker*, 20 Ala. 389-

cause delay.⁸ But where the remedy at law is inadequate an injunction restraining the levy of an execution may be granted.⁹ So where irreparable injury will ensue in consequence of the levy of an execution, a court of equity may interfere by injunction to restrain such levy.¹⁰

§ 740. Not enjoined where remedy therefor in damages.—

Where a party has an adequate remedy at law by an action for damages, the levy of an execution will not ordinarily be enjoined. So an execution sale of a horse which is exempt will not, except perhaps where the horse has a *pretium affectionis*, or other extraordinary value, be enjoined if the constable and his sureties are solvent;¹¹ for the constable, on being notified that the horse is exempt from seizure and sale under execution, will be a trespasser if he seizes and sells it, and both he and his sureties will be liable

391 (to enforce a gift of a chattel); *Young v. Young*, 9 B. Mon. 66 (to try legal title to chattels); *Comby v. McMichael*, 19 Ala. 747 (to compel delivery of chattel); *Hall v. Joiner*, 1 S. C. 186. See, also, 2 Story Eq. Jur., § 709. In 10 Amer. & Eng. Enc. Law, p. 871, it is said: 'An injunction will not lie to prevent the sale of personal property of a third person, levied on by an officer for unpaid taxes, when the property is not of peculiar value to the owner, and it does not manifestly appear that great injury would result to the owner from consequential or collateral damages occasioned by such sale. In such case the owner has a complete and adequate remedy at law, to which he may resort for redress.' Many authorities are cited in support of the text and include decisions in the States of West Virginia, Alabama, California, Michigan, Florida, Minnesota, Nevada, New York, North Carolina, Wisconsin and Missouri. Our conclusion is that the complaint alleged no facts excusing a resort to an equit-

able remedy, or showing that replevin was not a remedy plain and efficient."

That levy of execution will not be enjoined where adequate remedy at law. See, also, § 707a herein.

8. *Chittenden v. Davidson*, 52 N. Y. Super. Ct. 421, per Van Vorst, J.: "If the plaintiff has been unjustly deprived of the possession of the goods in question their full value can be recovered of the sheriff in an appropriate action, and with the moneys so collected the plaintiff can proceed to the execution of his trust so that the injury of which complaint is made is not irreparable."

9. *Funk v. Brooklyn Glass & M. Co.*, 25 Misc. R. (N. Y.) 91, 53 N. Y. Supp. 1086.

10. *Sinsabaugh v. Dunn*, 214 Ill. 70, 73 N. E. 390, *aff'd* 114 Ill. App. 523.

10a. *Florida Packing & I. Co. v. Carney* (Fla. 1905), 38 So. 602.

11. *Bailey v. Wade*, 24 Mo. App. 186. And see *Waldrop v. Green*. 63 N. C. 344. As to the effect of the Missouri statute providing that an

in damages for the conversion,¹² and as no title would pass by such a sale, the judgment debtor could replevin it.¹³ And a levy on heirlooms will not be enjoined unless the debtor tenders their value in payment of the judgment.¹⁴

§ 741. **Execution not enjoined where there is a statutory remedy.**—An injunction to restrain an execution sale will not be granted in favor of a judgment debtor who has an equally effective statutory remedy by petition to the court having jurisdiction of the action at law in which the judgment was rendered.¹⁵ And where an execution debtor has an adequate remedy by petition to the court from which the execution issued for a *supersedeas*, in which court the matter in dispute is pending, a chancery court should not enjoin proceedings under the execution.¹⁶ And a court of equity will not entertain a suit to enjoin the collection of cer-

injunction will lie in all cases in which an adequate remedy cannot be afforded by an action for damages, see *Bank v. Kercheval*, 65 Mo. 682; *Turner v. Stewart*, 78 Mo. 480.

12. *Miller v. Wall*, 27 Mo. 440; *Megehe v. Draper*, 21 Mo. 510; *State v. Barada*, 57 Mo. 562; *State v. Romer*, 44 Mo. 99; *State v. Kurtzeborn*, 2 Mo. App. 335; *State v. Taylor*, 3 Mo. App. 351.

13. *Rowell v. Klein*, 44 Ind. 206; *Freeman on Exec.* 215; *Wells on Replevin*, 268.

14. *Johnson v. Connecticut Bank*, 21 Conn. 148.

15. *Allen v. Winstandly*, 135 Ind. 105, 34 N. E. 699. Equity will not entertain a bill to enjoin an execution sale at the suit of a judgment debtor who lives eighteen miles from the county seat, and who was not apprised of the levy until it was too late to give the five days' notice of filing his schedule and claim of exemptions required by Mansf. Dig. Ark., § 3006. Such claimant has ample remedy at law, under section 2988, by petition to the circuit judge

setting forth the circumstances. *Driggs' Bank v. Norwood*, 49 Ark. 136, 4 S. W. 488, per Smith, J.: "A bill in equity cannot be allowed to restrain the sale of chattels under execution unless it shows that the plaintiff in such bill has no other means of stopping the sale, and that by such sale irreparable damage will result to him. *Lovette v. Longmire*, 14 Ark. 339; *Murphy v. Harbison*, 29 Ark. 340; *Stillwell v. Oliver*, 35 Ark. 184; *Jacks v. Bigham*, 36 Ark. 481. In *Nichols v. Claiborne*, 39 Tex. 363, it was held that a sale of exempt property might be restrained by the judgment debtor. But this seems to be contrary to principle. It is difficult to conceive of any state of facts which would call for the interference of a court of equity since adequate relief may generally be had either by superseding the sale under statutory provisions, or by an action at law. *Baxter v. Baxter*, 77 N. C. 118."

See § 707a herein.

16. *Ricks v. Richardson*, 70 Miss 424, 11 So. 935.

tain subscriptions, under a judgment against the subscriber in another court, so long as it was within the power of the court ordering the assessment to correct a mistake in the amount of the judgment by reducing the assessment, or by ordering a ratable return of any surplus remaining after payment of the debts.¹⁷ Nor will an injunction lie to restrain the enforcement of a judgment alleged to have been irregularly affirmed on certificate in the Supreme Court, in violation of an agreement of settlement in consequence of which the appeal was abandoned, when it appears that there is still time to set aside the affirmance at the term at which it was entered.¹⁸

§ 742. **Incumbrancer's injunction against execution.**—Equity will not enjoin a sale of personalty on execution at the instance of one claiming to hold an incumbrance on it, but will leave him to his legal remedies.¹⁹ For if an incumbrancer has the right to have the property sold and the proceeds paid to him in satisfaction of his lien, the sheriff may as well sell as anybody, and the incumbrancer will not be injured.²⁰ The fact that a judgment creditor, about to sell lands under execution, publicly asserts that his lien is prior to that of a certain mortgage on the premises, and that such mortgage is fraudulent, is no ground on which to enjoin his sale at the suit of the mortgagee.²¹ And an injunction will not lie to restrain a sale of land under a judgment on the ground that the plaintiff is the holder of a mortgage which is a prior lien on the land.²²

§ 743. **Execution sale of paraphernal property.**—Where a wife made an apparent sale of her paraphernal property to her husband's creditor, but in fact received no consideration for the same, and the real purpose was to secure her husband's debt, and the creditor never took possession, she is entitled to have enjoined

17. *Furnald v. Glenn*, 56 Fed. 372.

18. *Roebeling v. Stevens Electric Co.*, 93 Ala. 39, 9 So. 369.

19. *Rollins v. Hess*, 27 W. Va. 570.

20. *Bowyer v. Creigh*, 3 Rand. (Va.) 25.

21. *Ramsdell v. Tama Water-Power Co.*, 84 Iowa, 484, 51 N. W. 245.

22. *Ruthven v. Mast*, 55 Iowa, 715, 8 N. W. 659.

the sale of the property under execution against the creditor; and in the suit to enjoin such paraphernal property the execution creditors cannot set up as a defense the bar of an alleged judicial mortgage.²³

§ 744. **Enjoining sale of personalty in custodia legis.**—A temporary injunction may be granted to restrain the sale of personal property, when it appears that such property is *in custodia legis*, and is not subject to the satisfaction of the judgment under which the execution issued, and a sale of the same would confer no title on the purchaser.²⁴ According to both American and English chancery practice, when proceedings are of a nature to draw to the court the control and possession of the property, real or personal, which is the subject matter of litigation, such possession will not be allowed to be disturbed without the clerk's consent, even under a paramount claim of right; and any attempted enforcement of a judgment directed against such property may be restrained by an injunction.²⁵

§ 745. **Staying execution pending appeal.**—In Louisiana, to stay the execution of an order of seizure and sale by a suspensive appeal, an appeal bond must be furnished within the delays prescribed by law, in a sum exceeding by one-half the sum for which the order issued; and if in such a case the lower court refuses to pass on the effect of an insufficient bond, relief will be granted to

23. *Broussard v. LeBlanc*, 44 La. Ann. 880, 11 So. 460.

As to the effect of absence of possession in the mortgagor in such a case, see *Hunter v. Buckner*, 29 La. Ann. 604.

24. *Ryan v. Parris*, 48 Kan. 765, 30 Pac. 172, per Green, C.: "It was said in *Kimberly v. Sells*, 3 Johns. Ch. 470, by Chancellor Kent: 'If the execution creditor is permitted to sell while the title is doubtful and unknown who would buy? Probably no person could be induced to bid but

on mere speculation or for a nominal sum. The Supreme Court of Ohio has held that courts of equity would prevent a sale on execution where no title could be conferred.' *Norton v. Beaver*, 5 Ohio, 178. See, also, as affirming this doctrine, *Gas Light Co. v. Munsell*, 19 Iowa, 305; *Macklot v. Davenport City*, 17 Iowa, 379; *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Turner v. Reese*, 22 Kan. 319."

25. *Brady v. Johnson*, 75 Md. 445, 26 Atl. 49; *Krippendorf v. Hyde*, 110

the appellee on his application to the Supreme Court for writs of certiorari and mandamus.²⁶ In an action for recovery of land, after judgment and notice of appeal, and the filing of appeal bond, an injunction to stay execution until a suit pending in the Supreme Court of the United States is decided, will not be granted.²⁷

§ 746. Damages for enjoining execution process.—Where plaintiff sued to enjoin defendant from executing a warrant for

U. S. 276, 283. 28 L. Ed. 145; *Wisswall v. Sampson*, 14 How. (U. S.) 52, 65, 14 L. Ed. 322; *Russell v. East Anglian R. Co.*, 3 Mac & G. 104; *Angel v. Smith*, 9 Ves. 335.

26. *State v. Judges of Tenth District*, 45 La. Ann. 246, 14 So. 428, per *Parlange, J.*: "To stay the execution of an order of seizure and sale by a suspensive appeal, an appeal bond must be furnished within the time allowed, in an amount one-half over and above the sum for which the order issued. *State v. Judge*, 22 La. Ann. 35; *Tournillon v. Ratliff*, 20 La. Ann. 179; *Whan v. Irwin*, 27 La. Ann. 707; *Landry v. Victor*, 30 La. Ann. 1041. An order of seizure and sale to the sheriff, directing him to seize and sell the specific property to pay a specified sum is unquestionably 'for a specific sum,' within the intentment of article 575, Code Pr. In the case above cited (22 La. Ann. 35), in which the district judge, after fixing the amount of the suspensive appeal bond in executory proceedings at a sum less than that required by article 575, Code Pr., rescinded the order of appeal, this court said: 'To suspend the execution of a judgment for a specific amount, whether it be an order of seizure and sale or an ordinary judgment, the appeal bond must conform to article 575, Code Pr. *Tournillon v. Ratliff*, 20 La. Ann.

179. If the appellant fails to furnish such a bond within the legal delays, the appellee has the right to proceed with the execution, notwithstanding the appeal. Code Pr., art 578; *Jones v. Frellsen*, 9 Rob. (La.) 186; *Poydras v. Patin*, 5 La. 129; *Marshall v. Banking Co.*, 5 La. Ann. 360; *Montan v. Whitley*, 12 La. Ann. 175. Whether that part of the order fixing the amount of the bond in a sum less than that required by law for suspensive appeals was rescinded or not, the appellee was entitled to proceed with the execution of the order of seizure and sale.' In the case of *State v. Tissot*, 34 La. Ann. 90, this court said that the jurisprudence seems to be now firmly settled that it is only after a suspensive appeal has been obtained and perfected that the lower court ceases to have further jurisdiction over the case, and that the door has always been wisely left open for the determination of the court of the first instance of the question whether the judgment suspensively appealed from shall, or shall not, be executed, either because the case is unappealable, or because no bond has been furnished, or because that furnished is insufficient, or because the surety does not possess the required qualifications."

27. *Hammers v. Hamrick*, 69 Tex. 412, 7 S. W. 345.

the removal of plaintiff from certain premises, and obtained a preliminary injunction, which was subsequently vacated, plaintiff consenting thereto, and a motion for leave to discontinue the action was opposed by defendant, but granted on payment by plaintiff of the taxed costs of the suit, it has been decided that there has been a determination that plaintiff was not entitled to the injunction, and that defendant is entitled to an order of reference to ascertain his damages.²⁸ In Texas, the defendant's expenses and counsel fees in obtaining the dissolution of an injunction against a judgment are not allowed as damages;²⁹ and damages for wrongfully enjoining a levy on property, part of which is exempt, are measured by the value of the residue.³⁰ When the amount of the enjoined judgment is not the debt of complainant, the damages recoverable against him and the sureties on his bond are not the full amount of the judgment, but only such as resulted from the delay in the execution, to be ascertained by a referee; and the fact is immaterial that the penalty of the injunction bond was in double the amount of the judgment.³¹ An injunction preventing the sale on execution of particular property does not prevent the execution of the judgment, within the meaning of the Arkansas digest, which authorizes an assessment of damages on dissolution of an injunction where the proceedings upon a judgment have been stayed, and in such a case it is error to award damages on

28. *Amberg v. Kramer*, 8 N. Y. Supp. 821; *aff'd* 115 N. Y. 655, 21 N. E. 1119. To obtain an injunction, *pendente lite*, restraining the sheriff from selling goods levied on under an execution, and restraining the judgment creditor and the debtor from receiving any property of the latter, on the ground that the judgment was collusive and fraudulent, an undertaking was given to indemnify all the parties enjoined, if the injunction should be dissolved. On dissolution of the injunction the judgment creditor obtained an order directing a reference to ascertain the damages

sustained by him by reason of the injunction. Held that, as the order of reference did not include and was not for the benefit of the judgment debtor and the sheriff, and was made without notice to them, it should be vacated, on motion, as improvidently awarded. *Stein v. Levy*, 13 N. Y. Supp. 45.

29. *Galveston, H. & S. A. R. Co. v. Ware*, 74 Tex. 47, 11 S. W. 918.

30. *Coates v. Caldwell*, 71 Tex. 19, 8 S. W. 922.

31. *Staples v. White*, 88 Tenn 30, 12 S. W. 339.

the dissolution of the injunction.³² In Illinois it is decided that a bill filed by the grantee of a judgment creditor, praying that the judgment may be declared to be no lien on the premises conveyed to the complainant, is not a suit to enjoin a judgment, within the meaning of the Illinois statute regulating the bond and the measure of damages in suits to enjoin judgments.³³ Where a judgment for purchase money is enjoined until the vendor perfects his title and the injunction is then dissolved, damages should not be allowed against the complainant purchaser.³⁴ And where an injunction is granted enjoining execution upon a void judgment, damages will not be assigned on dissolving the injunction.³⁵ Where, in a suit to enjoin the sale of land under execution, there was a contest between the judgment creditor and a former owner of the land as to the right to the fund paid into court, and a decree rendered in favor of the creditor, but the injunction was not dissolved, it was held that no damages could be recovered on the injunction bond, as there had been no breach of it.³⁶

32. *Stanley v. Bonham*, 52 Ark. 354, 12 S. W. 706; *Greer v. Stewart*, 48 Ark. 21, 2 S. W. 251.

33. *Moriarty v. Galt*, 125 Ill. 417, 17 N. E. 714.

34. *Fishback v. Williams*, 3 Bibb (Ky.), 342.

35. *Wingfield v. McLure*, 48 Ark. 510, 3 S. W. 439.

36. *Yates v. Mead*, 69 Miss. 473, 13 So. 695.

CHAPTER XXVI.

AGAINST THE INFRINGEMENT OF TRADE-MARKS; TRADE NAMES.

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- 793a. Damages—Profits—Interest.

Section 747. The purpose and philosophy of trade-marks.—

The peculiar and proper purpose and function of a trade-mark is to point out the origin or ownership of the article to which it is affixed, and to give notice who was the producer of it.¹ Therefore a generic name or a name merely descriptive of an article of trade, of its qualities, ingredients or characteristics, cannot be employed as a trade-mark and the exclusive use of it be protected by an injunction.²

1. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 546, 34 L. Ed. 997, 11 S. Ct. 396; *Canal Company v. Clark*, 13 Wall. (U. S.) 311, 322, 20 L. Ed. 581.

Trade-mark defined.—A trade-mark is a peculiar name or device, by which a person dealing in an article designates it as of a peculiar kind, character or quality, or as manufactured by or for him, or dealt in by him, and of which he is entitled

to the exclusive use. *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

A trade-mark may be infringed anywhere, but this is held not to be the case with a trade name to which an exclusive right can generally be obtained in the locality only. *Ball v. Broadway Bazaar*, 121 App. Div. (N. Y.) 546, 106 N. Y. Supp. 249.

2. *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599, per Duer, J.:

§ 748. **Four general rules.**—The following general rules have been established by a line of decisions in the Federal Supreme Court: That to acquire the right to the exclusive use of a name, device, or symbol as a trade-mark, it must appear that it was adopted for the purpose of identifying the origin or ownership of the article to which it is attached, or that such trade-mark must point distinctively, either by itself or by association, to the origin, manufacture, or ownership of the article on which it is stamped. It must be designed, as its primary object and purpose, to indicate the owner or producer of the commodity, and to distinguish it from like articles manufactured by others. (2) That if the device, mark, or symbol was adopted or placed upon the article for the purpose of identifying its class, grade, style, or quality, or for any purpose other than a reference to or indication of its ownership, it cannot be sustained as a valid trade-mark. (3) That the exclusive right to the use of the mark or device claimed as a trade-mark is founded on priority of appropriation; that is to say, the claimant of the trade-mark must have been the first to use or employ the same on like articles of production. (4) Such trade-mark cannot consist of words in common use as designating locality, section, or region of country.³

"The owner of an original trade-mark has an undoubted right to be protected in the exclusive use of all the marks, forms or symbols that were appropriated, as designating the true origin or ownership of the article to which they were affixed; but he has no right to the exclusive use of any words, letters, figures or symbols which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or symbol which, from the nature of the fact, it is used to signify; others may employ with equal truth, and therefore have an equal right to employ for the same purpose." Referring to this

opinion, Fuller, C. , said, in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, *supra*: "We quote thus at length because the decision is a leading one which has been repeatedly referred to and approved, as presenting the philosophy of the law applicable to trade-marks in a clear and satisfactory manner, as should also be said of Judge Deuer's noted opinion in the case therein cited. *Manufacturing Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993; *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 27 L. Ed. 706; *Goodyear Rubber Glove Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 32 L. Ed. 535, 9 S. Ct. 166; *Corbin v. Gould*, 133 U. S. 308, 32 L. Ed. 611."

3. *Columbia Mill Co. v. Alcorn*,

§ 749. **Priority of use.**—The general rule is that a trade-mark cannot be made the subject of exclusive private property if it is already in use by another.⁴ And a court will not grant a preliminary injunction on the ground of an alleged infringement where a priority of use is shown by the affidavits of the defendant.⁵ No definite length of time is requisite to confer upon a person an exclusive right to a trade name, if he has by priority of adoption appropriated the name or symbol as peculiar to his merchandise and indicative of its place of manufacture, and he may select a name or symbol which had been abandoned by others when he employed it⁶. And when a medicinal preparation, not patented, has come to be known by the name of the original compounder, another person engaged in the manufacture cannot appropriate the name to his exclusive use as a proprietary trade-mark or trade name, as the name has thus practically become descriptive of the preparation.⁷ So a company known as the “Hygeia Water Ice Company” is not entitled to restrain a subsequently organized company from the use of the word “Hygeia” in its corporate name, where the word had been used in the name of another water company organized prior to plaintiff’s organization.⁸ But an infringement of plaintiff’s trade-mark will be enjoined where he

150 U. S. 460, 14 S. Ct. 151, 37 L. Ed. 1144; *Canal Co. v. Clark*, 13 Wall. 311, 24 L. Ed. 828; *McLean v. Fleming*, 9 U. S. 245; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993; *Goodyear Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 S. Ct. 166, 32 L. Ed. 535; *Corbin v. Gould*, 133 U. S. 308, 10 S. Ct. 312, 32 L. Ed. 611; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 S. Ct. 396, 34 L. Ed. 997; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. Ed. 247, 11 S. Ct. 625.

4. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 S. Ct. 151, 37 L. Ed. 1144.

5. *French v. Alter & J. Co.*, 74 Fed. 788.

6. *Cleveland Stone Co. v. Wallace*, 52 Fed. 431; *O'Rourke v. Soap Co.*, 26 Fed. 576.

7. *Watkins v. Landon*, 52 Minn. 389, 54 N. W. 193. In *Van Beil v. Prescott*, 82 N. Y. 630, it was held that plaintiff was not entitled to the exclusive use of the words “Rye and Rock,” because they were descriptive of the nature of the compound rather than of its origin. In *Stachelberg v. Ponce*, 128 U. S. 686, 32 L. Ed. 569, 9 S. Ct. 200, the same rule was applied to the words “La Normandi,” which indicated a particular kind of cigars. See, also, *Marshall v. Pinkham*, 52 Wis. 572, 9 N. W. 615.

8. *Hygeia Water Ice Co. v. New York Hygeia Ice Co. (Sup.)*, 19 N.

has used it exclusively for over ten years, although before that time another used it for two years to a limited extent, and where plaintiff has had two decrees establishing his rights in it.⁹ Where, however, on the affidavits filed by plaintiff and defendant, it remains in doubt whether plaintiff was the originator of the compound the name of which he seeks to protect by injunction, a preliminary injunction will be denied.¹⁰

§ 750. **Descriptive words, etc., as to quality.**—It is obvious that no one can claim protection for the exclusive use of a trade-mark or trade name which would practically give him a monopoly in the sale of any goods other than those made or produced by himself. If he could, the public would be injured, rather than protected, for competition would be destroyed. Nor can a general name or names merely descriptive of an article of trade, or its qualities, ingredients, or characteristics, be employed as a trade-mark, and the exclusive use of it be entitled to legal protection.¹¹ A word in common use cannot be appropriated and adopted as a trade-mark unless applied to the article designated thereby in a non-descriptive, arbitrary and fanciful way, having no natural or necessary application to the article in question, and when such a word is used as an adjective to describe the character and quality of a manufactured article, an injunction will not be granted to restrain its use in describing a similar article manufactured by another, upon the ground that such use is an infringement of a trade-mark and an invasion of property rights.¹² So it has recently

Y. Supp. 602. And see Phila. Mfg. Co. v. Blakesley Co., 37 Fed. 365, where the device was used by defendant's predecessors before it was used by plaintiff's predecessors and the injunction was refused. See, also, Siebert v. Abbott, 25 N. Y. Supp. 590; Price Baking Co. v. Fyfe, 45 Fed. 799.

9. Symonds v. Greene, 28 Fed. 834.

10. Kearsbey v. Brooklyn Chem. Works, 16 N. Y. Supp. 318.

As to injunction in doubtful cases, see § 781 herein.

11. Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537, 11 S. Ct. 396. 34 L. Ed. 997; Canal Co. v. Clark, 13 Wall. (U. S.) 311, 20 L. Ed. 581; Car Advertising Co. v. New York City Car Advertising Co., 107 N. Y. Supp. 547; Motor Boat Pub. Co. v. Motor Boating Co., 107 N. Y. Supp. 468.

12. Cooke & Cobb Co. v. Miller, 169 N. Y. 475, 62 N. E. 582, *aff'd* 53 App. Div. 120, 65 N. Y. Supp. 730, refusing to enjoin the use of the word "favorite" in connection with

been decided by the Court of Appeals in New York that an exclusive proprietary right to the use of a common English word, or a combination of such words, for the purpose of identifying the class, grade, style or quality of a commercial article, or for any purpose other than a reference to or indication of its ownership, cannot be acquired by the prior adoption and use thereof upon the label of any article and the subsequent employment of such word or combination of words by another to describe the character, quality and use of a similar article does not constitute a trespass or infringement of a trade-mark.¹³ So in accordance with the general rule that a symbol, mark or name placed upon an article for the purpose of identifying or describing its quality, grade or style, cannot be sustained and protected as a trade-mark, it has been held the name "Acid Phosphate," applied to a medicinal preparation, describing with reasonable exactness the character and qualities of the preparation, cannot be exclusively appropriated as a trade-mark, and will not be enjoined at the suit of another party using the same name, where defendant properly distinguished his preparation from complainant's and sold it as his own.¹⁴ And in a recent case the word "spearmint" is held to be a common English word descriptive of its nature and therefore not capable of appropriation as a trade-mark for chewing gum flavored with spearmint. The court declared that every one who manufactures chewing gum so flavored has as good a right to call it what it is, "spearmint," as another, and must so describe

a letter and invoice file, in which connection it was also used by complainant.

13. *Barrett Chemical Co. v. Stern*, 176 N. Y. 27, 68 N. E. 65, *rev'd* 71 App. Div. 616, 76 N. Y. Supp. 1009, wherein the court refused to enjoin the use of the words "Roach salt" at the suit of one who manufactured a similar preparation known as "Roachsault." The court said: "Words of this character correctly describing the purpose to which the article is to be put cannot be exclu-

sively used as trade-marks. The office of a trade-mark is to point out distinctively the origin or ownership of the article to which it is affixed, and no sign or form of words can be appropriated as a valid trade-mark which, from the fact conveyed by its primary meaning, others may employ with equal truth, and with equal right, for the same purpose." Per O'Brien, J.

14. *Rumford Chemical Works v. Muth*, 35 Fed. 524.

it if he describes it at all.¹⁵ And it has been held that the words "Iron Bitters" were so descriptive of the ingredients and purposes of the plaintiff's preparation as not to be the subject of monopoly by him as a trade-mark.¹⁶ So the words "Liver Medicine," being purely descriptive, cannot be appropriated as a trade-mark; and the name "Simmons" cannot be appropriated as a trade-mark, when it has become merely descriptive of medicine prepared under the formula of a Dr. Simmons, and is used by many people in connection with such medicines.¹⁷ And the name "Bromo-Caffeine," as applied to a preparation composed of bromide of potassium, caffeine, and other ingredients, is descriptive of the general characteristics and composition of the article to which it is attached, and a trade-mark cannot be acquired in such name.¹⁸

§ 751. **Same subject.**—Whether or not a word has acquired a generic meaning and become descriptive of a general kind, quality or class of goods, so that it cannot be exclusively appropriated as a trade-mark, is a question of fact in each case as it arises.¹⁹ In this connection it has been decided that the bronzing of horse shoe nails to distinguish a certain grade of nails, cannot constitute a trade-mark and as such be protected from imitation.²⁰

15. *William Wrigley, Jr., Co. v. Grove Co.*, 161 Fed. 885. Per Ward, J.

16. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. Ed. 247, 11 S. Ct. 625.

17. *Simmons Med. Co. v. Mansfield Drug Co.*, 93 Tenn. 84, 23 S. W. 165, 174; *Marshall v. Pinkham*, 52 Wis. 572, 9 N. W. 615.

18. *Keasbey v. Brooklyn Chemical Works*, 21 N. Y. Supp. 696.

19. *Noera v. Williams Mfg Co.*, 158 Mass. 110, 32 N. E. 1037; *Thomson v. Winchester*, 19 Pick. (Mass.) 214, 216.

20. *Putnam Nail Co. v. Dulaney*, 140 Pa. St. 205, 21 Atl. 391.

That a general description by words in common use of a kind of article or its nature or qualities cannot of itself be the subject of a trademark, is illustrated by the following cases: *Stokes v. Landgraff*, 17 Barb. 608 (Lake Cylinder-glass); *Wolfe v. Goulard*, 18 How. Pr. 64 (*Schiedam Schnapps*); *Corwin v. Daly*, 7 Bosw. 222 (*Club House Gin*); *Young v. Macrae*, 9 Jur. N. S. 322 (*Paraffine Oil*); *Phalon v. Wright*, 5 Phila. 464 (*Nightblooming Cereus*); *Bininger v. Wattles*, 23 How. Pr. 206 (*Old London Dock Gin*); *Liebig's Extract Co. v. Hanbury*, 17 L. T. N. S. 298 (*Liebig's Extract*); *Caswell v. Davis*, 58 N. Y.

§ 752. **Letters and numerals.**—Letters of the alphabet affixed to merchandise by a manufacturer for the purpose of denoting its quality only, cannot be appropriated by him to his exclusive use as a trade-mark, and an injunction will not be granted at his suit to restrain another manufacturer from using a label bearing no resemblance to his, except in the case of certain letters which alone convey no meaning, in the center of each.²¹ So where a corset manufacturer registered a trade-mark with initial letters added, disclaiming the right to their exclusive use, and used those letters by themselves on a particular part of the corsets, his motion to restrain a rival from using the same initials on the same part of his corsets, as being calculated to deceive, was refused on the ground that the plaintiff had disclaimed the right to their ex-

223 (Ferrophosph. Elixir); *Town v. Stetson*, 3 Daly, 53 (Dessicated Codfish); *Del. & H. Canal Co. v. Clark*, 13 Wall. 311 (Lackawanna Coal); *Hornbostel v. Kinney*, 52 N. Y. Sup. Ct. 41 (Sweet Caporal); *Pratt M'fg Co. v. Astral Ref. Co.*, 27 Fed. 492 (Astral-oil); *Russia Cement Co. v. LePage*, 147 Mass. 206 (Liquid Glue); *Gilman v. Hunnewell*, 122 Mass. 139 (Cough-Remedy); *Desmond's App.*, 103 Pa. St. 126 (Samaritan); *Royal Baking P. Co. v. Sherrill*, 93 N. Y. 331 (Royal); *Indurated Fibre Co. v. Amoskeag Ind. Fib. Co.*, 37 Fed. 695 (Indurated Fibre); *Colgan v. Danheiser*, 35 Fed. 150 (Taffy Tolu); *Rumford Chem. Works v. Muth*, 35 Fed. 524 (Acid Phosphate); *Koehler v. Sanders*, 48 Hun, 48 (International Bank); *Trask Fish Co. v. Wooster*, 28 Mo. App. 408 (Selected Shore Mackerel); *Brown Chem. Co. v. Stearns*, 37 Fed. 360 (Iron Bitters); *Waterman v. Ayres*, L. R. 38 Ch. D. 29 (Reverse-game); *Goodyear Rubber Glove Co. v. Rubber Co.*, 128 U. S. 598 (Goodyear Rubber); *Humphries v. Taylor Drug Co.*,

59 L. T. 820 (Herboline); *Laughman's App.*, 128 Pa. St. 1 (Sonman); *Chaynski v. Cohen*, 39 Cal. 501 (Antiquarian Bookstore); *Rowland v. Brudenbach*, 1 Trademarks, 261 (Maccassar Oil); *In re Brandreth*, L. R. 9 Ch. D. 618 (Porous Plaster); *In re Rader*, 13 Off. Gaz. 596 (Iron-Stone water pipes); *In re Goodyear Rubber Co.*, 11 Off. Gaz. 1062 (Crack-Proof India rubber); *Ayer v. Rush-ton*, 7 Daly, 9 (Cherry Pectoral); *Ex parte Heyman*, 18 Off. Gaz. 922 (Invigorator Spring Bed); *Ex parte Strasburger*, 20 Off. Gaz. 155 (Railway Time-keeper); *Marshall v. Pinkham*, 52 Wis. 497 (Rheumatic Lini-ment); *Larrabee v. Lewis*, 67 Ga. 562 (Snow-Flake bread); *Ginter v. Kinney Tobacco Co.*, 12 Fed. 782 (Straight Cut); *Ex parte Ams*, 23 Off. Rep. 344 (Albany Beef, sturgeon); *Carbolie Soap Co. v. Thompson*, 25 Fed. 625 (Cresylie Ointment); *Ball v. Siegel*, 116 Ill. 137 (Health-Preserving corsets).

21. *Amoskeag M'fg Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993.

clusive use.²² So also numerals or figures used descriptively on spools to denote the number of thread, are not capable of exclusive appropriation as a trade symbol.²³ But figures which have been arbitrarily selected to distinguish the pattern or character of a pen and not its quality or size, may be appropriated as a trade-mark and as such protected by injunction.²⁴ And where letters or figures are used in connection with some device or in a peculiar way an injunction will in many cases be granted to restrain the use of such letters or figures in connection with that device or in the same way where the result would be that an intending purchaser would probably be misled.²⁵

§ 753. **Geographical names.**—In accordance with the general rule that geographical names and words in common use as designating locality or section of a country cannot be appropriated by anyone as his exclusive trade-mark, it has been held that the word "Columbia" is not the subject of such exclusive appropriation as a brand upon sacks or barrels of flour, and that others will not be prevented by injunction from using it as a similar brand, and the rule is all the more applicable in cases where the word was in use as a brand before the complainant appropriated it.²⁶ In a recent

22. *Rosenthal v. Reynolds* (1892), 2 Ch. D. 301.

23. *Coats v. Merrick Threat Co.*, 149 U. S. 562, 572, 37 L. Ed. 847, 13 S. Ct. 966; *Ward & Co. v. Ward*, 15 N. Y. Supp. 913. Letters and figures which by the customs of traders or the declarations of the manufacturers are used only to denote quality or grade, are incapable of exclusive use as trademarks. *Royal B. P. Co. v. Sherrell*, 93 N. Y. 331.

24. *Gillott v. Esterbrook*, 48 N. Y. 374.

25. *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. 551; *Godillet v. American Grocery Co.*, 71 Fed. 873; *Clark & S. Co. v. Scott*, 4 Lack. Leg. News, 159.

26. *Siegert v. Abbott*, 25 N. Y. Supp. 590, 592 (*Angostura Bitters*); *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 S. Ct. 151, 37 L. Ed. 1144, per Jackson, J.: "The alleged trade-mark cannot, for many reasons, be made the subject of an exclusive private property: First, because it is clearly shown from the proof in the cause that the word 'Columbia,' as a brand upon sacks or barrels of flour, was in use long before its appropriation by the complainant. It is established by the evidence that as early as 1865 or 1866 a brand was made for Lee & Hollingsworth, owners of the Columbia Mills of Brooklyn, N. Y., which was placed upon their sacks or barrels of flour in the

case in the United States Supreme Court it is decided that "the name of a person or town may become so associated with a particular product that the mere attaching that name to a similar

form of a circle. The upper part of the circle was formed of the words 'Columbia Mills.' In the middle of the circle, in large letters, was the word 'Columbia,' and above and below this word were placed, respectively, '196' and 'XXX.' In the lower arc of the circle were the words 'Family Flour.' The whole brand was printed in black, and was encompassed by a black circular border. It is further shown by the proof that the word 'Columbia,' before its adoption by the complainant, was used by the Columbia Mill Company, of Columbia, Brown county, Dak.; by the Columbia Elevator & Grain Mills, of Providence, R. I.; by the Columbia Mill Company, of Oakland, Ind.; and by S. S. Sprague & Co., of Providence, R. I. The word 'Columbia' having been thus previously appropriated and used upon barrels and sacks of flour, was not subject to exclusive appropriation thereafter by the complainant, so as to make it a valid trade-mark, such as the law will recognize and protect. Second, the word 'Columbia' is not the subject of exclusive appropriation, under the general rule that the word or words, in common use as designating locality, or section of a country, cannot be appropriated by any one as his exclusive trade-mark. In *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581, it was held that the word 'Lackawanna,' which is the name of a region of country in Pennsylvania, could not be, in combination with the word 'coal,' constituted a trade-mark, because every one who mined coal in

the valley of Lackawanna had a right to represent his coal as Lackawanna coal. Speaking for the court, Mr. Justice Strong said: 'The word "Lackawanna" was not devised by the complainants. They found it a settled and known appellative of the district in which their coal deposits, and those of others, were situated. At the time they began to use it, it was a recognized description of a region, and of course of the earths and minerals in the region. . . . It must be then considered as sound doctrine that on one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district, or dealing in similar articles coming from the district, from truthfully using the same designation.' In *Koehler v. Sanders*, 122 N. Y. 65, 25 N. E. 235, it was held that the word 'international' could not be exclusively appropriated by any one as a part of a trade-name, because the word was a generic term in common use, and in its nature descriptive of a business to which it pertains, rather than to the origin or proprietorship of the article to which it might be attached. In *Connell v. Reed*, 128 Mass. 477, it was held that the words 'East Indian,' in connection with 'Remedy,' placed upon bottles of medicine, were not the subject of a trade-mark. In that case, Mr. Chief Justice Gray, speaking for the court, said 'that it was at least doubtful whether words in common use as designating a vast region of

product without more would have all the effect of a falsehood.²⁷ An absolute prohibition against using the name would carry trade-marks too far. Therefore the rights of the two parties have been

country and its products could be appropriated by any one as his exclusive trade-mark, separately from his own, or some other name, in which he has a peculiar right.' In *Glendon Iron Co. v. Uhler*, 75 Pa. St. 467, a corporation adopted the trade-mark 'Glendon,' which was placed upon their iron. The place where their furnace was located was afterwards erected into a borough by the name of Glendon. Another company, engaged in business in the same place, afterwards used the word 'Glendon' on their iron. It was held that the second company had a right so to do. The ruling of the court was rested on the ground that the name 'Glendon' was common to the whole world, and that the previous appropriation of it by the complainant did not prevent any other manufacturer of pig iron, in its limits, from using the same word. In *Laughman's Appeal*, 128 Pa. St. 1, 18 Atl. 415, it was held that the word 'Sonman,' being the name of a large boundary of land, containing a number of separate private estates, owned by a number of different persons engaged in the business of mining and shipping coal, could not be adopted as a trade-name by one party to the exclusion of others. In the leading case of *Manufacturing Co. v. Spear*, 2 Sandf. 599, it is laid down that no one has a right to appropriate a sign or symbol which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose. It is upon

these principles that a person may put his own name upon his own goods, notwithstanding another person of the same name may, in that name, manufacture and sell the same or similar articles. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. Rep. 625, 35 L. Ed. 347. The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have been to the use of the word 'America,' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated, and made the subject of an exclusive property. They do not, in and of themselves, indicate anything in the nature of origin, manufacture, or ownership; and in the present case the word 'Columbia' gives no information on the subject of origin, production, or ownership. The upper part of the brand or label of the trade-mark discloses the full name of the complainant as the manufacturer of the article, and is in no way supplemented or made clearer by the word 'Columbia.' It can no more be said that it was intended to designate origin or ownership than to denote the quality of the flour on which the brand was placed, and the proof tends strongly to show that the whole label was intended to indicate the quality or class or character of the flour, as being made of spring wheat instead of winter wheat. Defendant having carried on business for some years in New York under the names of the 'Westchester Hat Company' and 'Westchester Cloth-

reconciled, allowing the use provided that an explanation is attached.²⁸ Of course, the explanation must accompany the use, so as to give the antidote with the bane.”²⁹

§ 754. Names indicating origin and ownership protected.—

The use of the name of a city to indicate the origin and ownership of a product of nature may at the suit of the city selling such product be protected by an injunction restraining its use by another in such a way as to deceive a purchaser by inducing him to believe that he is obtaining the natural product placed upon the market by such city.³⁰ So the city of Carlsbad, Bohemia, sole owner of the celebrated mineral springs of that city, having for fifty years been engaged in the business of evaporating the waters, and selling the salts thus obtained under the names “Carlsbad Salts,” and “Carlsbad Sprudel Salts,” is entitled to an injunction to restrain other parties from using these words, even with the

ing Company, adopted the name ‘New York and Westchester Clothing Company’ at his place of business, and in advertising. Plaintiffs afterwards adopted the name ‘Harlem and Westchester Clothing Company,’ which they used at their store, more than a mile from defendant’s, but made no objection, during more than seven years, to the use by the latter of the name adopted by him, although having for part of the time a branch store opposite defendant’s. Neither was a manufacturer of goods. Held, that plaintiffs could not prevent the use by defendant of the name ‘Westchester.’ *Wormser v. Levy*, 12 N. Y. Supp. 558.”

“Geographical terms and words descriptive of the character, quality or place of manufacture of an article are not capable of monopolization as a trade-mark. To entitle a person to the protection in the use of a name as a trade-mark his right to use it must be exclusive, and not a name

which others may employ with as much truth as he who uses it.” *American Wine Co. v. Kohlman*, 158 Fed. 830, per Toulmin, J., in dismissing a bill to enjoin the use of the words “American Wine Co.”

Compare International Cheese Co. v. Phenix Cheese Co. (N. Y. App. Div. 1907), 103 N. Y. Supp. 362.

27. *Citing Walter Baker & Co. v. Slack*, 130 Fed. 514.

28. *Citing Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 200, 204, 16 S. Ct. 1002, 41 L. Ed. 118; *Brinsmead v. Brinsmead*, 13 Times L. R. 3; *Reddaway v. Bauham* [1896], A. C. 199, 210, 222; *American Waltham W. Co. v. United States W. Co.*, 173 Mass. 85, 87, 53 N. E. 141; *Dodge Stationery Co. v. Dodge*, 145 Cal. 380, 78 Pac. 879.

29. *Herring-Hall-Merwin Safe Co. v. Hall’s Safe Co.*, 208 U. S. 554. Per Mr. Justice Holmes.

30. *Carlsbad v. Ku’now*, 68 Fed. 794, *aff’d* 71 Fed. 167, 18 C. C. A.

word "Artificial" added thereto, as names for artificial salts containing the same chemical elements, although the artificial salts may be superior to the natural product.³¹ And, independently of any right of complainants to the exclusive use, as a trade-mark, of the name applied by them to their product, the sale by defendants of a deleterious substance, represented by the latter to be in part or in whole the same substance in which complainants are dealing, and of which they are the sole producers, and which is admittedly of a beneficial character, will be restrained.³² Where a manufactured article has become well known to the public by the name of a city, town or locality as having a high standard of quality, the courts will generally grant an injunction restraining the use of the name by another, especially if he is not located in business at

24, 35 U. S. App. 750; *Collinsplatt v. Finlayson*, '88 Fed. 693.

See § 755 herein.

31. *Carlsbad v. Thackeray*, 57 Fed. 18, per Blodgett, J.: "The proof shows that the salts made by complainants from these natural waters, and labeled 'Carlsbad Sprudel,' etc., have been on the market for over 50 years, and there can be no doubt, from the proof, that their wide reputation arises from the fact that they are known to be the product of the natural waters of the Carlsbad springs whose healing qualities are a matter of general notoriety. There can be no doubt that the city of Carlsbad, being the manufacturer of these salts, had the right to indicate their origin by its own name, to the same extent that a natural person would have such right; and it is equally clear to my mind that no other manufacturer of salts, even of the same chemical elements, has the right to put them on the market in the complainant's name. The complainant's salts are not only made in Carlsbad, but are made by Carlsbad, and no one else has the right

to use the name of Carlsbad as a designation of salts obtained from the Carlsbad waters."

See, also, *Carlsbad v. Kutnow*, 68 Fed. 794, *aff'd* 71 Fed. 167, 18 C. C. A. 24, 35 U. S. App. 750 holding that the fact that a name used as a trade-mark is the name of a city does not prevent the use of such name by the city for a trade-mark for salts evaporated from the water of peculiar springs within the city where such springs also have the same name and give it to their products.

But compare *Carlsbad v. Schultz*, 78 Fed. 469, 79 Off. Gaz. 1361, holding that the use of the word "Carlsbad" on bottles of water manufactured in this country, if accompanied by words showing that the water is not offered for sale as the imported water, will not be restrained by injunction where there is no similarity between the bottles and the labels used for the production of the foreign spring and those used for the American product.

32. *Carlsbad v. Tibbetts*, 51 Fed. 852.

that place, in connection with a similar article of an inferior quality in such a way as to deceive the public.³³ So one who has long made and sold beer under the name of the "St. Louis Lager Beer" may have enjoined the use of the name by another.³⁴ And a similar conclusion has been reached in the case of a manufacturer of flour,³⁵ of watches,³⁶ and of corset waists.³⁷ And where a coal field is well known by a certain name it has been decided that a person may be enjoined from selling, under the name given to the coal produced from that field, an inferior grade of coal mined from another locality.³⁸ And where, on motion for preliminary injunction to restrain the use of the word "Cream" in connection with the words "Baking-Powder," it appeared that complainant, since 1866, had manufactured and sold an article which it designated as "Dr. Price's Cream Baking-Powder;" that the word "Cream" had not been used on packages of baking-powder before that time; and that it is not descriptive of an ingredient of the article, or of its quality or kind, it was held that the injunction would be granted.³⁹ But the use of such a name will not be enjoined where both parties are in the same locality and there is no apparent intention on the part of the one against whom the injunction is sought to deceive the public by the use of a similar label or otherwise.⁴⁰

§ 755. **Names applied to natural products.**—The owner of a product of nature, as well as of human art and skill, may be protected in the exclusive use of a name which he has applied to

33. Pillsbury-Washburn Flour M. Co. v. Eagle, 86 Fed. 608, 30 C. C. A. 386, 58 U. S. App. 490, 41 L. R. A. 162, 85 Off. Gaz. 1397; Harvey v. Lamoureaux, 5 Ohio N. P. 473, 7 Ohio Dec. 455. See, also, cases in following notes.

34. Anheuser-Busch Brewing Assoc. v. Piza, 24 Fed. 149.

35. Pillsbury-Washburn Flour M. Co. v. Eagle, 86 Fed. 608 30 C. C. A. 386, 58 U. S. App. 490, 41 L. R. A. 162, 85 Off. Gaz. 1397.

36. American Waltham Watch Co. v. United States Watch Co., 173 Mass. 85, 53 N. E. 141, 43 L. R. A. 826; Elgin Nat. Watch Co. v. Illinois Watch-Case Co., 89 Fed. 487.

37. Gage-Downs Co. v. Featherbone Corset Co., 83 Fed. 213.

38. Coffman v. Castner, 87 Fed. 457, 31 C. C. A. 5, 9 U. S. App. 35.

39. Price Baking-Powder Co. v. Fyfe, 45 Fed. 799.

40. Genesee Salt Co. v. Burnap, 73 Fed. 818, 20 C. C. A. 27, 43 U. S.

it.⁴¹ So the name "Bethesda," applied by plaintiff to her mineral spring and used as a mark or brand upon the barrels in which the waters have been put by her for shipment and sale, and recorded by her as a trade-mark in the Patent Office, is a proper trade-mark; and the fact that defendant owns another spring within a few hundred feet of plaintiff's, which is alleged to have chemical constitution and curative properties, does not entitle him to use the name "Bethesda," that name not being the geographical designation of any district within or near which the springs are situated.⁴²

§ 756. Trade-mark word or name not to be used by another in any form; otherwise as to picture or symbol.—Where a trade-mark consists of a word, it may be used by the manufacturer who has appropriated it in any style of print or on any form of label, and its use by another in any form is unlawful. In such a case the goods become known by the name or word by which they have been designated, and not merely by the manner or fashion in which the word is printed or written, or its accessory circumstances and the unlawful use of the name or word in any form may be restrained.⁴³ But where a trade-mark consists of a picture, symbol,

App. 243. See *La Republique Francaise v. Schultz*, 94 Fed. 500; *American Cereal Co. v. Pettijohn Cereal Co.*, 72 Fed. 903.

41. *Congress Spring Co. v. High Rock Co.*, 45 N. Y. 291; *Brunnen v. Somborn*, 14 Blatch. 380.

See § 754 herein.

42. *Dunbar v. Glenn*, 42 Wis. 118.

43. *Hier v. Abrahams* 82 N. Y. 519, per Abraham, J.: "In *Newman v. Alvord*, 51 N. Y. 189. the trade-mark consisted of the name 'Akron.' The genuine label was Newman's Akron Cement Co., manufactured at Akron, New York. The hydraulic cement known as the Akron water lime. The label held to be an infringement was 'Alvord's Onondaga Akron Cement or water lime, manufactured at Syracuse, N. Y.' The

judgment was a perpetual injunction restraining the defendant from using the name 'Akron.' See, also, *Congress Spring Co. v. High Rock Spring Co.*, 45 N. Y. 291, where the trade-mark 'Congress' was protected by injunction; and *Gillott v. Estabrook*, 48 N. Y. 374, where the trade-mark '303' was protected in the same manner. . . . The dissimilarity in the form or accessories of the label can make no difference. The trade-mark consisted in the word simply, and the plaintiffs might have printed it on any form of label they might fancy without losing the protection of the law. The defendants had no right to adopt it by merely putting on a label of different fashion from that which the plaintiffs had been in the habit of using."

or a peculiar form or fashion of label, to constitute an infringement there must be such an imitation as to amount to a false representation liable to deceive the public.⁴⁴

§ 756a. **Enjoining use of name of hotel.**—That a hotel proprietor may acquire a right in the name of his hotel is said to be entirely settled by precedent and indisputable in reason.⁴⁵ So in an early case in New York it is decided that the principle upon which trade-marks are protected is not confined to personal property but is applicable to a name applied or appropriated to real property as to a public hotel.⁴⁶ This application of this general principle is recognized in other cases and it seems to be a general rule that one who has given a certain name to a hotel, which has acquired a favorable reputation under that name, will be entitled to an injunction against the use by another of the same name for a hotel in the same place.⁴⁷

§ 757. **When actual deception need not be proved.**—In an action to restrain infringement of a trade-mark it is not necessary for plaintiff to show that any person has actually been deceived

The use of the name of a magazine may be enjoined. *Gannert v. Rupert*, 127 Fed. 962, 62 C. C. A. 594.

44. *Hier v. Abrahams*, 82 N. Y. 519, 523. In *Popham v. Cole*, 66 N. Y. 69, the trade-mark consisted of a fat hog and the injunction was refused because defendant's lean wild boar was not such an imitation as was liable to deceive.

45. *Busch v. Gross* (N. J. Eq. 1906), 64 Atl. 754.

46. *Harvard v. Henriques*, 3 Sandf. 5 N. Y. Super. Ct. 725, wherein *Campbell, J.*, said: "We think that the principle of the rule is the same, to whatever subject it may be applied, and that a party will be protected in the use of a name which he has appropriated and by his skill

rendered valuable, whether the same is upon articles of personal property which he may manufacture, or applied to a hotel where he has built up a prosperous business. . . . If one man has, by close attention to the comfort of his guests, and by superior energy, made his hotel desirable for the traveler, and caused its name to become popular throughout the land, another man ought not to be permitted to assume the same name in the same town, and thus deprive him who first appropriated the name, of some portion of the fruits of that good will which honestly belongs to him alone."

47. *O'Grady v. McDonald* (N. J. Eq. 1907), 66 Atl. 175, where the use of the name "The New Dominion" was restrained at the suit of one pre-

by defendant's alleged imitation; it is sufficient for him to show his proprietary right to the trade-mark, and that defendant is selling similar goods in packages having upon them marks and characters bearing a resemblance sufficiently close to those adopted by plaintiff for his trade-mark to deceive the public. It is the liability to injury which the injunction may be invoked to prevent. And in such a case it is sufficient to show an actual infringement without showing defendant's intention to infringe, though the intent might be material if damages also were claimed.⁴⁸ So in a recent case it is decided that the intention of one who infringes upon the technical trade-mark of another or the question whether he has made profits or the complainant suffered damage are not material in determining the right to the injunction as the cause should proceed solely upon the complainant's ownership of the trade-mark, and if the defendant infringes it an injunction should issue regardless of his intention or the consequences.⁴⁹ So the use of the word "Home" in connection with a make of sewing machine for over twenty-five years, and its registration as a trade-

viously and at the time conducting a hotel under the name "The Hotel Dominion." *Busch v. Gross* (N. J. Eq. 1906), 64 Atl. 754, where the use of the name "Metuchen Inn" was enjoined at the suit of one who at the time had an established hotel by the same name.

48. *Taendsticksfabriks Aktiebolagat Vulcan v. Myers*, 139 N. Y. 364, 34 N. E. 904, per Maynard, J., speaking for a unanimous court: "It is sufficient if injury is threatened or imminent to authorize the court to intervene to prevent its occurrence. The owner is not required to wait until the wrongful use of his trade-mark has been continued for such a length of time as to cause some substantial pecuniary loss. *Manufacturing Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993." In *Colman v. Crump*, 70 N. Y. 573, Allen, J., said: "It is

not necessary to establish a guilty knowledge or fraudulent intent on the part of the wrongdoer. It is sufficient that the proprietary right of the party and its actual infringement is shown."

On a bill to restrain the use of a trade-mark consisting of words merely, it is not necessary to prove that any one has been deceived by defendant's acts, or that he ever intended to deceive or defraud. *Cahn v. Gottschalk*, 2 N. Y. Supp. 13.

See, also, *American Tin Plate Co. v. Licking Roller Mill Co.*, 158 Fed. 690; *Godillot v. American Grocery Co.*, 71 Fed. 873; *Eckhart v. Consolidated Mill Co.*, 72 Ill. App. 70; *Dutton & Co. v. Cupples* (N. Y. App. Div. 1907), 102 N. Y. Supp. 309.

49. *Hutchinson Pierece & Co. v. Loewy*, 163 Fed. 42.

mark, entitle the manufacturer to protection by injunction against one who puts the words "Home Delight" in a similar way on machines offered for sale by him.⁵⁰

§ 758. **Infringing trade-mark by acts only.**—A person may be restrained from selling a spurious article as the genuine. So it has been decided that a manufacturer of bitters is entitled to an injunction restraining the sale of bitters by another in the same bottles which contained the bitters manufactured by the complainant.⁵¹ And where tanks which contained gas were refilled by another with a different make of gas and the plates on the tanks with the trade-mark of the complainant thereon were not removed, such acts were held to constitute an infringement and to be unfair competition which would be enjoined.⁵² So a person may infringe upon the trade-mark "Sapolio," by fraudulently selling to cus-

50. *New Home Sewing Mach. Co. v. Bloomington*, 59 Fed. 234. Wheeler, District Judge: "The pleadings and proofs show that during about twenty-five years the predecessors of the orator have, and lately the orator, a corporation of Massachusetts, has used the word 'Home' in making and selling sewing machines; that by this name, which was registered by them as a trade-mark March 15, 1892, their machines acquired a wide and favorable reputation; and that the defendants are putting the words 'Home Delight' in a similar way upon sewing machines offered by them for sale. This use of that word seems to be well calculated to lead ordinary purchasers of such machines to think that these machines come from the orator or its predecessors. The defendants have no right to so pass off their machines as those of the orator. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828. This proof is sufficient for preventive relief without proof of actual sales by these means of de-

fendants' machines for the orator's."

51. *Hostetter Co. v. Sommers*, 84 Fed. 33, 82 Off. Gaz. 753. In this case it was also decided that a manufacturer of bitters was entitled to an injunction restraining the sale of bitters to a retailer in demijohns and the shipment of empty bottles of the complainant to such retailer for the purpose of selling the spurious bitters in such bottles as the genuine article.

In *Hostetter Co. v. Brueggeman Co.*, 46 Fed. 188, the defendant was enjoined though it did not use plaintiff's labels and bottles, but only advised its customers to use them by refilling the bottles with defendant's mixture.

A person may be restrained from selling labels which are an infringement upon the trade-mark of another though he is not the manufacturer of such labels. *Hennessy v. Herrmann*, 89 Fed. 669.

52. *Prest-O-Lite Co. v. Avery Lighting Co.*, 161 Fed. 648.

tomers asking for that soap another soap not resembling it in the size of cakes or the wrappers.⁵³ And where an employee of defendant, retail dry goods merchant, in charge of the men's furnishing goods department, advertised sales, at reduced prices, of men's shirts made from Wamsutta cotton, a high-grade cotton of established reputation made by plaintiff, and the clerk in charge of such sales, in positive terms, represented the shirts sold at the advertised prices as made of Wamsutta cotton, when in fact they were made of a much inferior cotton, it was held that a temporary injunction should be granted restraining defendant from advertising and selling such shirts as made from Wamsutta cotton, notwithstanding defendant denied knowledge of the untrue representation, and the sales were discontinued on service of the motion papers and notice of the misrepresentation.⁵⁴

§ 759. Same subject; responsibility for sales by retailer.— One who puts into the hands of retail dealers an article made by

53. Complainant had a trade-mark in the word "Sapolio," used to designate a particular kind of soap. When persons called at defendants' store and asked for "Sapolio," their salesman would, without explanation, pass out a soap called "Pride of the Kitchen," on which these words were plainly marked, and receive the customary price. The wrappers used on the two soaps were entirely different, and the size and shape of the cakes also differed. It was held that, though there was no use of the word "Sapolio" on the soap, and no resemblance in the packages, the transaction amounted to an infringement of plaintiff's trade-mark, and would be enjoined. *Enoch Morgan's Sons Co. v. Wendover*, 43 Fed. 420.

54. *Wamsutta Mills v. Fox*, 49 Fed. 141.

The Cigar-Makers' International Union of America, an unincorporated

association for mutual benefit, adopted a label purporting to be issued by the union, and to be placed on boxes of cigars made by members of the union. Complainant, who was a manufacturer of cigars, and a member of the union, filed a bill to restrain defendants, who were not members thereof, from making and selling counterfeits of the union labels, with the alleged attempt to defraud complainant and the public. The bill alleged that by the use of the labels complainant was enabled to receive a higher price for his cigars, and that the sale of such counterfeit labels injured his trade. It was held that, though there is no trade-mark in such labels, as complainant shows special damage and that the right to use them is valuable, and as the adoption and use of such labels are in no way unlawful, and the action of defendants is confessedly fraudulent.

him, and so dressed up as to enable such dealers to deceive the ultimate purchaser into the belief that he is purchasing the goods of a third person, may be enjoined by the latter; and where the proofs warrant the conclusion that the only reason why defendants dress up their article in the manner employed by them is because it can be successfully used to defraud the ultimate consumer, it is unnecessary to prove that any particular person has been in fact so defrauded.⁵⁵ And where on bill for injunction it appeared that

lent, in that they sold the spurious labels, though they may not have used them on cigars of their own manufacture, the bill alleges good grounds for equitable relief. *Carson v. Ury*, 39 Fed. 777.

55. *Von Mumm v. Frash*, 56 Fed. 830. In this case it appeared that in 1866, plaintiffs, in France, originated a champagne wine having a "dry" flavor, which has since been extensively sold in the United States as "G. H. Mumm & Co.'s Extra Dry," and is distinctively known by the term "Extra Dry." Plaintiffs adopted a novel characteristic metal capsule, of a peculiar rose color, on top of which is stamped, in blue, an imperial mantle, bearing a trade-mark, while, running perpendicularly, are the words "G. H. Mumm & Co." Just below the capsule is a small label, on which the trade-mark is also imprinted. The principal label of the bottle also bears this trade-mark on its upper field. Defendants sell an aerated American wine in ordinary champagne bottles. On the upper part of the principal label they put the words "Extra Dry," and also a colorable imitation of the imperial mantle, bearing a colorable imitation of the Mumm trade-mark. Just below the capsule they place a small label, bearing a similar imitation of the trade-mark and mantle,

and the words "Extra Dry." The metal capsule is of the peculiar color used by Mumm & Co., and on its top is stamped, in blue, an imitation of the trade-mark and mantle, while the words "Extra Dry" are stamped perpendicularly thereon, in the same place in which plaintiffs stamp "G. H. Mumm & Co." Defendants' wine has no "dry" quality, and the court found from the testimony that the words "Extra Dry" were used by them for the purpose of fraud, and that their bottles were dressed up so as to enable them to be put off as the goods of plaintiffs. It was held that defendants should be enjoined (1) from further dressing up their product in the manner before employed, or from using in combination the marks, labels and capsules described; (2) from using any colorable imitation of plaintiffs' trade-mark; (3) from placing the words "Extra Dry" on any bottles of their product, of the character described, either in combination or otherwise; (4) from surrounding the neck and cork of any bottles of the form generally used for champagne, and containing their product, with the rose-colored metal capsule, whether stamped as before, or otherwise. The court said: "In *Koehler v. Sanders*, 122 N. Y. 74, 25 N. E. 235, it is said by the New York Court of Appeals: 'There are cases

complainant was engaged in the manufacture and sale of "Hostetter's Bitters," and was the owner of the trade-marks, brands, labels, etc., used in connection with such sale; that defendant manufactured an article of bitters closely resembling Hostetter's Bitters in appearance and flavor, which was sold in bulk to its customers, advising them at the same time to refill bottles that orig-

where the right to use a name to designate a product is so qualifiedly exclusive that the right to the protection of its use against infringement by others rests upon the ground that such use by them is an untrue or deceptive representation. The application of this principle is not necessarily dependent upon a proprietary right in a name, or the exclusive right to its use. But when another resorts to the use of it fraudulently, as an artifice or contrivance to represent his goods or his business as that of the person so previously using it, and to induce the public so to believe, the court may, as against him, afford relief to the party injured.' In *Thompson v. Montgomery*, 41 Ch. Div. 35, cited by the Supreme Court in the case of *Coats v. Merriek Thread Co.*, hereafter referred to (149 U. S. 562, 13 S. Ct. 966, 37 L. Ed. 847), the controversy related to ale manufactured at Stone, in Staffordshire. There, in deciding to enjoin the defendants from using the words 'Stone Ale,' the judge says (page 51): 'I am satisfied that the defendant does not use the words "Stone Ale" for any honest purpose whatever, but, according to the evidence, with a distinctly fraudulent purpose. Is there any reason, then, why the court should not deal with him accordingly, and prevent him from carrying out such intention, by restraining him from using the words which

he will only use for that purpose?' In the case of *Johnston v. Ewing*, L. R. 7 App. Cas. 219, the House of Lords say: 'No man has a right to adopt and use so much of his rival's established trade-mark as will enable any dishonest trader, into whose hands his own goods may come, to sell them as the goods of his rival.' In 19 Ch. Div. 612 it is said: 'No man is permitted to use any mark, stars, or any other means whereby, without making a direct false representation himself to a person who purchases from him, he enables such purchaser to tell a lie, or make a false representation, to somebody else, who is the ultimate customer.' Says the Lord Chancellor in *Wotherpoon v. Currie*, L. R. 5 H. L. 517: 'It was long ago pointed out that it is not upon the *mala mens* towards the buyer that the decision of the case rests.' In *Lever v. Goodwin*, 36 Ch. Div. 1, the court says: 'Now, it has been said more than once, in this case, the manufacturer ought not to be held liable for the fraud of the ultimate seller; that is, the shopkeeper or the shopkeeper's assistant. But that is not the true view of the case. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchasers.' The question thus stated I consider to be the question here, and the answer must be that the de-

inally contained Hostetter's Bitters with the spurious article, and put them on the market as genuine; that in all probability the plaintiff had been thereby to some extent damaged, and the public deceived, it was held that, though defendant did not itself use

defendants knowingly put into the hands of the retail dealers an article of the defendants' manufacture, so dressed up that, in the hands of the retail dealers, it is an effective means of deceiving the ultimate purchaser into the belief that he is purchasing the champagne wine of the complainants known as 'G. H. Mumm & Co.'s Extra Dry.' At the argument great stress was laid by the defendants upon a decision in their favor, rendered by Judge Coxe, in an action similar to this, brought by the same complainants, in the southern district of New York (*Mumm v. Kirk*, 40 Fed. 589), which decision, it is insisted, should control the decision in the present case. But in controversies of this character, as has been stated by the New York Court of Appeals in the case of *Fischer v. Blank*, cited below (33 N. E. 1040), 'each case must, in a measure, be a law unto himself.' The case decided by Judge Coxe related to a different defendant, and to a wine differently marked. In that case the difference between the two methods of dressing up the goods, presented to the court, was so great that it was found as a fact that the defendants' article could not be used for fraud unless the vendor happened to be a knave, and the purchaser an imbecile. Far different is the case at bar. In *Fischer v. Blank*, 138 N. Y. 244, it was declared that, although there could be no exclusive right to a name which indicates a characteristic quality of the article to which it is applied, such a name,

when used in connection with a particular form, style, color, and embellishment of the package that had been adopted by the plaintiff, and when the resemblance between the defendants' package and that of the plaintiff is such that there is danger that the one may be taken for the other, to the detriment of the plaintiff, and to the deception of the public, it is the province of equity to interfere for the protection of the purchasing public, as well as the complainant, 'and for the suppression of unfair and dishonest competition.' Such is the case at bar. The defendants apply to a bottle of the form generally used for champagne wine, and containing their product, the name 'Extra Dry,' in connection with the rose-colored cap adopted by the complainants, in 1866, to designate their wine, and also in connection with the eagle, with head erect and wings extended, adopted by the complainants as their trade-mark, also in connection with the imperial mantle used by the complainants in their advertising, and which has been above described; and, by applying these designating marks in the way they do, the defendants make their manufacture so to resemble the manufacture of the complainants that one may be taken for the other, to the detriment of the complainants, and the deception of the public. It is further to be observed that although, in the case decided by the New York Court of Appeals, there was no testimony from witnesses that in the

plaintiff's labels and bottles, still in advising its customers to use them, it was guilty of a wrong which a court of equity will enjoin.⁵⁶

§ 760. **Use of person's name by another enjoined.**—A manufacturer whose goods have become favorably known to the public by reason of the use of his surname in connection therewith, is as a general rule entitled to an injunction restraining the use of such surname by another in such a manner as to deceive intending purchasers by inducing them to believe that they are purchasing the goods of the complainant.⁵⁷ So a corporation may be restrained from using the name of an individual as a part of its corporate name or in connection with its business or advertisements or from using the picture of such person, and the fact that such person is not engaged in the same or similar business as the corporation is not material.⁵⁸ And where a person by the name of Mathias Hohner was a well known maker of harmonicas in Wurtemberg, most of which were sold under his name in this country, and another person made harmonicas in Saxony, and put upon them his own name, partly in monogram, with the word "nach" and

trade the defendants' manufacture had been taken for the other, the danger of such mistake was held sufficient to call for the interference of the court. See, also, *Braham v. Beachim*, 7 Ch. Div. 856. That case, therefore, overthrows the objection taken here, that there is no evidence of any instance where a person has been defrauded by the method adopted by the defendants in dressing up their manufacture. In a case like the present it would be too much to require the complainants to prove instances of such deception. It is not likely that the knave who perpetrates the fraud upon the ultimate consumer will disclose himself to the complainants; and the ultimate consumer, if cognizant of the fraud practiced upon him, could not, unless by mere accident, be known to the defendants."

56. *Hostetter Co. v. Brueggeman-Reinert Distilling Co.*, 46 Fed. 188.

See, also, *Hostetter Co. v. Sommers*, 84 Fed. 33, 82 Off. Gaz. 753.

57. *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. 1017, 17 C. C. A. 576, 35 U. S. App. 843; *Feder v. Benkert*, 70 Fed. 613, 18 C. C. A. 549, 44 U. S. App. 99; *Heinisch's Sons Co. v. Boker*, 86 Fed. 765; *Carlsbad v. Schultz*, 78 Fed. 469, 79 Off. Gaz. 1361; *Burrow v. Marceau* (N. Y. App. Div. 1908), 109 N. Y. Supp. 105; *De Long v. De Long Hook & E. Co.*, 89 Hun (N. Y.), 399, 35 N. Y. Supp. 509, 74 Off. Gaz. 809; *Schmid v. De Grauw*, 27 Misc. R. (N. Y.) 693, 59 N. Y. Supp. 569; *Pinet v. Maison Louis Pinet*, 77 Law T. Rep. 613, 67 L. J. Ch. N. S. 41.

58. *Edison v. Edison Polyform Mfg. Co.* (N. J. Ch. 1907), 67 Atl. 392.

the words "Improved Hohner" in larger and plainer letters, and sold them in this country through an agent, it was held that Hohner's right to the use of his own name was infringed, and he was entitled to an injunction and accounting.⁵⁹ And an injunction will lie at the suit of a physician to restrain the unauthorized use of a fac-simile of his signature in advertising a medicine.⁶⁰ The general rule also applies to one who has succeeded to the business of the original owner of the name.⁶¹ In this connection it is also decided that it is not necessary, in order to entitle a plaintiff to an injunction, that there should be any allegation of damage.⁶²

§ 761. **Same subject; in Massachusetts.**—Under a Massachusetts statute⁶³ prohibiting the use by one in business of the name of another without the consent of "such person or his legal representative," it has been decided that a child of one deceased could not maintain a suit in equity to restrain defendant from using, as a part of the name under which he carries on business, the name of plaintiff's father.⁶⁴

59. *Hohner v. Gratz*, 52 Fed. 871. And see *Smail v. Sanders*, 118 Ind. 105, 20 N. E. 296. Plaintiff, the Plant Seed Company, was organized in 1872 by the Plant Bros., dealers in flowers, bulbs, plants, etc. Defendant, the Michel Plant & Seed Company, was incorporated in 1882, the name being changed from "H. Michel & Co.," dealers in flowers, plants, etc. Held, that equity would not restrain the use of defendant's name, such name being proper indication of its business, and not likely to mislead customers. *Plant Seed Co. v. Michel Plant & Seed Co.*, 37 Mo. App. 313.

60. *Mackenzie v. Soden Mineral Springs Co.*, 18 N. Y. Supp. 240, 27 Abb. N. C. 402.

61. *Feder v. Benkert*, 70 Fed. 613, 18 C. C. A. 549, 44 U. S. App. 99; *Heinisch's Sons Co. v. Boker*, 86 Fed.

765; *Schmid v. De Grauw*, 27 Misc. R. (N. Y.) 693, 59 N. Y. Supp. 569.

62. *Bagby & R. F. Co. v. Rivers*, 87 Md. 400, 40 Atl. 171, 40 L. R. A. 632.

63. Mass. Pub. Stat., chap. 76, § 6.

64. *Lodge v. Weld*, 139 Mass. 499, 2 N. E. 95, per Allen, J.: "It is a natural inference from the phraseology of the statute that the persons whose consent in writing is required in order to justify the use of their name, would be the only persons entitled to remedy the wrong, if committed. And so it has been considered heretofore. Bills in equity for this purpose have always been brought in the name of the person himself whose name was used without authority, or of his executor or administrator. *Bowman v. Floyd*, 3 Allen, 76; *Morse v. Hall*, 109 Mass.

§ 761a. **Use of name under a license.**—Where a person has a right under a license to use a certain name during the term of a contract his right to use that name expires upon the termination of the contract and he may be enjoined from a subsequent use of it. So where a manufacturer of beer leased certain premises to another, giving the latter the exclusive right to bottle beer manufactured by the lessor during the term of the lease and the lessee bottled and sold the beer using the name “Lauer Beer Bottling Company,” it was decided that upon the expiration of the lease the right to use the name was at an end as the lessee had only a mere license to use it and he was enjoined from doing business under such name, but the court refused to restrain him from using the property purchased by him for use in the business of bottling during the term of the contract or to enjoin him from using the property on hand at the termination of the lease, except that he must not use it in such a manner as to induce the public to believe that he was bottling and selling “Lauer beer.”⁶⁵

§ 761b. **Where trade-mark only transferred.**—The transfer of a naked trade-mark used to distinguish one cigar from another, detached from the business in which it had theretofore been used, will not support an action by the transferee to enjoin its use and for damages for its infringement. This ruling is based upon the doctrine that a trade-mark is not a piece of property that passes from hand to hand by assignment separate from the business of the owner of the trade-mark or of the article which it may serve to distinguish, and that generally it passes only with the business and good will of which it is an inseparable part.⁶⁶ The court, however, declared in this case that it did “not say that the principle above suggested would apply to an assignment of all trade-marks made in a similar way. There are, doubtless, some trade-marks

409; *Hallett v. Cumston*, 110 Mass. 29. See, also, *Rogers v. Taintor*, 97 Mass. 291.

⁶⁵. *Lauer Brewing Co. v. Ehresman* (N. Y. App. Div. 1908), 111 N. Y. Supp. 266.

⁶⁶. *Falk v. American West Indies T. Co.*, 180 N. Y. 445, 73 N. E. 1123, reversing 90 App. Div. 606, 85 N. Y. Supp. 1130.

See, also, § 789 herein.

that consist of words that identify an article produced by some secret process and without the use of which the article could not be described. In other words, the name used may be inherent in the article itself, and is not used as in this case to distinguish one cigar from another. The celebrated cordial which is in use the world over, known as 'Chartreuse,' is a sample of a trade-mark, the bare assignment of which might confer upon the assignee the right to manufacture and sell that article."⁶⁷

§ 762. **Use of own name when enjoined.**—An ordinary sur-name cannot be appropriated by any person of that name as against others of the same name who are using it for a legitimate purpose.⁶⁸ But one may be enjoined even from using his own name to help sell his goods, if he does it in such a way that it is apparent that he intends deceiving the public, who have bought similar goods sold by another person of the same name.⁶⁹ So it is said that where either persons or corporations have a right to use a name, courts will not interfere where the only confusion, if any, results from a similarity of the names and not from the manner of the use. The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails.⁷⁰ And in a recent case in the United States Supreme Court it is decided that though a person may be a stockholder and officer in a corporation which sells its property, including trade name and good will, to another corporation, he will not be enjoined from using his

67. Per O'Brien, J.

68. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 S. Ct. 625, 35 L. Ed. 247; *Duryea v. National Starch Mfg. Co.*, 79 Fed. 651, 45 U. S. App. 649, 25 C. C. A. 138; *Wm. Rogers Mfg. Co. v. Rogers*, 84 Fed. 639.

69. *Tarrant v. Johann Hoff*, 76 Fed. 959, 22 C. C. A. 644, 45 U. S. App. 143, 78 Off. Gaz. 1107; *Dr. A. Reed Cushion Shoe Co. v. Frew*, 158

Fed. 552; *Landreth v. Landreth*, 22 Fed. 41; *International Silver Co. v. Rogers* (N. J. Eq. 1907), 67 Atl. 105; *Arnheim v. Arnheim*, 28 Misc. R. (N. Y.) 399, 59 N. Y. Supp. 948; *Howes Co. v. Howes Grain Cleaner Co.*, 24 Misc. R. (N. Y.) 83, 52 N. Y. Supp. 468.

70. *Howe Scales Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972.

name in the same line of business because such name was a part of the trade name of the corporation of which he was a stockholder, but that he may be enjoined from using any name, mark or advertisement indicating that he is the successor of the original company or that his goods are the product of that corporation.⁷¹

§ 762a. **Same subject continued.**—In the application of the rules stated in the preceding section⁷² it has been decided that the maker of a preparation known as “Johann Hoff’s Malt Extract” is entitled to an injunction restraining a person by the name of Leopold Hoff from using the words “Hoff’s Malt Extract” without the name Leopold.⁷³ And if a defendant adds to his name imitations of the plaintiff’s labels, boxes or packages, and thereby induces the public to believe that his goods are those of the plaintiff he may be enjoined on the ground of deception.⁷⁴ And a person may be restrained from using his own name though it is only similar to that of another where it is used in such a way that it will tend to deceive an intending purchaser. So the sale of Dr. Stewart’s Dyspepsia Tablets was enjoined at the suit of one who had established a business in the sale of a preparation known as Stuart’s Dyspepsia Tablets.⁷⁵ Again, a person has no right to use his name with such additions as may lead the public to believe that he is selling an article made by another. Thus the defendant Solomon Jung assumed the name of “Young,” under which he engaged in a business similar to that done by plaintiff under its

71. *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U. S. 267.

See, also, *Rowley v. J. F. Rowley Co.*, 161 Fed. 94 (C. C. A. 1908). “The right of every man to his name is indisputable, though equity will not permit its use in such a manner as to compass a fraud. No one, it is true, should be allowed so to employ it as to convey to the public the notion that his goods are the goods of another; but in completely depriving this appellant of the use of his own name we think the court below went too far. The rights of the two parties ought to have been reconciled by

allowing the use, but requiring it to be accompanied by an explanation which would avoid deception.” *Per Dallas, J.*

72. See § 762.

73. *Tarrant v. Johann Hoff*, 76 Fed. 959, 22 C. C. A. 644, 45 U. S. App. 143, 78 Off. Gaz. 1107.

74. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Hires v. Hires*, 6 Pa. Dist. R. 285; *Holloway v. Holloway*, 13 Beav. 209 (*Holloway’s Pills and Ointments*).

75. *Stuart v. Stewart Co.*, 91 Fed. 243, 33 C. C. A. 480, 63 U. S. App. 561.

corporate name of "De Youngs," established himself in the same street near plaintiff and used similar business signs and advertising devices, displaying the name "The Youngs," so that it differed from that of the plaintiff only in the prefix "The." It was held that a temporary injunction would be granted.⁷⁶ But the fact that a manufacturer uses a brand, composed in part of his own name, which is of such similarity to that of another manufacturer of the same name as to indicate an intent to deceive, does not justify an injunction forbidding absolutely the further transaction of such business in his own name.⁷⁷

76. *De Youngs v. Jung* (Com. Pl. N. Y.), 25 N. Y. Supp. 479, per *Curiam*: "The" cannot stand as an abbreviation of the defendant's given name, which appears by his naturalization papers and his passport to be "Sol," and defendant swears he has been known by that name from youth up, and not by the name of "Solomon," or "Theodore" or any other name that can be abbreviated into "The." That these coincidences of names, styles or signs, impressions on bill heads, etc., have led unwary persons from plaintiff's business is apparent from the affidavits which were read as a part of plaintiff's moving papers. As was well said by the learned judge who granted the injunction: "No person is bound to accept his patronymic as a surname, and he may engage in business under whatever name he sees fit, provided, however, that the assumption of any particular name for such purposes is unaccompanied by design to perpetuate a fraud upon others. If so, the use of the assumed name should be restrained." And equity will enjoin a party from so using his name as to cause the public to believe the goods of one man or firm are the productions of another. *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Co.*, 37 Conn. 278; *McLean v. Flem-*

ing, 96 U. S. 245, 24 L. Ed. 828. So, too, a party has a right to use his own name, but he has no right to do so with such additions to it as may deceive the public or lead it to believe that he is selling an article made by another. *Meneely v. Meneely*, 62 N. Y. 427, cited in *Caswell v. Hazard*, 121 Id. 484; *Clark v. Clark*, 25 Barb. 76. To constitute an infringement of a trade-mark exact similitude is not required, but an infringement has been committed when ordinary purchasers buying with ordinary caution are likely to be misled. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828. Defendant's firm, consisting of C. B. Rogers and two others named Rogers, began the making of plated ware, which they stamped "C. Rogers & Bro., A. 1," in such a way as to resemble closely plaintiff's mark used for twenty-five years on goods of like manufacture, "Rogers & Bro., A. 1." The word Rogers had value as a trade-mark in connection with such wares. Held, that plaintiff was not entitled to an injunction. (*Park, Ch. J.*, and *Loomis, J.*, dissenting). *Rogers v. Rogers*, 53 Conn. 121, 55 Am. Rep. 78.

77. *Rock Springs Distillery Co. v. Monarch*, 15 Ky. Law Rep. 866, 22 S. W. 1028.

§ 763. **Use by vendor of business of own name.**—In the absence of an express covenant, or of fraud, there is nothing to prevent the vendor of a business and good will from establishing a like business in the same place, under his own name, provided he does nothing to injure the good disposition of the public towards the old place of business, or impair any of the advantages which the purchaser has properly acquired by the purchase of the good will of the old customers.⁷⁸ But partners who have sold the good will of a business and those associated with them, will be enjoined from carrying on a rival establishment under a name so similar as to mislead the public. They will, however, not be prohibited from receiving mail matter addressed to the new name.⁷⁹

§ 764. **Arbitrary and fanciful words as trade-marks.**—Where a manufacturer has invented a new name consisting either of a new word or a word or words in common use which he has applied for the first time to his own manufacture or to an article manufactured for him to distinguish it from those manufactured and sold by others, and the name so adopted is not generic or descriptive of the article and not used to denote grade or quality, but is arbitrary or fanciful, he is entitled to be protected in the use of that name as a trade-mark; and this is the rule though the name has become so generally known that it has been adopted by the public as the ordinary appellation of the article.⁸⁰ And in a recent case it is declared that

78. *Churton v. Douglas*, 28 L. J. Ch. 841; *Hogg v. Kirby*, 8 Ves. 215; *Cruttwell v. Lye*, 17 Ves. 335; *Hall's Appeal*, 60 Pa. St. 458; *Leggott v. Barrett*, 15 Ch. Div. 308; *Cottrell v. Manufacturing Co.*, 54 Conn. 122, 6 Atl. 791; *Rogers M'fg Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467; *Massam v. Food Co.*, L. R. 14 Ch. D. 748; *Gilman v. Hunnewell*, 122 Mass. 139; *Carmichel v. Latimer*, 11 R. I. 395; *Browne, Trade-Marks*, § 420.

79. *Myers v. Kalamazoo Buggy Co.*, 54 Mich. 215, 52 Am. Rep. 811.

80. *Selchow v. Baker*, 93 N. Y. 59. where the words "sliced animals," "sliced birds," "sliced objects," were held to be capable of being appropriated as trade-marks, as applied to games or puzzles consisting of pictures of animals, birds or objects on pasteboard, cut into strips or pieces, the puzzles consisting of putting the pieces together so as to form the original picture. *Rapallo, J.*, said: "Whether a name claimed as a trade-mark is subject to the objection of being descriptive or whether it is an

when one has designedly and arbitrarily taken an unusual and an ungrammatical combination of two words, even if they do suggest an idea, and a correct one, of the construction or utility of the article, as his designing and distinctive name for his article of manufacture, and by long use it has come to be so understood by the purchasers and users thereof, a competitor has no right to use it for the purpose of deceit and will be enjoined from so doing.⁸¹

arbitrary or fancy name must depend upon the circumstances of each case as it arises. In *Burnett v. Phalon*, 3 Keyes (N. Y. App.), 594, the word 'Cocaine,' as applied to a hair wash, compounded from coconut oil and other ingredients, was upheld as a trade-mark. So with 'Magnetic Balm,' as applied to a medicinal preparation of which magnetism or electricity was not in fact one of the component parts. *Smith v. Sixbury*, 25 Hun, 232. . . . A case which is claimed by the learned counsel for the appellants to be very much in point, is cited from *Browne on Trade-marks*, p. 113, § 166, viz.: *Barnett v. Kubler*, decided in the French courts, and I agree that that case is a fair illustration of the principle under discussion. It related to the toy known as 'The Serpent of Pharaoh,' a chemical preparation, sold under the form of a little cone, which being set on fire develops into the form of a real serpent, with its length, movements and color. The infringement charged consisted of the application to a similar article manufactured by the defendant of the name 'Magic Serpent,' and this use of the word 'serpent' was complained of, and it was held that the plaintiff had no right to the exclusive appropriation of it. It is plain that the article was in fact the imitation of a serpent, or the production

of an artificial serpent, and the defendant having the right to manufacture the article, it would have been a clear invasion of his rights to prohibit him from using a name so appropriate and necessary to its description. The words 'Magic Serpent,' or 'Artificial Serpent,' were as accurate a description of the toy as could well be devised. A comparison of this case with that of the 'Pearls of Ether,' as applied to other pills, covered with a silvery coating which made them resemble pearls, exemplifies the distinction. This was held by the French courts to be a good trade-mark, and not descriptive. The word 'Pearls,' as applied to pills, was an arbitrary and fancy name, whose exclusive appropriation abridged no one's right to the use of language in describing pills. If in the case of the 'Serpent of Pharaoh' the infringement had consisted in the piracy of the word 'Pharaoh,' as applied to the toy, it could hardly have been said that the plaintiff was not entitled to protection, if the word had been adopted for the purpose of distinguishing the plaintiff's manufacture."

81. *Rushmore v. Saxon*, 158 Fed. 499. In this case the words were "Flare Front" used to distinguish an automobile lamp.

In the Circuit Court of Appeals, however, these words were said to be

So the fancy name "Eureka," as used in connection with a shirt manufactured by the plaintiff, was protected by injunction, and it was held that he did not lose his exclusive right to the name by habitually using it in conjunction with his own name as maker of the article.⁸² But where a person by the name of Hawthorne was advertising and selling a certain kind of candy as "Hawthorne's What Is It?" it was decided that an injunction would not be granted restraining him from so doing at the suit of one who had previously offered a similar kind of candy for sale as "Oakes' What Is It?" where it appeared that the complainant had no exclusive right to either manufacture or sell such candy under that designation.⁸³ And the words "Merrie Christmas" woven into a ribbon at intervals are not the subject of a trade-mark but an integral part of the ribbon adding to its value, the object of

descriptive merely and not the subject of exclusive appropriation. The court said: "We regard them as descriptive merely and are of the opinion that an injunction should not issue at least until proof, more cogent than anything which now appears in the record, is presented, showing that they have acquired a secondary meaning. So far then as the prayer for an injunction is based upon the use of the name 'Flare Front' and the allegation that the defendant has actually deceived purchasers by representing that its lamps were made by the complainant, the most that can be said is that the questions are involved in doubt. This court has uniformly held that an injunction should not issue in a doubtful case. . . . The order should be modified by excluding from its provisions the prohibition against the use of the name 'Flare Front' and as so modified, is affirmed." *Rushmore v. Manhattan Screw & S. Works*, 163 Fed. 939 (C. C. A. 1908). Per *Coxe, J.*

82. *Ford v. Foster*, L. R. 7 Ch. 611, per *James, L. J.*: "It seems to

be impossible to distinguish this case from *Braham v. Bustard*, 1 H. & M. 447, where a man had a trade-mark for white soft soap made by him upon which was the word 'Excelsior,' and another man applied the word 'Excelsior' to white soft soap in conjunction with his name and was enjoined; so from the older case of *Millington v. Fox*, 3 Myl. & Cr. 338, where persons used the name of 'Millington' as part of the mark upon some steel; or from the case in Ireland of *Kinahan v. Bolton*, 15 Ir. Ch. 75, with respect to the initials 'L. L.' in 'Kinahan's L. L. Whiskey,' which the defendant tried to evade by calling his whiskey 'Bolton's L. L. Whiskey.' Where plaintiff had long used the words 'Sweet German Chocolate' on its labels, the defendant was enjoined from the use of the words 'German Sweet Chocolate' on its labels. *Pierce v. Guittard*, 68 Cal. 68."

See, also, *Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co.* (N. J. Eq. 1907), 65 Atl. 870.

83. *Oakes v. St. Louis Candy Co.*, 146 Mo. 391, 48 S. W. 467.

using such words on the ribbon being to enable persons desiring to give a Christmas gift to tie the package with a ribbon having a Christmas greeting upon it.⁸⁴

§ 765. **Coined words registered as trade-marks.**—Where a person had coined a word which he has applied to an article manufactured or prepared by him and has registered such word as a trade-mark he will be entitled to an injunction restraining the use of the word by another who manufactures or prepares a similar article. So where, in a suit for infringing a trade-mark, it appeared that for many years plaintiff had manufactured and sold a chemical preparation for medicinal purposes under the name of “Bromidia,” a word coined for and arbitrarily applied to the preparation, and that in 1881 it had registered that word as a trade-mark in the Patent Office; that defendants subsequently manufactured and sold a similar compound, intended for the same uses, which they labeled, “Compound Elixir Chloral & Bromide of Potassium,” underneath which, in large letters, the most prominent and conspicuous word on the label was the word “Bromidia,” while below, in smaller type, though distinct and of good size, was a statement that it was prepared by defendants, there was held to be an infringement of the trade-mark, by which incautious purchasers were likely to be deceived, and that an injunction *pendente lite* must be granted.⁸⁵ And where a publisher

84. *Smith v. Krause*, 160 Fed. 270.

85. *Battle v. Finlay*, 45 Fed. 796, per Pardee, J.: “Chancery protects trade-marks upon the ground that a party shall not be permitted to sell his own goods as the goods of another, and therefore he will not be allowed to use the names, marks, letters or other indicia of another by which he may pass off his own goods to purchasers as the manufacture of another. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828. And see *Burton v. Stratton*, 12 Fed. 696, and cases there cited.” In 1872, plaintiffs registered in the patent office, as a

trade-mark, the words “Maryland Club Rye Whiskey, C. B. & Co., special Trade-mark,” surrounding the seal of Maryland, a monogram, and a representation of a clover leaf, a copy of which, printed on white paper about six inches square, their initials forming part of this design, they placed on each barrel of their Maryland Club whiskey. In 1882, defendant began the sale of a whiskey, painting his barrel-heads yellow, and stenceling thereon in black the words “Maryland Jockey Club Rye Whiskey,” so that the words “Maryland” and “Whiskey” formed a circle

has adopted the name of "Old Sleuth Library," to designate a series of detective stories, the pseudonym "Old Sleuth" belongs to him, but he has not such a property in the word "Sleuth" that he can restrain another publisher of similar stories from using the words "Young Sleuth," or "Sleuth," in the absence of proof of similarity in the publications or of other facts showing an intent to mislead purchasers.⁸⁶ Again, a brewer in England who had registered his trade-mark "John Bull" was held entitled to enjoin the defendants from using labels having on them the words "John Bull" and "registered."^{86a}

§ 766. **Corporate names.**—An injunction will be granted restraining an infringement upon the name of a corporation where it appears that the name is being used or infringed upon by another corporation or by an individual in such a way as to deceive the public and to injure the corporation entitled to use such name.⁸⁷ And though a corporation may adopt a name with no actual intent to deceive or in ignorance of the fact that it infringes upon an established name of another person or corporation, the one whose name is infringed upon may nevertheless be entitled to an injunction where it appears that its use by the other party will tend to deceive the public and cause injury to the complainant.⁸⁸ But where the "Drummond Tobacco Company," a

around the barrel-head in letters one and one-half inches high, and "Jockey" in letters seven-eighths of an inch high. Held, an infringement. *Cahn v. Gottschalk*. 2 N. Y. Supp. 13.

86. *Munro v. Tousey*, 129 N. Y. 38, 29 N. E. 9.

86a. *Paine v. Daniells* (1893), 2 Ch. D. (A. C.) 567.

87. *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. 1017, 17 C. C. A. 576, 35 U. S. App. 843; *Block v. Standard Distilling Co.*, 95 Fed. 978; *Allegretti Chocolate Cream Co. v. Keller*, 85 Fed. 643; *Red Polled Cat-*

tle Club v. Red Polled Cattle Club, 108 Iowa, 105, 78 N. W. 803; *Armington v. Palmer*, 21 R. I. 111, 42 Atl. 308, 43 L. R. A. 95; *North Cheshire & M. B. Co. v. Manchester Brewery Co.* (H. L.) [1899], A. C. 83, 68 L. J. Ch. N. S. 74, *aff'g* (C. A.) 67 L. J. Ch. N. S. 351, 78 Law T. Rep. 537.

Such a suit is not one to annul a corporation. *Armington v. Palmer*, 21 R. I. 109, 42 Atl. 308, 43 L. R. A. 95.

88. *Red Polled Cattle Club v. Red Polled Cattle Club*, 108 Iowa, 105, 78

corporation, sought to enjoin the incorporation of another company under the name of the "Drummond-Randle Tobacco Company," it was held that in the absence of a showing that injury to the plaintiff would result, equity would not interfere.⁸⁹ And a corporation will not be restrained from using the name of Richardson & Morgan Company on account of confusion arising from its similarity to the name of plaintiff, the Richardson & Boynton Company, where the two companies manufactured different goods, and where there is no further evidence of confusion than that it occurred in plaintiff's correspondence, not in the corporate name, but in the address; that in one instance credits were wrongly posted; and that, according to the testimony of a single salesman of plaintiff, mistakes daily occur, during busy times, as to plaintiff's locality.⁹⁰

§ 767. **Name of patented article after patent expires.**—Where an article has been patented and the patent expires, and in foreign countries where the patent has no force, there is no piracy in making or selling the article under the name by which it has become generally known; for this name has become the proper description of the article as indicating that it is made according to the patented invention and is not the trade-mark of any particular manufacturer. The patentee relies for his protection upon his

N. W. 103; *North Cheshire & M. B. Co. v. Manchester Brewery Co.* (H. L.) [1899], A. C. 83, 68 L. J. Ch. N. S. 74, *aff'g* (C. A.) 67 L. J. Ch. N. S. 351, 78 Law. T. Rep. 537. Compare *Rogers v. William Rogers Mfg. Co.*, 70 Fed. 1019, 17 C. C. A. 575, 35 U. S. App. 848.

89. *Drummond Tobacco Company v. Randle*, 114 Ill. 412. And see *Hygeia Water Ice Co. v. New York Hygeia Co.*, 19 N. Y. Supp. 602. The "Employers' Liability Assurance Corporation, Limited," of Great Britain, doing business in the State of New York, sought to restrain defendant, the "Employers' Liability In-

surance Company of the United States," a junior company, from doing business in the same State, on account of similarity of name. It was held that a general injunction was properly refused, on the ground that the term "Employer's Liability" was descriptive of a well-known branch of insurance business. 10 N. Y. Supp. 845, reversed. *Employers' Liability Assur. Corp. v. Employers' Liability Ins. Co.* (Sup.), 16 N. Y. Supp. 397.

90. *Richardson & Boynton Co. v. Richardson & Morgan Co.*, 8 N. Y. Supp. 52.

patent, and cannot by calling the name of his patent a trade-mark protect his monopoly after the patent has expired, or where it has no force.⁹¹ And in such a case the patentee is not entitled to any relief on the ground of his former monopoly.⁹² And it has been decided that it is no ground for an injunction that the public is being deceived owing to the fact that the rival maker against whom the injunction is sought has changed the formula for the medicine which the original patentee used.⁹³ But the fact that the patent has expired does not entitle a rival maker of the article to hold himself out by means of his label as the original patentee or maker and such acts on his part may be restrained by injunction.⁹⁴

§ 767a. **Name copyrighted; expiration of copyright.**—In those cases where a name has been copyrighted, upon the expiration of the copyright it is held that the name goes out to the public subject to a certain and well understood limitation or condition, namely, that the public right to use shall be so exercised as not to deceive members of the public and lead them into the belief that they are buying the particular or identical thing which was produced under the copyright.⁹⁵

§ 768. **Effect of trade-mark registration.**—Although registration of a trade-mark under the Act of Congress of March 3, 1881, may not prevent the adoption of another device as a common law trade-mark for the same article in domestic markets, such registry may be evidence, in a suit to restrain infringement of such common law trade-mark, to show what complainant really claimed; and in such a suit, the statement filed to obtain registration, and attached to the affidavits on motion for a preliminary injunction,

91. *Selchow v. Baker*, 93 N. Y. 59, 66; *Wheeler, etc., Mfg. Co. v. Shakespear*, 39 L. J. Ch. (N. S.) 36; *Singer Mfg. Co. v. Loog*, 27 Alb. L. J. 270. See *Westcott Chuck Co. v. Oneida National Chuck Co.* (N. Y. App. Div. 1907), 106 N. Y. Supp. 1016.

92. *Coats v. Merrick Thread Co.*,

149 U. S. 562, 13 S. Ct. 966, 37 L. Ed. 847; affirming 36 Fed. 324.

93. *Centaur Co. v. Marshall*, 92 Fed. 605.

94. *Centaur Co. v. Marshall*, 92 Fed. 605.

95. *Merriam Co. v. Ogilvie*, 159 Fed. 638 (C. C. A. 1908), so holding

may be considered on the final hearing.⁹⁶ As to the effect of registration it is declared in a recent case in the United States Supreme Court that it is well settled that as against others having a right to use it a personal name cannot be exclusively appropriated by any one as a valid trade-mark and that the registration as such gives it no validity.⁹⁷

in the case of the name "Webster" used in connection with a dictionary.

96. *Kohler Mfg. Co. v. Beeshore*, 59 Fed. 572, per Shiras, J.: "We are not willing to affirm the proposition that the registration in the patent office of a certain name or phrase as a trade-mark for an article made and sold by the owner will in all cases prevent or estop the owner from adopting and using another name or phrase as a trade-mark, which might become his property by reason of such adoption and use. If, indeed, the legal effect of registry of a trade-mark would be to protect the owner, in all markets, from infringement of the name so registered, it would probably follow that registry of a given name for an article would conclude the owner, and he could not be permitted to claim that his trade-mark was other than that which the registry notified the public was claimed by him. But as the effect of such a registry in the patent office of the United States is restricted by the Act of March 3, 1881 (21 Stat. 502), to the case of a trade-mark to be used in commerce with foreign nations or Indian tribes, the contention that, as to domestic commerce, he might adopt and use a different trade-mark than that registered would seem to be reasonable. As the scope and operation of a trade-mark act is constitutionally confined to foreign commerce, trade with Indian tribes, and commerce between the States, and as

the Act of March 3, 1881, provides only for a trade-mark to be used in commerce with foreign States and with Indian tribes, a trade-mark might well be adopted and registered for the purpose of those trades, and a different one be used in domestic commerce. *Trade-Mark Cases*, 100 U. S. 82, 25 L. Ed. 550; *Ryder v. Holt*, 128 U. S. 525, 9 S. Ct. 145, 32 L. Ed. 529. This view is not inconsistent with the doctrine of the case of *Richter v. Remedy Co.*, decided in the western district of this circuit, and reported in 52 Fed. 455. That was the case of a foreigner, who, prior to his registration, had never sold any of his medicines in the United States, and who, not having here a common-law trade-mark, had to depend upon his registry. He alleged in his bill of complaint that the defendants were infringing his trade-mark as registered, and, when met by the defense that the defendants had used the trade-mark prior to the plaintiff's registry, he sought to invoke the doctrine of a common-law trade-mark; and this the court rightfully held he could not do, but that he was restricted to the trade-mark described in his registry. The complainant in that case was unable to support his claim that he had acquired as against the defendants, a common-law right to the exclusive use of certain words in connection with the manufacture and sale of medical compounds."

97. *Howe Scale Co. v. Wyckoff*,

§ 768a. Trade-mark registration; effect on jurisdiction.—

Upon the question of jurisdiction of the Federal courts it is decided that where an equity action is brought between citizens of the same State for an infringement of a trade-mark such jurisdiction depends solely upon the question whether the plaintiff has a registered trade-mark valid under the act of Congress.⁹⁸ And the fact that one has registered his trade-mark under the Federal statute is held not to deprive the State court of jurisdiction of litigation in respect to his title in those cases where such courts would otherwise have jurisdiction.⁹⁹

§ 769. Unlawful competition.—Rival manufacturers may lawfully compete for the patronage of the public in the quality and price of their goods, in the tastefulness of their enclosing packages and in the attractiveness of their advertising devices, but they have no right by means of imitative devices to beguile the public into buying their wares under the impression that they are buying those of their rivals, and they will be prevented by injunction from engaging in such unfair and unlawful competition.¹ And

Seamans & Benedict, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972, citing *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Elgin National Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 44 L. Ed. 365.

98. *Leschen Rope Co. v. Broderick*, 201 U. S. 166, 26 Sup. Ct. 425, 50 L. Ed. 710.

99. *Traiser v. Doty Cigar Co.* (Mass. 1908), 84 N. E. 462.

1. *United States*.—*Coats v. Merrick Thread Co.*, 149 U. S. 562, 566, 13 S. Ct. 966, 37 L. Ed. 847; *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Merriman Co. v. Ogilvie*, 159 Fed. 638 (C. C. A. 1908); *Enterprise Mfg. Co. v. Landers*, 131 Fed. 240, 65 C. C. A. 587; *Tarrant v. Johann Hoff*, 76 Fed. 959, 22 C. C. A.

644, 45 U. S. App. 143, 78 Off. Gaz. 1107; *Muller v. Schener*, 74 Fed. 225, 20 C. C. A. 161, 45 U. S. App. 184; *George Frost & Co. v. Estes & Sons*, 156 Fed. 677; *Carmel Wine Co. v. Palestine Hebrew Wine Co.*, 161 Fed. 654; *National Water Co. v. O'Connell*, 159 Fed. 1001; *Devlin v. MeLeod*, 135 Fed. 164; *Colgate v. Adams*, 88 Fed. 899; *Saxlebner v. Eisner & M. Co.*, 88 Fed. 61; *Walter Baker & Co. v. Baker*, 87 Fed. 209; *Van Mumm v. Wittemaure*, 85 Fed. 966; *Vitascope Co. v. United States P. Co.*, 83 Fed. 30; *Pennsylvania Salt Co. v. Myers*, 79 Fed. 87; *Klotz v. Hecht*, 73 Fed. 822; *Cook & B. Co. v. Ross*, 73 Fed. 203.

California.—See *Morton v. Morton* (Cal. 1905), 82 Pac. 664, 1 L. R. A. (N. S.) 660.

Connecticut.—*Boardman v. Meriden, etc., Co.*, 35 Conn. 402.

Georgia.—*Whitley Grocery Co. v.*

where a label is a clear infringement of the label and trade-mark used by the complainant the fact that the defendant may have used an additional label in connection therewith to distinguish the article from that of the complainants will not prevent the granting of an injunction where, though the label may have been adopted in good faith, its employment would not prevent the casual customer from purchasing the articles upon which it is used as that of the plaintiff.² This principle has been applied in favor of a manufacturer of soap which was labeled "Cashmere Bouquet" as against a rival manufacturer of soap labeled "Violets of Cashmere,"³ in favor of a manufacturer of a preparation for killing insects labeled "Insectine," as against one offering for sale a preparation labeled "Instantine,"⁴ and in favor of one selling perfume in bottles into which flowers were blown as against one offering for sale perfume in bottles into which a similar design was also blown.⁵ And in this connection it has also been decided that a person in business may be enjoined from imitating the place of business of another in such a manner as to deceive the public into the belief that it is the place of such other.⁶

McCaw Mfg. Co., 105 Ga. 839, 32 S. E. 113.

Illinois.—Allegretti v. Allegretti Chocolate C. Co., 177 Ill. 129, 52 N. E. 487.

Massachusetts.—Gilman v. Hunnewell, 122 Mass. 139.

Missouri.—Williamson Corset & B. Co. v. Western Corset Co., 70 Mo. App. 424.

New York.—Taylor v. Carpenter, 2 Sandf. Ch. 603; Amoskeag Mfg. Co. v. Spear, 2 Sandf. Ch. 599.

Ohio.—Lippman v. Martin, 5 Ohio N. P. 120.

Pennsylvania.—Arthur v. Howard, 19 Pa. Co. Ct. 81.

England.—Weingarten v. Bayer, 92 Law T. R. 511; Saxlehner v. Apollinaris Co. [1897], 1 Ch. 893, 76 Law T. Rep. 617; Thompson v. Montgom-

ery, 41 Ch. D. 35; Johnston v. Ewing, L. R. 7 App. Cas. 219; Wotherspoon v. Currie, L. R. 5 H. L. 508; Lee v. Haley, L. R. 5 Ch. 155; Croft v. Day, 7 Beav. 84; Perry v. Truefitt, 6 Beav. 66.

No manufacturer can dress his goods so as to palm them off on the public as the goods of another. This will be enjoined as unfair competition. William Wrigley, Jr., Co. v. Grove Co., 161 Fed. 885.

2. Saxlehner v. Eisner, 179 U. S. 19, 21 Sup. Ct. 7, 44 L. Ed. 60.

3. Colgate v. Adams, 88 Fed. 899.

4. Arthur v. Howard, 19 Pa. Co. Ct. 81.

5. Klotz v. Hecht, 73 Fed. 822.

6. Lippman v. Martin, 5 Ohio N. P. 120.

May be compelled by manda-

§ 769a. **Unlawful competition continued.**—A person may be entitled to an injunction on the ground of unfair competition against one who uses the same words upon his labels in such a manner as to deceive an intending purchaser though the complainant has no exclusive right to use such words.⁷ But where there is no similarity in the labels used an injunction will not be granted in favor of one to restrain the use of a word or words by another to which the former has no exclusive right.⁸ And where an employee on opening a place of business uses stationery which is so closely similar as to be a deceptive imitation of that of his former employer and publishes notices of removal so ambiguous in phrasing as to lead the unwary to believe that reference is made to such employer and not to the employee, it constitutes unfair competition which will be enjoined.⁹ And though a defendant has not used the exact trade-mark of the complainant, yet, if the device used by him embodies the essential feature of such trade-mark and so closely resembles it that it will have a tendency to cause the goods so marked to be known in the market by the same name as that by which the complainant's goods are known, there is an infringement which will be enjoined.¹⁰

§ 769b. **Use of former employer's name in advertising.**—Where no deception to the public is shown or any injury to the plaintiff it is decided that a defendant will not be restrained from fairly calling to the attention of the public at such proper times and in such proper places as he chooses, that skill, knowledge and experience of a former employee of the plaintiff, acquired at such places as that employee evidently served the plaintiff.¹¹

tory injunction to distinguish it.—Weinstock L. & Co. v. Marks, 109 Cal. 529, 42 Pac. 142, 30 L. R. A. 182.

7. Pillsbury Washburn Flour M. Co. v. Eagle, 86 Fed. 608, 30 C. C. A. 386, 58 U. S. App. 490, 85 Off. Gaz. 1397, 41 L. R. A. 162. Compare Vitascope Co. v. United States P. Co., 83 Fed. 30.

8. Morgan Envelope Co. v. Walton,

86 Fed. 605, 30 C. C. A. 383, 58 U. S. App. 30, 84 Off. Gaz. 811; Gaines v. Leslie, 25 Misc. R. (N. Y.) 20, 54 N. Y. Supp. 421.

9. United States Frame & P. Co. v. Horowitz, 51 Misc. R. (N. Y.) 101, 100 N. Y. Supp. 704.

10. American Tin Plate Co. v. Licking Roller Mill Co., 158 Fed. 690. See Gulden v. Chance, 163 Fed. 447.

11. Sultzbach Clothing Co. v. Bal-

§ 770. **Imitation where no technical trade-mark.**—Often where no trade-mark has been infringed or involved, courts of equity have granted injunctions against the use upon goods of certain marks, labels, or wrappers, when the evident design of such use was to deceive the public by concealing the true origin of the goods, and making it appear that they were the product of some other manufacturer of established reputation, thereby depriving the latter of a portion of the patronage that would otherwise come to him, or injuring the reputation of his goods.¹²

sam, 56 Misc. R. (N. Y.) 324, 107 N. Y. Supp. 622. In this case it appeared that an advertisement by defendant simply stated that a certain person, not the defendant, fully named in the advertisement, and of recognized and admitted standing as a salesman, and with a circle of acquaintances in the trade of the plaintiff and defendant, who was formerly with the plaintiff, "generally known as 'George's' and 'Fisher's,'" announced that he could be found at "Balsam's Misfit Parlors," which was named according to defendant's surname. There was nothing in the arrangement or composition of the contents of the advertisement calculated to mislead the public to the detriment of the plaintiff. The court held that an injunction *pendente lite* would not be granted restraining the defendant, his agents, servants or employees, from using the name "George's" or "Fisher's," the two trade-names theretofore and as present used by the plaintiff in conducting his business at different places.

12. *Carson v. Ury*, 39 Fed. 777; *Leelanche Battery Co. v. Western Elec. Co.*, 23 Fed. 276. In *Croft v. Day*, 7 Beav. 84, which was not a technical trade-mark case, Lord Langdale granted an injunction to restrain the defendant from using labels or

show cards calculated to mislead the public, saying that the right which any person may have to the protection of the court does not depend upon any exclusive right to a particular name of a man or to a particular form of words. His right, said he, is to be protected against fraud, and fraud may be practiced by means of a name, though the person using it has a perfect right to use that name, provided he do not accompany the use of it with other circumstances to effect fraud. In *Knott v. Morgan*, 2 Keen, 213, it appeared that the omnibuses of the London Conveyance Company were painted, and their servants clothed, in a special and distinctive manner, and that the defendants began to run omnibuses similarly painted, with servants similarly clothed. On motion by plaintiffs, injunction was granted to restrain the defendants from imitating the plaintiff's line of omnibuses. Lord Langdale, in delivering his judgment in the case, expressly stated that the plaintiffs had no exclusive right to the words "Conveyance Company" or "London Conveyance Company," or any other words, but held that they had the right to call upon the court to restrain the defendants from fraudulently using precisely the same words and devices which plain-

§ 771. Same subject; fraudulent imitation.—Though a dealer may have no proper trade-mark, yet where he has for a long period

tiffs had taken for distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages, really the defendant's, belonged to or were under the management of the plaintiffs. In *Williams v. Johnson*, 2 Bosw. 1, decided by the Supreme Court of New York in 1857, it appeared that plaintiffs were the manufacturers of soap which they sold under the name of "Genuine Yankee Soap," using a particular style of wrapper, form of cake, handbill, etc., and that the defendant put up his soap in a similar manner with slight variations. It also appears that there was sufficient doubt about the exclusive right of the plaintiffs to use the words "Genuine Yankee" to prevent their being protected. An injunction was granted restraining the defendant from using the simulated wrapper, etc., complained of. *Woodruff, J.*, in his judgment, referred particularly to the form and size of cake, particular mode of covering and packing, a combination of three labels on each cake, and an exterior handbill upon the box, and the arrangement of the whole, and to the fact that the defendant had copied the form, appearance, color, style, and substantial characteristics which distinguished the plaintiffs' goods. In *Sawyer v. Horn*, 1 Fed. 24, complainant alleged that, to individualize and identify his bluing, he adopted a peculiar and original style of package, "consisting of a blue cylinder, having a red top," and that his goods had long been known and identified by consumers by the peculiar appearance of the pack-

age. It was also set forth that his method of packing, including the size, shape and color of his large packages, was original with him, and had never been varied. It was shown that the defendant had knowingly made and sold bluing put up in boxes and packages imitating complainant's article in all these particulars, except that he used his own name and made changes in the wording of his label. Defendant was restrained from putting up his goods in the manner stated, "or in any other manner so simulating the form, color, labels and appearance given by the complainant to his goods as to mislead purchasers into taking one for the other," and this "whether the plaintiff has a trade-mark or not." In *Avery v. Meikle*, 81 Ky. 75, it appeared that the defendants had not imitated plaintiffs' trade-mark; yet that, by the exact simulation of plaintiffs' plow in every perceivable point, exposed to an ordinary observer, and purchaser, and the use of the same coloring and staining, the same relative position of the letters and figures as employed and used by the plaintiffs avoiding the literal appropriation of any part of the trade-mark, they had obscured their own and appellants' trade-mark, but at the same time sought to avoid detection and responsibility in doing so, and to cause their plows to be taken for and purchased as those of plaintiffs. It was held that plaintiffs were entitled to injunction and relief; and, in setting forth the grounds of the judgment, the court say: "The confusion which prevails in the argument against the jurisdiction in this case results from

put up his wares in packages of uniform and distinguishable shape, size, and contents, with marks or brands similarly distinguishable

assuming that in all cases the complainant must make out a legal title to an exclusive trade-mark by means of which, or some part of which, the defendant has done the wrong and injury to his rights. The authorities do not sustain this assumption, but, on the contrary, are numerous and strong that the wrong consists in one person fraudulently selling his goods as and for those of another, either by the use of the other's trade-mark, or indicia, or by any means whatever, if such fraudulent practices result, or are likely to result, in damage to the complainant. . . . As the object of the courts of equity is to prevent one man injuring another's rights by selling his goods as those of the other, why not prevent all fraudulent misrepresentations, whether oral, by sign, symbols, trade-marks, labels, words, or figures, by which that wrong is accomplished? The injury is the same, no matter how, or by what means it may be done, and the responsibility should attach when that injury is deliberately and fraudulently committed." And in *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 S. Ct. 396, 34 L. Ed. 997, it is said: "It seems, however, to be contended that plaintiff was entitled, at least, to an injunction, upon the principle applicable to cases analogous to trade-marks; that is to say, on the ground of fraud on the public and on the plaintiff, perpetrated by defendant by intentionally and fraudulently selling its goods as those of the plaintiff. Undoubtedly, an unfair and fraudulent competition against the business of the plaintiff—conduct with the in-

tent, on the part of the defendant, to avail itself of the reputation of the plaintiff, to palm off its goods as plaintiff's—would, in a proper case, constitute ground for relief. Now, a trade-mark clearly such, is in itself evidence, when wrongfully used by a third party, of an illegal act. It is of itself evidence that the party intended to defraud, and to palm off his goods as another's. Whether this is in itself a good trade-mark or not, it is the style of goods adopted by the complainant which the defendants have imitated for the purpose of deceiving, and have deceived, the public thereby, and induced them to buy their goods as the goods of the complainant. This is fraud." The court quotes with approval the case of *Wotherspoon v. Currie*, L. R. 5 H. L. 508, known as the "Glenfield Starch Case," and *Thompson v. Montgomery*, 41 Ch. Div. 35, 50, known as the "Stone Ale Case." See, also, *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. Ed. 247, 11 S. Ct. 625; *Nail Co. v. Bennett*, 43 Fed. 800. In *McCann v. Anthony*, 21 Mo. App. 83, the St. Louis Court of Appeals say: "The governing principle is that one manufacturer shall not be allowed to impose his goods upon the public as the goods of another manufacturer, and to derive a profit from the reputation of that order. It is not necessary that the trade-mark, trade name, sign, label, or other device which is employed by one merchant for that purpose shall be an exact imitation or counterfeit of the trade-mark, trade name, sign, label, or other device employed by the other manufacturer. Nor is it required

and uniform, equity will protect him against fraudulent imitation of his packages, calculated to deceive persons into the belief that

that the imitation be so close as to deceive cautious and prudent persons; it is sufficient if it be so close as to deceive the incautious and unwary, and thereby work substantial injury to the other manufacturer. Nor is it necessary to prove that actual fraud was intended by the manufacturer employing the simulated trade name, sign, label, or other device, in order to entitle the other manufacturer to relief in equity, or for an action for damages at law. Here, as in most other civil actions, the law does not attempt to penetrate the secret motives or intent with which the act is done; contents itself with the conclusion that the party intended the natural and probable consequence of the act; and gives its judgment accordingly." In *Hostetter v. Adams*, 10 Fed. 838, the criterion is stated to be: "If the general effect is to deceive an ordinary observer having no cause to use more than ordinary caution." In speaking of the packages in controversy in that case, Judge Blatchford says: "But the general effect to the eye of an ordinary person acquainted with plaintiff's bottle and label, and never having seen the defendant's label, and not expecting to see it, must be, on seeing the defendant's, to be misled into thinking it is what he has known as the plaintiff's." In *Siebert v. Findlater*, L. R. 7 Ch. D. 801, it appeared that Siebert's mixture was first introduced in England in 1863, since which their popular name has been "Angostura Bitters;" but that the Siegerts did not adopt and apply the name to their mixture until after that name had been used

by Maynard, in 1874, as descriptive of the kind of bitters made by him. It was held that the Siegerts failed to establish a valid trade-mark; but it was also held that the mode in which the defendant put up and described his mixture was calculated to and was intended by the defendant as a deception. In that case the defendant was restrained "from using the words 'Angostura Bitters' or the word 'Angostura,' on any bitters or other fluids contained in bottles, not made by the plaintiffs, so as to induce the belief that such bitters or fluids are made by the plaintiffs, and, further, from selling or offering for sale any bitters or other fluids in the bottles, in the wrappers, and in the general form in which the defendants were selling the bitters called by them 'Angostura Bitters' at the commencement of this action, or in any other wrappers or form contrived or designed to represent and induce the belief that the bitters or fluids sold by the defendants, and not made by the plaintiffs, are the goods of the plaintiffs."

See, also, *Hiram Walker & Sons v. Hochstaeder*, 85 Fed. 776; *Wilson v. Garrett & Co.*, 78 Fed. 472, 24 C. C. A. 173, 47 U. S. App. 250, 79 Off. Gaz. 1681; *Buck's Stove & R. Co. v. Kiechle*, 76 Fed. 758, 77 Off. Gaz. 1785; *Godillot v. American Grocery Co.*, 71 Fed. 873; *Scott v. Standard Oil Co.*, 106 Ala. 475, 19 So. 71, 31 L. R. A. 374; *McLoughlin v. Singer*, 33 App. Div. (N. Y.) 185, 53 N. Y. Supp. 342; *Tuerk Hydraulic P. Co. v. Tuerk*, 92 Hun (N. Y.), 65, 36 N. Y. Supp. 384.

they came from such dealer.¹³ So the use, to designate a medical preparation, of the phrase "Improved Fig Syrup," with bottles, wrappers, and devices which resemble a similar preparation manufactured and sold under the name of Syrup of Figs," in such a way as to mislead the public, will be enjoined as an infringement.¹⁴ And where complainants have built up a business as agents for the sale of canned salmon, and in such business have been in the habit of using a printed label placed on the cans, giving their firm name and a statement that they were the sole agents for such brand of canned salmon, injunction will lie to restrain the false and fraudulent use by defendants of that part of a label which represents that complainants are the sole agents for defendant's salmon, whether defendants' salmon be of an equal or inferior quality to those sold by complainants.¹⁵ And a distiller who bottles his whiskey in peculiarly shaped bottles has been held to be entitled to an injunction restraining another from bottling his whiskey in similarly shaped bottles.¹⁶ Again, it has been decided that where wagons used for the delivery of milk are painted and decorated in a peculiar manner with the name of the dairy upon them, a person may be enjoined from using wagons painted and decorated in the same manner with a similar name upon them, where it appears that there was a fraudulent intent on the part of the defendant in using such wagons and also that the public would probably be deceived.¹⁷ And where it appeared that the defendant put on the market packages of medicine labeled "Dr. M. A. Simmons' Liver Medicine," in packages so substantially similar to those in which complainant's "Simmons' Liver Medicine" had been previously sold as to deceive the public, and that this was done with the purpose of sell-

13. California Fig Syrup Co. v. Worden, 95 Fed. 132; Noel v. Ellis, 89 Fed. 978, 86 Off. Gaz. 633; Walter Baker & Co. v. Baker, 87 Fed. 209; Baker v. Baker, 77 Fed. 181; Gaines & Co. v. Whyte Grocery F. & W. Co. 107 Mo. App. 507, 81 S. W. 648; Trask Fish Co. v. Wooster, 28 Mo. App. 408. See, also, International Silver Co. v. Rodgers Bros. Cutlery Co., 136 Fed. 1019.

14. Improved Fig Syrup Co. v. California Fig Syrup Co., 54 Fed. 175. See, also, California Fig Syrup Co. v. Worden, 95 Fed. 132.

15. Coleman v. Flavel, 40 Fed. 854.

16. Cook & B. Co. v. Ross, 73 Fed. 203.

17. Nokes v. Mueller, 72 Ill. App. 431.

ing it in place of complainant's medicine, the latter was held to be entitled to an injunction to restrain the use of such labels and packages by defendant.¹⁸

§ 772. **Same subject; resemblance of primary importance; court's comparison without witnesses.**—In these cases of suspicious imitation resemblance is a circumstance of primary importance to consider, because if the court finds, as it almost invariably does find in such cases, that there is no reason for the resemblance except for the purpose of misleading, it will infer that the resemblance is adopted for the purpose of misleading.¹⁹ The right of a person, however, to an injunction restraining the use of a similar label or trade-mark by another is held not to depend upon the fact of a mere possibility that an intending purchaser may be deceived, it being declared that there must be at least a prob-

18. *Simmóns Med. Co. v. Mansfield Drug Co.*, 93 Tenn. 84, 23 S. W. 165.

19. *Taylor v. Taylor*, 23 L. J. Ch. 255. Such is the reasoning of all the courts. Probably Vice Chancellor Shadwell did not go too far, in 1847, when he said that "if a thing contains twenty-five parts, and but one is taken, an imitation of that one will be sufficient to contribute to a deception, and the law will hold those responsible who have contributed to the fraud." *Guinness v. Ullmer*, 10 Law T. 127. *Browne, Trade-marks*, § 33, and cases cited. And in the case of *Read v. Richardson*, appearing as No. 698 of Cox's Manual of Trade-mark Cases, the following facts appeared: The plaintiffs were bottlers of beer for export. Plaintiff's label consisted of a representation of the head of a bull dog, on a black ground, surrounded by a blue circular band, on which were the words "Read Brothers, London. The Bull Dog Bottling." Defendants' label consisted of the representation of the head of a terrier, on a black ground, surrounded by a red circular band on which were the words "Cel-

ebrated Terrier Bottling;" one considerably larger than the other, as appears from the cuts attached to the report of the case. It was made to appear that plaintiff's beer was well known in the colonies as "Dog's Head Beer," and it was alleged that the defendants, by exporting their beer to the colonies, where plaintiff's beer was in demand, enabled the substitution of defendants' beer for plaintiffs' beer as Dog's Head Beer, to plaintiffs' injury. A motion for a preliminary injunction was heard by Jessel, M. R., who denied the motion, chiefly on the ground that plaintiffs had failed to make out a case of infringement. On appeal, held, that the use of the defendants' label was an infringement of plaintiffs' rights, especially because it enabled the sale of defendants' beer as Dog's Head Beer, which name had come to be known as indicating the beer of the plaintiffs. And see *Montgomery v. Thompson, Cox, Manual Trademark Cas. No. 722*. The imitation must be sufficiently close to be calculated to deceive, to justify an injunction. *Gail v. Wackerbarth*, 28 Fed. 286.

ability.²⁰ And it must be made to appear that the offending imitation was presented to the observation of the purchasing public.²¹ In determining whether a trade-mark is infringed, the court may base its conclusions upon a comparison of the devices used by plaintiff and defendant, and does not necessarily require the testimony of witnesses as to the likeness.²² But to authorize the granting of an injunction it has been decided that there must, in the absence of evidence showing fraud, be such a similarity of labels that fraud may be inferred from an inspection thereof.²³

§ 773. **Test of enjoicable resemblance.**—Where there is no such similarity in the trade-marks used by plaintiffs and defendants, both firms being manufacturers of the same article, as to justify the conclusion that one was intended as an imitation of the other, the fact that there is a resemblance in the size of the packages, and the manner of putting them up, so that perhaps a careless person might mistake one for the other if no examination was made, is not sufficient to justify the inference of a court of equity; but where there is an actual infringement of the trade-mark itself, or where the resemblance of one to the other is such as to leave the question of imitation in doubt, the fact that the party charged with such imitation has also adopted a like style of putting up his packages may be some evidence on the question of intent.²⁴

20. Fairbank Co. v. Swift, 64 Ill. App. 477. See Van Camp Packing Co. v. Cruikshanks Bros. Co., 90 Fed. 814, 61 U. S. App. 454, 33 C. C. A. 280; Lorillard Co. v. Peper, 86 Fed. 956, 57 U. S. App. 565, 30 C. C. A. 496.

21. Babbitt v. Brown, 12 N. Y. Supp. 409.

22. Van Mumm v. Frash, 56 Fed. 830; Coats v. Merrick Thread Co., 149 U. S. 562, 13 S. Ct. 966, 37 L. Ed. 847.

23. Day v. Webster, 23 App. Div. (N. Y.) 601, 49 N. Y. Supp. 314.

24. Brown v. Seidel, 153 Pa. St. 60, 25 Atl. 1064, per *Curiam*: "There

is no such similarity in the trade-marks used by the respective parties to this controversy as to justify the conclusion that the one is intended as an imitation of the other. This is so palpable upon inspection that any discussion of the subject is unnecessary. In fact the complaint of the plaintiffs is not so much that the defendants have pirated their trade-mark, as that they put up their goods in a form and style of package which resembles those of plaintiffs. The respective parties are engaged in the manufacture and sale of an article of stove polish; and there certainly is a resemblance in the size of

So the manufacturer of an uncooked pudding put up in packages under the trade-mark name of "Puddine," can not enjoin the maker of a similar preparation from using the word "Pudding" in describing it; and the use of the word "rose," in connection with the word "vanilla," as a trade-mark, is no ground for enjoining a rival maker of similar products containing those well known flavors from using those words in describing his goods.²⁵ But while a manufacturer will be restrained from selling his own products as and for those of another by means of a trade-mark in imitation of the other's trade-mark, it has been decided that the mere manu-

the packages, and in the manner in which they are put up, between those of the defendants and the plaintiffs. They both use tin foil as wrappers for the stove polish, over which is placed paper wrapper of similar colors. The packages, as thus put up, might perhaps induce an ignorant or a careless person to mistake the one for the other, provided he made no examination whatever. The mere possibility of a mistake, however, is not sufficient. As was said in *Heinz v. Lutz*, 146 Pa. St. 592, 23 Atl. 314: 'It is not enough that there may be a possibility of deception. The offending label must be such that it is likely to deceive persons of ordinary intelligence.' See authorities there cited. We are not prepared to say that the mere resemblance, accidental or otherwise, in the size and style of putting up packages, is of itself sufficient to justify the interference of a court of equity. Where there is an actual infringement of the trade-mark itself, or where the resemblance of the one to the other is such as to leave the fact of imitation in doubt, the fact that the party charged with such imitation has also adopted a like style of putting up his packages may be some

evidence upon the question of intention. It is only where there is a manifest intent on the part of one manufacturer to sell his goods as and for the goods of another manufacturer that the aid of equity has been successfully invoked to restrain it. This whole subject has been so recently and fully discussed by this court that we do not think it necessary to elaborate. See *Hoyt v. Hoyt*, 143 Pa. St. 623, 22 Atl. 755; *Heinz v. Lutz*, *supra*, and other cases." And see *Siegert v. Abbott*, 25 N. Y. Supp. 590; *Foster v. Webster Piano Co.*, 13 N. Y. Supp. 338. In *Hygeia Ice Co. v. N. Y. Hygeia Ice Co.*, 140 N. Y. 94, 35 N. E. 417, an injunction to restrain defendant from using its corporate name on the ground that it so closely resembled plaintiffs as to be calculated to deceive the public, was denied because there was no finding or sufficient proof that any one had been deceived by the use of the name. It was held that plaintiff had no absolute right to the aid of the equitable powers of the court, and that the injunction might be withheld in the exercise of a sound discretion.

²⁵ *Clotworthy v. Schepp*, 42 Fed. 62.

facture and sale of an unpatented article in precise imitation of another manufacturer's product will not be enjoined.²⁶

§ 774. **Misleading imitations illustrated; boxing and methods.**—A manufacturer of white lead in Chicago will be enjoined from the use of the words "White Lead, St. Louis," except as to preparations of white lead manufactured there, such use tending to deceive and defraud the public and complainant, a manufacturer of lead in St. Louis.²⁷ And where defendant's boxes of medicine, as prepared for market, bore a close and intentional resemblance to plaintiff's boxes externally, and in the arrangement and number of the bottles of ointment, medicator, pamphlet, and labels, calculated to mislead the public, it was held that plaintiff was entitled to an injunction restraining defendant from infringing on his original and peculiar method of preparing, wrapping, boxing and packing his medicines.²⁸ And where the imitation of plaintiff's

26. Putnam Nail Co. v. Dulane, 140 Pa. St. 205, 21 Atl. 391, per Paxson, C. J.: "The manufacturer of a particular article can only be protected by a patent. The law in regard to trade-marks should not be pushed to the extent of interfering with manufactures. A man may make an unpatented article precisely like that of any other manufacturer; he may imitate it so perfectly that the one may be mistaken for the other, but he may not sell his own article as that of another by means of a trade-mark in imitation of his."

27. Southern White Lead Co. v. Coit, 39 Fed. 492. Plaintiff places its hair-crimpers in a bright red box, having a white label with a black border, and on the label the words, "Madame Louie Common Sense Hair Crimpers. Patented August 5, 1879," form a column of four lines above the representation of the head and bust of a woman with curled hair, below which are the words "Friseur Re-

nommee. To hide the crimper in doing up the hair, turn the ends under." Defendant's hair crimpers are placed in a bright red box, on which is a white label, bearing the words "The Langtry Elegantes" in a column of two lines above the representation of the head of a woman with curled hair, at one side of which are the words "One Gross," and at the other side the words "No. 1 Black," and below which are the words "Hair Crimpers." The use of the representation of the woman's head by defendant's predecessor antedated that by plaintiff's predecessor. It was held that there was no such imitation as would authorize a preliminary injunction. Philadelphia Novelty Mfg Co. v. Blakesley Novelty Co., 37 Fed. 365.

28. Humphreys' Homeopathic Med. Co. v. Bell, 2 N. Y. Supp. 50. The words "Coral Baking Powder," in connection with the color of the labels and the general appearance of

labels, bottles, and wrappers, together with the use of the words "Nerve Food," as used by plaintiff, is calculated to deceive the public as to the identity of the contents of the bottles, a preliminary injunction should issue.²⁹ Again, a label bearing six distinct points of resemblance to a label used by another person in the same business, whose goods had acquired a market reputation, is such an imitation as should be enjoined, where it appears that at least two persons were deceived, and defendant's sales increased, without other cause being shown, since the adoption of the label.³⁰ It is, however, decided that an injunction will not be granted restraining a person from putting up a like preparation in boxes of a similar size and shape where the preparation is given a different name from that put up by the complainant and there is no similarity in the labels used.³¹

§ 775. **Enjoining imitation though differing in details.**—The use of an imitation of a trade-mark will be enjoined, though the imitation differ from the original in some details which would not attract attention.³² And the use of a label may be enjoined though

the cans—Held, properly enjoined, as calculated to deceive, although the words of themselves do not infringe the trade-mark "Royal Baking Powder." *Royal Baking Powder Co. v. Davis*, 26 Fed. 293.

29. *Moxie Nerve Food Co. v. Beach*, 33 Fed. 248.

30. *McCann v. Anthony*, 21 Mo. App. 83.

31. *Sterling Remedy Co. v. Eureka Chemical & M. Co.*, 70 Fed. 704. See *Lamont, Cirliss & Co. v. Hershey*, 140 Fed. 763; *Kroppf v. Furst*, 94 Fed. 150.

32. *Heinz v. Brueckmann*, 134 Pa. St. 495, 19 Atl. 674. The complainant made and sold "Morse's Compound Syrup of Yellow Dock Root" in bottles in paper wrappers. The defendant subsequently set up the sale in bottles, without wrappers, of "Dr.

Morse's Celebrated Syrup," those words being blown in the glass, with labels inscribed "Dr. Morse's Improved Yellow Dock and Sarsaparilla Compound." The bottles were exactly similar in size and shape, but the labels were different. The complainant made his preparation under one trade-name and sold it under another, and advertised it as "sold only in quart bottles," whereas the bottles, although known to the trade as quart bottles, held substantially less. Held, that complainant was entitled to an injunction and an account of profits. *Alexander v. Morse*, 14 R. I. 153, 51 Am. Rep. 369. For an injunction to restrain the infringement of a trade-mark, the affidavits showed that large sums had been expended by plaintiffs in establishing the reputation of their flint

it is not identical with the complainant's label in any of its details where there is such a similarity between the labels that a person might purchase the article manufactured by the defendant reasonably believing that he was purchasing that manufactured by the complainant.³³

§ 776. **Same subject illustrated.**—The labels on complainant's tobacco packages had a representation of a shield or banner and an ellipse with a circle, and the words "Smoke and Chew." The colors used were red and yellow. Defendant's labels had the same figures and colors, and the words "Smoke and Chew," and were so much like complainant's that one might easily be mistaken for the other. One was called "Peach Blossom," and the other "Sweet Lotus." It was held that defendant's wrappers were a palpable imitation of complainant's, and that their use should be enjoined.³⁴

paper, for which they had adopted, as a trade-mark, the words "Baeder's Flint Paper Company, New York;" that their first quality flint paper bears the mark "Baeder's Flint Paper Company, Flint Paper," and is well recognized as of first quality, and of established reputation; that it is the practice of manufacturers to brand paper of first quality with the firm name, while second quality is designated differently—as "Star Paper," and the like; that defendants manufacture flint paper at Philadelphia, under the name of "Baeder, Adamson & Co.," and for the purpose of deceiving the public, and disposing of second-class paper, appearing to be made by plaintiffs as their first-class paper, mark their second-rate paper as "Baeder's Flint Paper (Star), manufactured at Riverside Flint Paper Mills, Philadelphia, No. 1 Warranted." Held, that a preliminary injunction was proper. *Baeder v. Baeder*, 5 N. Y. Supp. 123, 52 Hun, 170. A manufacturer of an

article of dentistry printed on the boxes containing it the words "Non-Secret Dental Vulcanite, made according to our analysis of the Akron Dental Rubber;" the words "Akron Dental Rubber" being the trade-mark of a competitor, and being printed in red ink and large type. The preceding words were printed in large black type, and the formula for the preparation of the article followed in red ink in very small type. It was held that the label was likely to mislead, and was an infringement, and that its use should be enjoined. *Keller v. Goodrich Co.*, 117 Ind. 556, 19 N. E. 196.

See, also, *Burnett v. Hahn*, 88 Fed. 694; *Rubel v. Allegretti Chocolate Cream Co.*, 76 Ill. App. 581, *aff'd* 177 Ill. 129, 52 N. E. 487.

33. *Fairbanks Co. v. Bell Mfg. Co.*, 77 Fed. 869, 45 U. S. App. 190, 23 C. C. A. 554. See *Centaur Co. v. Robinson*, 91 Fed. 889.

34. *Wellman, etc., Tobacco Co. v. Ware Tobacco Works*, 46 Fed. 289,

For many years the plaintiff had made a tobacco to each plug of which it attached six five-pointed stars made of tin, with a hole in the center. After the "Star" tobacco had become well known, the defendant put on the market a "Buzz-Saw" tobacco, to which is attached a tin symbol of the same size as the plaintiff's, with eight points slightly inclined to the right, a hole in the center, and the words "Buzz" dimly impressed on the surface. It was attached to the plug the same as the star of the plaintiff. It was held that the "Buzz-Saw" symbol was an infringement of the plaintiff's trade-mark, and that its use should be enjoined.³⁵ Plaintiff being the proprietor of "Brown's Iron Bitters," defendant was enjoined from printing in the place of his name on the labels of his "Iron Tonic Bitters" the words "Brown & Co., New York

per Nelson, J.: "While there are variations, the general effect of the wrappers is the same and they are enough alike to enable the defendant to deceive the public and interfere with complainant. In *Hutchinson v. Blumberg*, 51 Fed 829, it was held that trade-marks consisting of the words 'Star shirts' and 'Star goods' might be infringed by marking similar goods with a star and crescent and making the star so prominent that the goods might be designated as star goods." Blodgett, J., said: "Many cases have been decided where analogous questions have arisen, such as that the use of the words 'Perry Davis Vegetable Pain Killer' is an infringement upon the trade-mark 'Perry Davis Pain Killer.' *Davis v. Kendall*, 2 R. I. 566; 'Charter Oak' and a sprig of oak leaves an infringement of 'Charter Oak' omitting the sprig. *Filley v. Fassett*, 44 Mo. 173; 'The Hero' is an infringement of 'The Heroine,' *Rowley v. Houghton*, 2 Brewst. 303; 'Rising Sun Stove Polish,' an infringement of 'Rising Moon Stove Polish,' *Morse v. Wor-*

rell, 9 Am. Law Rev. 368; 'Apollinaris Water' an infringement of 'London Apollinaris Water,' though the bottles and labels were different. *Apollinaris Co. v. Norrish*, 33 Law T. (N. S.) 242."

35. *Liggett & Myers Tobacco Co. v. Sam Reid Tobacco Co.*, 104 Mo. 53, 15 S. W. 843. "Johnson's Anodyne Liniment" had been sold for more than fifty years in bottles of a certain size and style, having a blue wrapper and a purplish label bearing a certain description and a *fac-simile* of the name of A. Johnson, the original proprietor. Defendant's article was called "Johnson's Anodyne Liniment," and appeared in the same size bottles, with a similar blue wrapper; that a label differing but little from that of the genuine article, except in a not very marked difference in color, and bore the *fac-simile* of defendant's name, "F. E. Johnson." There was evidence of actual deception. Held, that defendant should be restrained from the sale of his article in such form. *Jennings v. Johnson*, 37 Fed. 364.

City," though such printing was for the accommodation of a particular dealer and was on other articles.³⁶

§ 777. **Packages of peculiar form and devices.**—As a general rule the adoption of packages of a peculiar form and color in which to enclose merchandise for sale, without any distinguishing symbol, letter, sign, or seal, is not sufficient to constitute a trade-mark, and confers no proprietary right to the exclusive use of the form and color of such packages; but a person may acquire an exclusive right to such packages if they have on them emblems, labels and other devices, and a name to represent their contents, though each one of these distinguishing features might separately be used by another.³⁷ So an injunction prohibiting defendant from using disks, words, and labels similar to those adopted by plaintiff, none of which, by themselves, are the subject of a trade-mark, should be restricted to packages similar to those used by plaintiff, and should not prohibit their use on different kinds of packages; nor should such injunction require the disks and labels to be destroyed, since defendant has a lawful right to use them

36. Brown Chemical Co. v. Stearns, 37 Fed. 360.

37. Fischer v. Blank, 138 N. Y. 244, 33 N. E. 1040, per *Curiam*: "Each one of these distinguishing features might be separately used and no harm result. But when all or a number of them are combined in a single package, and so arranged and exhibited that when they strike the eye of the intending purchaser possessed of ordinary intelligence, the false impression is likely to be produced that the goods of the plaintiff are offered, it is the province of equity to interfere for the protection of the public as well as of the plaintiffs, and for the suppression of unfair and dishonest competition. The true test, we think, is whether the resemblance is such that it is calculated to deceive the ordinary buyer,

making his purchases under the ordinary conditions which prevail in the conduct of the particular traffic to which the controversy relates. Frank v. Weaver, 10 Beav. 297; Amoskeag M'fg Co. v. Spear, 2 Sandf. 599; Colman v. Crump, 70 N. Y. 573; McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828; Lawrence M'fg Co. v. Tennessee M'fg Co., 138 U. S. 537, 11 S. Ct. 396, 34 L. Ed. 997. No inflexible rule can be laid down. Each case must, in a measure, be a law unto itself." See, also, Boker v. Korkemas (N. Y. App. Div. 1907), 106 N. Y. Supp. 904.

Must show exclusive right.—Lamont, Corliss & Co. v. Hershey, 140 Fed. 763. Examine Reckitt & Sons v. Kellogg, 28 App. Div. (N. Y.) 111, 50 N. Y. Supp. 888.

in a manner not injurious to plaintiff.³⁸ And an injunction restraining defendant from using an oblong form of package adopted by plaintiff for packing tea is too broad since that would prevent defendant from using such form, though of a different color from plaintiff's, and entirely plain, and destitute of any of plaintiff's distinguishing marks and devices.³⁹ And the use of a capsule of the same color as that used by complainants on bottles of champagne will not be enjoined, where there is no attempt at deception thereby, and where other labels used by defendant are so unlike those of complainants that no mistake could arise between them.⁴⁰

§ 778. **Protecting symbols; foreign manufacturers; necessary publicity.**—Sales of medical preparations in this country by a foreign manufacturer, to a limited extent, upon special orders, to supply particular customers, do not amount to use in such circumstances as to publicity, and to such length of use, as show an intention to adopt a symbol placed upon such preparations as a trade-mark, and as entitle him to have the symbol protected by injunction.⁴¹ The treaty of 1871 between the United States and Germany, which provided that, with regard to the marks of labels of goods, or of their packages, the citizens of Germany shall enjoy in the United States the same protection as native citizens, did not give to a citizen of Germany who had acquired the right to a

38. *Fischer v. Blank*, 138 N. Y. 244, 33 N. E. 1040.

39. *Fischer v. Bank*, 138 N. Y. 244, 33 N. E. 1040.

40. *Mumm v. Kirk*, 40 Fed. 589.

41. *Richter v. Reynolds*, 59 Fed. 577, following *Kohler Mfg. Co. v. Beeshore*, 59 Fed. 572, where *Shiras, J.*, said: "It may be, as is argued by complainant's counsel, that the interference of a court of equity does not depend on the length of time the name has been used, and that the rule is that he who first adopts a trade-mark acquires the right to its exclusive use in connection with the particular class of merchandise to

which its use had been applied. Nevertheless, however short the time may be in which a person may acquire a title to a trade-mark there must be shown an actual intention to acquire such a title. A merely casual use, interrupted, or for a brief period, would not support a claim to a trade-mark. *Menendez v. Holt*, 128 U. S. 514, 9 S. Ct. 143, 32 L. Ed. 526. Nor will a court of equity recognize by injunction a proprietary right in a phrase or name, unless it has been used in circumstances, as to publicity and length of use, as to show an intention to adopt it as a trade-mark for a specific article."

trade-mark in that country a similar right to the trade-mark in the United States.⁴²

§ 778a. **Labels indicating article made by union; imitation of.**
 —Where an association such as a cigarmakers' union, embracing many members and many divisions as subordinate unions, has adopted a symbol or device to be used on boxes of cigars made by its members, such device or symbol not indicating by whom the cigars are made, but only that they are made by some of the members of the union, and where the right to use the device or symbols belongs equally to all the members, and continues only while they are members, it is decided that a bill cannot be entertained by individual members or officers of such association to restrain others wrongfully and fraudulently using such device or symbol from so doing.⁴³ In this case the court declared that however disreputable and dishonest it may be to falsely represent goods made by other persons to have been made by members of the union, those who do not carry on any business to which the use of the label is incident, who have not applied it to any vendible commodity which has been placed upon the market in which they deal, or of which they are owners or manufacturers, cannot maintain a bill to restrain the use of the label as a trade-mark. The label was said to want every essential element of a trade-mark, as it did not indicate by what persons the articles were made but only membership in a certain association and that its rightful use was not connected with any business and could not be transferred with any business.⁴⁴ And in this connection it has also been decided that the Cigar Makers International Union, not being a trader in any sense, can have no distinctive trade-mark entitled to protection under the Act of Congress of July 8, 1870, and that the registration of said label in the Patent Office, in the manner prescribed for the regis-

42. *Richter v. Reynolds*, 59 Fed. 577.

43. *Weener v. Brayton*, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640.

44. Per Devens, J.

That a union label is not a

trade-mark, see *Cigar Makers Prot. Union v. Couhaim*, 40 Minn. 243; *Schneider v. Williams*, 44 N. J. Eq. (17 Stew.) 391, 14 Atl. 812. Compare *People v. Fisher*, 50 Hun (N. Y.), 552.

tration of trade-marks, is unauthorized by the act and confers no right to have imitations thereof enjoined.⁴⁵ And in this case it was also decided that, independent of the law of trade-marks, equity will not give relief by enjoining the making and use of counterfeit copies of such a label, the purpose of which is to do harm to non-union men by covering them with opprobrium and preventing the sale of their work, the right of the association to use it being at least doubtful, whether the question be treated as one of morals or of law.⁴⁶ But where the complainant averred himself to be a manufacturer of cigars entitled to use the union label, that he had and was actually using it on the cigars manufactured by him, thus guaranteeing the character and quality of the cigars, that he had made profits thereby, and that he had been greatly injured and was liable to be greatly injured by the defendant who had prepared counterfeit labels closely resembling those used by him, it was held that he was entitled to an injunction.⁴⁷

§ 779. **Necessary averments of imitation's publicity.**—On a motion to continue a preliminary injunction against the use by defendants of a printed wrapper resembling that used by plaintiff in packing and selling soap manufactured by her, it appeared that there was a direct resemblance in the color of the wrappers, and in the general form and size of type and style of letters of the prominent words printed on them, and impressed on the cakes of soap, one of which was contained in each wrapper; but it was not shown, by the complaint or the affidavits, that the wrappers were so used as to display these words, or to present them to the immediate observation of purchasers. It was held that the injunction could not be sustained.⁴⁸

45. *McVey v. Brendel*, 144 Pa. St. 235, 22 Atl. 912, 13 L. R. A. 377, 27 Am. St. Rep. 624.

46. *McVey v. Brendel*, 144 Pa. St. 235, 22 Atl. 912, 13 L. R. A. 377, 27 Am. St. Rep. 624.

47. *Carson v. Ury*, 39 Fed. 777.

48. *Babbitt v. Brown*, 12 N. Y. Supp. 409, per Daniells, J.: "If the

purchasers were deceived at all, and the plaintiff was thereby injured in her business, it could only be by the words upon and the coloring of the wrappers; and to obtain an injunction restraining defendant from using the wrapper during the action, it was for the plaintiff to maintain that such deception would not really re-

§ 780. **Preliminary injunction.**—Where it clearly appears that defendants have closely imitated plaintiff's labels, patterns and style, and have done obvious damage to his business from the methods they have employed, the plaintiff is entitled to injunctive relief and to a preliminary injunction on the ground of fraud, independently of the validity of his trade-marks.⁴⁹ But in a recent case it is decided that where a court of equity has denied the right to an injunction against infringement of a trade symbol, it will not retain jurisdiction for the purpose of an accounting, the complainants having a complete and adequate remedy at law.⁵⁰

§ 781. **Preliminary injunction refused in doubtful cases; delay; fraud.**—Where there is a doubt as to the rights of the parties to the use of a trade-mark or label and consequently as to whether there has been any infringement, the court will not generally grant a preliminary injunction.⁵¹ And it also decided that it should appear, to authorize the granting of a preliminary injunction, that irreparable damages will be sustained if it is not granted.⁵² So on a bill to restrain infringement of a trade-mark, there being no charge that defendant is insolvent, and irreparable damage not

sult from these appearances, and that could be done only by showing if that were the fact that the wrapper was so used by defendants in wrapping and selling the soap as to bring these words to the immediate view and observation of the buyers of the defendant's soap. It may be conjectured that this was the fact, but conjectural evidence will not maintain a preliminary injunction; but the facts on which it is made to rest must be proved to a reasonable degree of certainty, and that has not been done in this instance."

49. *Cleveland Stone Co. v. Wallace*, 52 Fed. 431, per Swan, J.: "The close imitation of the plaintiff's labels, patterns and style, evidenced by the exhibits of both parties and the catalogues and circulars issued to the trade, and the obvious damage to

plaintiff's business from the defendant's methods, entitle plaintiff to relief on the ground of fraud."

50. *Van Raalt v. Schneck*, 159 Fed. 248.

51. *Mueller Mfg. Co. v. McDonaly & M. M. Co.*, 132 Fed. 585; *Foster v. Blood Balm Co.*, 77 Ga. 216, 3 S. E. 284; *Keasbey v. Brooklyn Chemical Works*, 61 Hun (N. Y.), 627, 16 N. Y. Supp. 318; *Samuel v. Berger*, 4 Abb. Pr. (N. Y.) 88; *Partridge v. Werick*, 2 Barb. Ch. (N. Y.) 101, 47 Am. Dec. 281; *Marshall v. Pinkham*, 52 Wis. 372, 9 N. W. 615, 38 Am. Rep. 756.

See *Smith & Dixon Co. v. Stevens*, 100 Md. 110, 59 Atl. 401.

52. *Lies v. Daniel*, 82 Ga. 272, 8 S. E. 432; *Foster v. Blood Balm Co.*, 77 Ga. 216, 3 S. E. 284.

being probable, and the question of imitation being for the jury, an interlocutory injunction is properly denied.⁵³ So where the trade-mark of plaintiff, a piano manufacturer, was "Weber, New York," it was held that an injunction restraining defendant *pendente lite* from putting on its pianos the words "Webster, New York," was rightly refused, there being nothing to show any intention by defendant to sell its pianos as the pianos made by plaintiff, or that the use of the word "Webster" had deceived any one.⁵⁴ A delay in prosecuting infringers of a trade-mark also affords a reason for refusing a preliminary injunction which would injure the defendant.⁵⁵ So an injunction *pendente lite* to restrain the imitation by defendant of plaintiff's label will be denied, where the defendant shows that he abandoned the use of that label before the hearing of the motion, and that plaintiffs were misleading the public by falsely claiming that the form of their cakes of soap on which the label was used and the title in the label were secured by a trade-mark.⁵⁶ But a preliminary injunction against the use of a trade-mark will be granted when from the affidavits the court is satisfied of the infringement, unless there are special circumstances which take the case out of the general rule.⁵⁷

53. *Lies v. Daniel*, 82 Ga. 272, 8 S. E. 432. Preliminary injunction denied, where affidavits of defendants make it doubtful whether the plaintiff has so had exclusive use of symbols sought to be restrained as to make their use by the defendants likely to pass their wares as his. *Portuondo v. Monne*, 28 Fed. 16. In a suit to restrain the infringement of a trade-mark, complainant alleged a license to defendant to use the trade-mark and machines for manufacturing the article bearing it, and a default in paying royalties. Defendant alleged that he had purchased of complainant's predecessor machines for making the article, and suited to no other purposes. It did not appear that such purchase had any connection with the license, or that its use

was subject to restriction or revocation. On motion for preliminary injunction, held, that defendant may use the machine until worn out, and sell the article made by it, and that as the trade-mark appears to be intended to designate the article manufactured by the invention, and not that made by complainant personally, defendant may use it on the article so made by him. *Martha Washington Creamery Buttered Flour Co. v. Martien*, 37 Fed. 797.

54. *Foster v. Webster Piano Co.*, 13 N. Y. Supp. 338.

55. *Estes v. Worthington*, 22 Fed. 822.

56. *Brown v. Doscher* (Sup.), 20 N. Y. Supp. 900.

57. *Schener v. Muller*, 74 Fed. 225, 20 C. C. A. 161, 26 U. S. App.

§ 782. **Same subject.**—Plaintiffs, manufacturing a compound which they termed “Bromo Caffeine,” and claiming proprietary rights in the use of such name, sought to restrain the use by defendants of the same name applied to the same compound manufactured by defendants. Affidavits filed by plaintiffs and defendants left the question in doubt whether plaintiffs were the originators of the compound in question, whether the name in question was not a mere designation of the principal ingredients of such compound, and whether the dissimilarity of the bottles and labels used by defendants in putting up the compound was sufficient to prevent the public from buying their compound for that of plaintiffs. It was held that a preliminary injunction was properly denied.⁵⁸ In a recent case in the Circuit Court of Appeals it appeared that a liquor known as “Chartreuse” had been made by an order of monks in France and that such liquor had become well known by the name of “Chartreuse” in the United States, where the name had been registered as a trade mark. The monks, who were subsequently expelled from France, where a receiver for their property was appointed, removed to Spain where they continued to make a liquor which they sold, using a different label and trade-marks, setting forth upon the label the circumstances in connection with their expulsion. The receiver appointed in France continued the business, selling the liquor in the United States, using the name and labels which the monks had used and by which it had become familiar to the public. In an action by the monks to enjoin the sale by an agent of the receiver in the United States in bottles on which were used such name and labels,

784; *White Co. v. Miller*, 50 Fed. 277, per Colt, J.: “The name of Miller on each label is the same. The designation of the one as ‘Miller’s Chicken Cock Whiskey’ and of the other as ‘Miller’s Game Cock Whiskey’ or ‘Game Cock Whiskey,’ is the mere substitution of the word ‘Game’ for ‘Chicken,’ and this difference, with other minor differences are not enough to protect defendants in the use of what is distinctively com-

plainant’s mark. The complainant is entitled to an injunction.”

58. *Keasbey v. Brooklyn Chemical Works*, 61 Hun (N. Y.), 627, 16 N. Y. Supp. 318, per Daniels, J.: “There is reason for believing from the affidavits that this phrase ‘Bromo Caffeine’ is no more nor less than a description of the compound itself resulting from the names of the principal articles used in its production; and where that appears to be the

it was decided that the rights of the parties not having been finally adjudicated in France, and that the application of the complainant being principally based on affidavits on information and belief, a preliminary injunction prohibiting the use of such bottles, name and labels should be modified so as to allow the sale provided the facts in connection with its manufacture were set forth in an additional label attached thereto.⁵⁹

§ 782a. **Preliminary injunction; dissolution of.**—A preliminary injunction restraining the use of a trade-mark on the ground of an infringement will generally be dissolved where the facts and equity of the bill are denied by the answer,⁶⁰ or where the rights of the complainant are doubtful.⁶¹

§ 783. **Violations of injunction; punishment.**—The terms of the injunction must be reasonably clear and unambiguous, and are not to be extended by construction so as to involve the defendant in a violation.⁶² When the court, in a suit between non-residents to prevent the use of trade-marks, acquires jurisdiction of the parties and the subject matter, and issues an injunction restraining defendant from using the trade-mark as long as the injunction exists, the court has jurisdiction to punish defendant for violating the same.⁶³ And where a corporation is enjoined

fact, the phrase is incapable of exclusive appropriation by any party making the compound to which it is appropriately applied as a mere matter of description. Citing and relying on *Caswell v. Davis*, 58 N. Y. 223, and distinguishing *Electro Silicon Co. v. Hazard*, 29 Hun. 369, and *Selchow v. Baker*, 93 N. Y. 59.”

59. *Baglin v. Cusenier Co.*, 141 Fed. 497, 72 C. C. A. 555.

60. *Tucker Mfg. Co. v. Boyington*, Fed. Cas. No. 14,229.

61. *American Cereal Co. v. Pettijohn Cereal Co.*, 76 Fed. 272, 22 C. C. A. 236.

62. An advertisement of plasters

manufactured and sold by defendant, as “Benson’s Porous Plasters; Benson’s Capcine Porous Plasters; Benson’s Plasters; the Best Porous Plaster,” does not violate an injunction restraining defendants from using the word “Porous” by affixing or applying it to any plasters manufactured, shipped, sold, or supplied by them, or to the boxes in which they are put up. *Porous Plaster Co. v. Seabury*, 1 N. Y. Supp. 134.

63. *Prince Mfg. Co. v. Prince’s Metallic Paint Co.*, 4 N. Y. Supp. 348, 51 Hun. 443. In this case the injunction restraining defendant from using a trade-mark contained a pro-

from using a certain name proceedings will lie to prosecute the president of such corporation for a violation of the injunction.⁶⁴

§ 783a. **Defenses.**—A suit for an infringement of a trade-mark is not barred in the Federal courts by the fact that in opposition to complainant's claim the defendant has been granted the right to register the words which are claimed to be an infringement by a decision of the English high court of chancery.⁶⁵ And the fact that no sales have been made is no ground for refusing to grant an injunction restraining the use of a trade-mark which is an infringement, where it is shown that there was an intention to make sales and that they would have been made but for a suit.⁶⁶ Nor will the fact that a person may have adopted a trade-mark in good faith, where it is an infringement of the trade-mark of another, prevent the granting of an injunction to restrain its use by him.⁶⁷ And it is not an equitable defense to an action to restrain infringement of trade-mark that defendant's wares are equal in quality to those of plaintiff.⁶⁸ Again, the infringement of a trade-mark which the complainant intends to use in connection with different articles in a certain line of business may be enjoined though the complainant has not yet used it in connection with the article to which defendant has applied it.⁶⁹ And though no damages may be shown from the infringement of a trade-mark, yet

vision forbidding it from inserting in the newspapers advertisements denying the right of the plaintiff to use the designation "Prince's Metallic Paint." Defendant advertised that the recent decision "in a suit brought against us by our competitors in trade is not a final disposition of the case," and in reference to other decisions by the courts of another State said: "In these cases our right to use our corporate name and trade-mark were fully sustained, and we are confident on the final hearing of the case upon its merits, our rights in the city of New York will also be sustained by the New York court." Held, a violation of the injunction.

64. *Janney v. Pau Coast V. & M. Co.*, 131 Fed. 143.

65. *Carlsbad v. Kutnow*, 68 Fed. 794, *aff'd* 71 Fed. 167, 18 C. C. A. 24, 35 U. S. App. 750.

66. *Cuervo v. Landauer*, 63 Fed. 1003.

67. *Low v. Fels*, 35 Fed. 261.

68. *Cleveland Stone Co. v. Wallace*, 52 Fed. 431; *Shaver v. Shaver*, 54 Iowa, 208, 6 N. W. 188, 37 Am. Rep. 194; *Prince's Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. 990, 17 L. R. A. 129; *Coats v. Holbrook*, 2 Sandf. Ch. (N. Y.) 586; *Taylor v. Carpenter*, 11 Paige (N. Y.), 292.

69. *Godillot v. American Grocery Co.*, 71 Fed. 873.

this is held to be no reason for refusing an injunction.⁷⁰ Nor is it any ground for denying an application for an injunction that the defendant has since the commencement of the suit refrained from doing the act or acts which constituted the infringement.⁷¹ It is, however, decided that an injunction will not be granted where the evidence only establishes an infringement in the past and shows no attempt or threat to continue the infringement after an adjudication in another jurisdiction which was adverse to the defendant.⁷²

§ 784. **Defenses continued.**—In an action to restrain the infringement of a trade-mark belonging to a cigar manufacturer, it is no defense that Spanish labels similar to such trade-mark had been used by other manufacturers for many years, nor that imitations of his trade-mark were sold or used in the absence of evidence that it was with his consent or acquiescence.⁷³ And an objection to a bill for an injunction to restrain the infringement of a trade-mark on the ground that it is uncertain whether complaint is made of the use of the words designating the article by themselves or in combination with other words, devices, etc., cannot be sustained, it being enough, for the purposes of a demurrer, that complainant is entitled to relief in respect of the combined use, which is clearly set forth in the bill.⁷⁴ Again, the use by defendant of the name of plaintiff's hotel as a trade-mark for his cigars will be enjoined, though, at the time of the registration of such trade-mark, plaintiffs had not opened the hotel for business, but had it in process of construction, where it appears that the hotel was well known by the name in question.⁷⁵ And the facts that the infringer of a trade-mark, on being notified of his infringement, told his cus-

70. *Tuerk Hydraulic P. Co. v. Tuerk*, 92 Hun (N. Y.), 65, 36 N. Y. Supp. 384.

71. *Burnett v. Hahn*, 88 Fed. 694. See *Clark Thread Co. v. William Clark Co.*, 56 N. J. Eq. 789, 40 Atl. Atl. 686, *rev'g* 55 N. J. Eq. 658, 37 Atl. 599.

72. *Saxlehner v. Graef*, 81 Fed. 704.

73. *Cuervo v. Henkell Co.*, 50 Fed. 471; *Taylor v. Carpenter*, 3 Story, 458.

74. *California Fig Syrup Co. v. Improved Fig Syrup Co.*, 51 Fed. 296.

75. *Kingley v. Jacoby* (Sup.), 20 N. Y. Supp. 46, 28 Abb. N. C. 451.

tomers to erase the trade-marks from their goods, and had since gone out of business, are not ground for denying an injunction to the true owner of the trade-mark where every step of the suit for an injunction and accounting has been contested by the infringer, and he has put the complainants to the expense of proving every fact necessary to establish their right and his infringement.⁷⁶

§ 785. **Cross bill as an original bill.**—Where one claiming the exclusive right under a contract to use the name of another in the sale of patent medicines files a bill against him to enjoin a violation thereof, whereupon the latter files an alleged cross bill to enjoin complainant from making a use of the name not authorized by the contract, this latter bill is not a true cross bill, but an original bill.⁷⁷

§ 786. **Parties.**—Where a bill for an injunction to restrain the infringement of a trade-mark alleges that certain defendants named and others are using the defendant corporation as a means of infringement, they themselves being substantially the corporation, it is held that there is no misjoinder in making them parties defendant.⁷⁸ But where a distiller granted the sole and exclusive

76. *Hutchison v. Blumberg*, 51 Fed. 829.

77. *Chattanooga Medicine Co. v. Thedford*, 58 Fed. 347. The Supreme Court, in the case of *Ayres v. Carver*, 17 How. 591, states the rule in reference to a cross bill (on page 595), as follows: "A cross bill is brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or in question in the original bill. It is brought either to obtain a discovery of facts, in aid of the defense to the original bill, or to obtain full and complete relief to all parties, as to the matter charged in the original bill. It should not introduce new and

distinct matters not embraced in the original bill, as they cannot be properly examined in that suit, but constitute the subject matter of an original, independent suit. The cross bill is auxiliary to the proceeding in the original suit, and a dependency upon it. It is said by Lord Hardwicke that both the original and cross bill constitute but one suit, so intimately are they connected together. *Field v. Schieffelin*, 7 Johns. Ch. 252."

78. *California Fig Syrup Co. v. Improved Fig, etc., Co.*, 51 Fed. 296; *Nerve Food Co. v. Baumbach*, 32 Fed. 205.

That aliens may be parties plaintiff, see *Coats v. Holbrook*, 2

control of his bottle product for five years, and agreed not to permit others to use his trade labels, a bill by the grantee to enjoin infringement of the trade-marks was defective which failed to make the distiller a complainant, or state a reason for not doing so.⁷⁹ A cigar manufacturer, to protect his trade-mark, may have an injunction restraining a boxmaker from furnishing boxes with those trade-marks to other cigar manufacturers, and against all who knowingly combine for that purpose.⁸⁰

§ 787. **Transferees.**—A trade name is capable of assignment in connection with the assignment of the business to which it belongs.⁸¹ A new firm, which succeeds to the business of an old one, may acquire by purchase and assignment the trade-mark of the old firm, and thereby succeed to the exclusive right to use it.⁸² And where a person transfers the right to use his own name as a trade-mark in connection with a transfer of the good will of the business to which it belonged, he may be enjoined from thereafter using the trade-mark.⁸³ So plaintiff having become sole proprietor of the business of preparing the article having a trade-mark from the original proprietor through several *mesne* purchasers, he has such a proprietary right as entitles him to maintain a suit for an

Sandf. Ch. (N. Y.) 587; Taylor v. Carpenter, 11 Paige (N. Y.), 292.

79. Krauss v. Peebles, 58 Fed. 585.

80. Cuervo v. Jacob Henkell Co., 50 Fed. 471; De Kuyper v. Witteman, 23 Fed. 871; Hostetter Co. v. Brueggeman Co., 46 Fed. 188; Mat-sell v. Flanagan, 2 Abb. Pr. (N. S.) 459.

81. Noera v. Williams M'fg Co., 158 Mass. 110, 32 N. E. 1037; Russia Cement Co. v. Le Page, 147 Mass. 206, 17 N. E. 304; Hoxie v. Chaney, 143 Mass. 592, 10 N. E. 713.

82. Kinney Tobacco Co. v. Maller, 6 N. Y. Supp. 389, 53 Hun, 340. The Apollinaris Company obtained of its

owners in Hungary the exclusive right to export Hunyadi Janos water to the United States and to sell it there, and to use its name as a trade-mark. The Hungarian owners made their European sales in bottles, cautioning the public against their purchase except in Europe. A. bought water of those to whom the Hungarian owners had sold it in Europe, exported it to the United States and sold it there. It was held that he should not be enjoined at the instance of the Apollinaris Company. Apollinaris Co. v. Scherer, 23 Blatchf. 459, 27 Fed. 19.

83. Russia Cement Co. v. Le Page, 147 Mass. 206, 17 N. E. 304. And see Julian v. Hoosier, etc., Co., 78

injunction.⁸⁴ And an assignee of a trade-mark is entitled to the same protection as the original owner, and in the absence of a formal transfer, where the trade-mark is used by a company, one of whom is the original owner, and its use is continued by his consent and procurement, injunctive relief will not be denied the company by reason of the informal transfer.⁸⁵ But where one conveys the exclusive right to the use of his name in connection with "Simmons' Liver Medicine," the grantees are not entitled to protection against him when they have ceased to sell or advertise that medicine and are using his name in advertising and selling a different medicine.⁸⁶ And the right of a person to use his name as a brand on manufactures, the words used in connection with his name being words of common use, is a personal right, and does not pass to his assignee in bankruptcy.⁸⁷

§ 788. **Same subject.**—A partnership trade-mark is an asset of the firm salable on a dissolution like any other asset, and upon such a dissolution either partner may continue to use the trade-marks unless he has transferred or in some manner divested himself of the right to do so.⁸⁸ And the owner of a trade-mark bearing his own name which is affixed to articles manufactured at a particular establishment, may, in selling the latter, confer upon the purchaser exclusive authority to use the trade-mark.⁸⁹

Ind. 408; *Congress Spring Co. v. High Rock Co.*, 45 N. Y. 291; *Filkins v. Blackman*, 13 Blatchf. 440.

84. *Jennings v. Johnson*, 37 Fed. 364. In this case it was also held that plaintiff, having been a member of the firm which prepared the article bearing a trade-mark, and having purchased the business, may properly state on his labels that the article is prepared by such firm.

85. After adoption of a trade-mark by R. Solis, the Solis Manufacturing Company was incorporated, and R. Solis, who became its manager and largest stockholder, turned over to it

his whole business, good will, trade, and, although there was no formal transfer of the trade-mark, the corporation continued its use. It was held that the corporation would not be denied relief against a third person on account of the condition of the title. *Solis Cigar Co. v. Pozo*, 16 Col. 388, 26 Pac. 556.

86. *Chattanooga Medicine Co. v. Thedford*, 58 Fed. 347.

87. *Mattingly v. Stone*, 12 Ky. Law Rep. 72, 12 S. W. 467.

88. *Hazard v. Caswell*, 93 N. Y. 259.

89. *Brown Chemical Co. v. Mey-*

§ 789. Where trade-mark but not business transferred.—

Where the proprietor of a medicine transfers the right to use his trade-mark and formulas without transferring the place of manufacture, or plant used, or the good will of the business, and there is no exclusive right to manufacture the medicine in any one, and there is nothing in the trade-mark to indicate that the medicine comes from a particular manufactory, the grantee cannot restrain another person from using it, as the only effect of a trade-mark is to indicate a class of goods which any one who knows how may manufacture.⁹⁰ A manufacturer of medicines according to secret formulas of his own has no exclusive right to the use of them, but any one who comes honestly to the knowledge of them can use

ers, 139 N. S. 540, 547, 11 S. Ct. 625, 35 L. Ed. 247; *Kidd v. Johnson*, 100 U. S. 617, 620, 25 L. Ed. 769. Ordinarily a trade-mark will go to the purchaser of or successor to the business and the good will. *Menendez v. Holt*, 128 N. S. 514, 9 S. Ct. 143, 32 L. Ed. 526; *Deering v. Plate*, 29 Cal. 292; *Cleveland Stove Co. v. Wallace*, 52 Fed. 431, per Swan, J.: "While it is commonly said that to entitle the owner of a trade-mark to protection against infringers, his right to it must be exclusive, it is not meant thereby that no other than the original has rightfully employed it. Such a right is properly transferable and descendible, and may be the subject of ownership by two or more without impairing the claim of its owners to redress for its unlawful use by others. *N. Y. Cement Co. v. Coplay Cement Co.*, 45 Fed. 212; *Brown Chemical Co. v. Meyer*, 139 N. S. 540, 547, 11 S. Ct. 625, 35 L. Ed. 247; *Kidd v. Johnson*, 100 N. S. 617, 25 L. Ed. 769; *Burton v. Stratton*, 12 Fed. 696."

90. *Covell v. Chadwick*, 153 Mass. 263, 26 N. E. 856, per Knowlton, J.:

"If this had been a sale of the business in which the trade-marks were being used, they would have passed by the conveyance. *Emerson v. Badger*, 101 Mass. 82; *Lohier v. Johnson*, 111 Mass. 238; *Gilman v. Hunnewell*, 122 Mass. 139; *Warren v. Warren Thread Co.*, 134 Mass. 247; *Russia Cement Co. v. LePage*, 147 Mass. 206, 17 N. E. 304; *Frank v. Sleeper*, 150 Mass. 583, 23 N. E. 213; *Kidd v. Johnson*, 100 U. S. 617, 620, 25 L. Ed. 769. But so far as appears, the business in which the trade-marks were used by the owner of them had been wound up several years before the plaintiff acquired his title, and the plaintiff did not buy a business, or the good will of a business, or anything else which carried with it property in a trade-mark. The principles stated in *Chadwick v. Covell*, 151 Mass. 190, 23 N. E. 1068, control the present case." See, also, *Thornloe v. Hill* (1894), 1 Ch. 569, where it was held that the assignment of the right to use a name unconnected with any business was invalid.

See, also, § 761b herein.

them without his permission and against his will.⁹¹ In the case last supposed the manufacturer died and his administratrix transferred the formulas and trade-marks by way of gift to one who proceeded to make the medicines with her own plant and to sell them under the same name and labels. Subsequently the administrator *be bonis non* of the original manufacturer conveyed by deed the same formulas and trade-marks to another who began to make and sell the medicines in the same way as the donee. It was held that the donee, even if the gift were valid, had no such exclusive right to make the medicines or to use the trade-marks as entitled her to an injunction to prevent the grantee from making and using them.⁹²

91. Peabody v. Norfolk, 98 Mass. 452, 458; Morison v. Moat, 9 Hare, 243, 263; Williams v. Williams, 3 Meriv. 157.

92. Chadwick v. Covell, 151 Mass. 190, 23 N. E. 1068, per Holmes, J.: "What is the plaintiff's position when she seeks to prevent the defendant from selling his medicine by the name of 'Dr. Spencer's Queen of Pain?' She is not Dr. Spencer. She is not the owner of a manufactory once owned by him. She makes the medicine with her own ingredients, tools, plant, and contrivances. She has no exclusive right to make it. The defendant's use of the name does not mislead the public any more than hers does as to the maker, the place of manufacture, or the nature or quality of the goods. Unless, therefore, it should be held that a trade-mark may be erected into a new species of property, capable of lasting as long as the world does and certain goods are manufactured, and of being transferred for value or by gift from person to person, irrespective of good will, special right to make the goods, place of manufacture, or fraud of any kind upon the

public, the plaintiff cannot prevail. When the common law developed the doctrine of trade-marks and trade-names, it was not creating a property in advertisements more absolute than it would have allowed the author of *Paradise Lost*, but the meaning was to prevent one man from palming off his goods as another's, from getting another's business or injuring his reputation by unfair means, and, perhaps, from defrauding the public. Indeed, the plaintiff would not claim an absolute property in the marks and names merely as such. She would not argue that she had a right to forbid their use for any purpose by others apart from the medicine, or in connection with some entirely different class of goods. It is true that some judges, noticeably Lord Westbury, have preferred to rest the protection of trade-marks on the notion of property, rather than of fraud, but it is plain, upon reading his judgments, that he means no more than that the deception which equity will prevent need not have been intended, as when a man ignorantly adopts a trade-mark already in use, and that within certain limits

§ 790. **Effect of laches.**—A court will in some cases refuse to grant a complainant a temporary injunction where it appears that there has been a delay or laches on his part.⁹³ But it is decided that laches of the plaintiff will not avail as a defense in a proceed-

a trade-mark may be sold, which nobody denies. *Hall v. Barrows*, 4 DeG. J. & S. 150, 158; *Leather Cloth Co. v. American, etc., Co.*, 4 DeG. J. & S. 137. The limitations are clearly marked by the language of Lord Cranworth and Lord Kingsdown, in the latter case on appeal to the House of Lords. 11 H. L. Cas. 523. See, also, *Singer M'fg Co. v. Loog*, L. R. 8 App. Cas. 15, 29; *Wotherpoon v. Currie*, L. H. 5 H. L. 508, 514, 519; *Ainsworth v. Walmsley*, L. R. 1 Eq. 518, 525; *Collins Co. v. Brown*, 3 Kay & J. 423. At least as strict a rule is to be drawn from the Pub. Stats., chaps. 76, 81, and *Gilman v. Hunnewell*, 122 Mass. 139, 148. If the nature and foundation of the right is what we suppose, then the reason why and the limits within which a grantee will be protected are plain. The most usual case is when a trade-mark means that goods come from a certain manufactory and the manufactory and mark change hands together; *e. g.*, *Hoxie v. Chaney*, 143 Mass. 592; *Warren v. Warren Thread Co.*, 134 Mass. 247; *Kidd v. Johnson*, 100 U. S. 617, 620, 25 L. Ed. 769. The use of the mark by a third person would be as much a fraud upon the grantee as it would have been upon his grantor; therefore the grantee will be protected. *Singer M'fg Co. v. Loog*, L. R. 8 App. Cas. 15, 17; *Jennings v. Johnson*, 37 Fed. 364. But our decisions have gone no further. *Sohier v. Johnson*, 111 Mass. 238, 244. See *Cotton v. Gillard*, 44 L. J. Ch. 90; *Congress Springs Co. v. High Rock Spring Co.*, 45 N. Y. 291,

302; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321, 339. It may be that similar principles would apply if the plaintiff had the exclusive right of manufacturing the medicines, though she was not strictly a successor to Dr. Spencer's business, and did not have his manufactory or plant. See *Morison v. Moat*, 9 Hare, 241; *In re Palmer's Trade-mark*, L. R. 24 Ch. D. 504; *Menendez v. Holt*, 128 U. S. 514, 9 S. Ct. 143, 32 L. Ed. 526. But that is not this case. The only significance of Dr. Spencer's marks at the present time, by whomsoever used, is to indicate a class of goods which any one who knows how to do it may lawfully manufacture. The case more nearly resembles *Thomson v. Winchester*, 19 Pick. 214. See *Emerson v. Badger*, 101 Mass. 82; *Goodyear's India Rubber Glove Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 S. Ct. 166, 32 L. Ed. 535; *In re Leonard Trade-mark*, L. R. 26 Ch. D. 288. There is a slight analogy also to the cases where a patentee has been denied the exclusive right to the name of his patented article as a trade-mark after the patent has expired. *Linoleum M'fg Co. v. Nairn*, L. R. 7 Ch. D. 834."

93. *Burke v. Bishop*, 144 Fed. 838; *Von Mumm v. Steinmetz*, 137 Fed. 168; *Mueller Mfg. Co. v. McDonahey & M. M. Co.*, 132 Fed. 585; *Estes v. Worthington*, 22 Fed. 822. See, also, *Low v. Fels*, 35 Fed. 361; *Wormser v. Levy*, 12 N. Y. Supp. 558; *Tygart Allen Fertilizing Co. v. Tygart Co.*, 191 Pa. St. 336, 43 Atl. 224.

ing to restrain the use of a trade name, where the defendant adopted the name with a fraudulent intent.⁹⁴ So the right to an injunction against the intentional use of complainant's trade-mark was held not lost by laches, though the infringement began in 1869, and the action was not brought until 1882, especially when it did not appear that the trade-mark had acquired an increased value from defendant's use; but it was held an accounting would not be granted.⁹⁵ And the fact that the defendant may have used a similar label for some time prior to the commencement of the suit by the complainant to enjoin its use is held not to deprive the latter of his right to relief by injunction where it appears that there had been no unreasonable delay on his part after the goods of the defendant had been offered for sale in a locality where they interfered with the sale of his goods.⁹⁶ And the fact that defendant put his packages on the market a year before complainant filed his bill to restrain such competition does not deprive complainant of his right to an accounting.⁹⁷ But where two firms used the same trade-mark on their goods at the same time and one of them after ceasing to use it for some time sought to resume the use of such trade-mark, it was decided that it would be enjoined from so doing, it appearing that the complainant had continued its use during the entire time and that the goods manufactured by it and to which it had applied the trade-mark had become favorably known by such name.⁹⁸

94. *Sanders v. Jacob*, 20 Mo. App. 96.

95. *Menendex v. Holt*, 128 U. S. 514, 9 S. Ct. 143, 32 L. Ed. 526.

96. *Sartor v. Schadan*, 125 Iowa, 696, 101 N. W. 511.

97. *Simmons Med. Co. v. Mansfield Drug Co.*, 93 Tenn. 84, 23 S. W. 165. In an action to restrain defendant from using a trade-mark which both parties claimed, an instruction that if both parties had used it for one year and upwards without any attempt to interfere with

each other's use, the jury should find for defendant, but if plaintiff was the exclusive owner, and had done nothing which would lead defendant to believe that it had abandoned its rights, and had always objected to defendant's use of it, when such use came to plaintiff's knowledge, they should find for plaintiff, is not open to objection on the part of defendant. *Durham Tobacco Co. v. McElwee* (N. C.), 5 S. E. 907.

98. *Daniel v. Whitehouse* [1898], 1 Ch. 683, 67 L. J. Ch. U. S. 262.

§ 791. **Clean hands.**—The jurisdiction of equity to restrain the infringement of trade-marks is founded upon the right of property in the plaintiff and its fraudulent invasion by another, and is exerted to prevent fraud upon him and upon the public; and therefore any material misrepresentation in the plaintiff's label or trade-mark as to the person by whom or the place where the article is manufactured, or as to the materials composing it or any other material, false representation deprives him of the right to injunctive relief, though the defendant's conduct is without justification.⁹⁹ Where the owner of a trade-mark used in connection with

99. United States.—*Beecham v. Jacobs*, 159 Fed. 129 (C. C. A. 1908); *Hilson Co. v. Foster*, 80 Fed. 896.

California.—*Joseph v. Macousky*, 96 Cal. 518, 31 Pac. 914.

Georgia.—*Coleman B. & W. Co. v. Dannenberg Co.*, 103 Ga. 784, 30 S. E. 639, 41 L. R. A. 470.

New York.—*Prince Mfg. Co. v. Prince's Paint Co.*, 135 N. Y. 24, 31 N. E. 990.

Ohio.—*Piso Co. v. Voight*, 6 Ohio Dec. 479, 4 Ohio N. P. 347.

Compare *Tarrant v. Johann Hoff*, 76 Fed. 959, 45 U. S. App. 143, 22 C. C. A. 644, 78 Off. Gaz. 1107.

If upon the dissolution of a firm the label used by some of the former contains the untrue assertion that the article was manufactured by the old firm, they are not entitled to injunctive relief. *Hazard v. Caswell*, 93 N. Y. 259.

Using a name indicating that the complainants were a corporation does not deprive of right to an injunction. *Block v. Standard Distilling & D. Co.*, 95 Fed. 978.

Representation that article patented.—An injunction to restrain the use of trade-mark will not be granted where plaintiff in using it makes a false representation that the article is patented when, in fact,

the patent has run out. *New York, etc., Card Co. v. Union Playing Card Co.*, 39 Hun, 611. In *Burton v. Stratton*, 12 Fed. 696, *Brown, J.*, said: "A court of equity will not protect a person in the exclusive use of a word which expresses a falsehood; as if the article bears the word patented when in fact it is not patented or exhibits an untruth as to the place of manufacture or composition of the article. *Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. of L. 531; *Flavel v. Harrison*, 10 Hare, 467; *Partridge v. Menck*, 2 Barb. Ch. 101; *Pidding v. How*, 8 Simons, 477 (*Howqua Mixture Case*); *Palmer v. Harris*, 60 Pa. St. 156, wherein the trade-mark indicated that certain cigars were made in Havana, when in fact they were made in New York; *Fetridge v. Wells*, 13 How. Pr. 385 (*Balm of Thousand Flowers Case*); *Phalon v. Wright*, 5 Phila. 464 (*Night Blooming Cereus Case*); *Cocks v. Chandler*, L. R. 11 Eq. 446 (*Reading Sauce Case*); *Connell v. Reed*, 128 Mass. 477 (*East India Remedy case*). But in a recent case in the Circuit Court of Appeals the use of the word "patent" as a part of the name on a package in this case, "*Beecham's Patent Pills*," was held not to amount to a representation

a particular manufacture or vendible commodity applies for an injunction to restrain a defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark or in the business connected with it be himself guilty of any false or misleading representation.¹ And though the false article is as good as the true one, "the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce," and therefore not entitled to protection.² And in such cases, if the adverse party fails to allege the fraud and misrepresentation, the court may itself interpose in behalf of the public, and in order to discountenance the complainant's fraud may refuse to afford him relief.³ In Colorado it has been decided that the presence of the word "Copyrighted" on a label, when it had not been copyrighted, is not such a misrepresentation as would prevent the owner's receiving protection; but the use of the word "Habana" on a label, when in

that that article was patented, and therefore deceptive, so as to preclude from relief in equity, but was construed as meaning that the article was made according to Beecham's secret formula. *Beecham v. Jacobs*, 159 Fed. 129 (C. C. A. 1908).

1. *Worden v. California Fig Syrup Co.*, 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282. See, also, *Holzappel's Compositions Co. v. Rathjen's American C. Co.*, 183 U. S. 1, 22 Sup. Ct. 6, 46 L. Ed. 49.

2. *Partridge v. Menck*, 1 How. App. Cas. 547, 558; *Phalon v. Wright*, 5 Phila. 464.

3. *Simmons Med. Co. v. Mansfield Drug Co.*, 93 Tenn. 84, 23 S. W. 165, per *Curiam*: "This question, it is true, is not raised in the answer of the defendants, but it is raised by the facts which the affidavits and other papers before me have disclosed, and, in my opinion, it is emphatically the question that, as a judge in equity, I am bound to consider and deter-

mine. And in *Connell v. Reed*, 128 Mass. 477, the fraud was first disclosed in the report of the master upon the subject whether there had ever been a former use of the trade-mark in controversy, and when this report came in, containing the information that the plaintiff had adopted and used the words 'East Indian' to denote and to indicate to the public that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which was the fact, the court declined to entertain the proceeding further, saying: 'Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public.' *Id.*, Price & S. Amer. Trade-mark Cas. 347. It is not, strictly speaking, a defense at all, but rather an interposition by the court in behalf of the public, to discourage fraud and wrong upon the public."

fact the cigars on which the label appeared were merely Havana filler, is such a deceit on the public that equity will furnish no relief against an infringement.⁴

§ 792. **Clean hands; patent medicines.**—A manufacturer who falsely represents the composition of his goods by the labels on his packages, has no standing in a court of equity to enjoin a rival from using similar labels and packages on the ground that the latter thereby deceives the public.⁵ In some of the Federal Circuit Courts, and of the State courts, the judicial conviction has prevailed that equity should not interpose by injunction to protect the owners of those quack medicines which are sold without the advice of licensed physicians; but in other courts, and among them the Federal Supreme Court, the owners of proprietary medicines have been protected by injunction. The rule would seem to be sound both in law and morality, that an injunction should not be granted to protect the use of words, as the trade-mark of a medicinal preparation, which assert a manifest falsehood or

4. *Solis Cigar Co. v. Pozo*, 16 Col. 388, 26 Pac. 556.

5. *Clotworthy v. Schepp*, 42 Fed. 62, per Lacombe, J.: "The complainant himself is engaged in deceiving the very public whom he claims to protect from the deception of others. He calls his preparation 'fruit' puddine. In nine different places on his package this word 'fruit' is repeated as descriptive of the article, and a dish of fruit (pears, grapes, etc.) is most prominently depicted on one face of each packet. His packages plainly suggest that fruit of some kind enters in some shape into his compound. A chemical analysis produced by defendant, the substantial accuracy of which is not disputed, discloses the fact that his 'puddine' is composed exclusively of corn starch, a small amount of saccharine and a flavoring extract

with a little carmine added to give it color. It contains no fruit in any form. Under these circumstances, complainant's rights are not sufficiently clear, to warrant the granting of a preliminary injunction. *Fetridge v. Wells*, 4 Abb. Pr. 144, approved in *Medicine Co. v. Wood*, 108 U. S. 218, 27 L. Ed. 706." In *Siebert v. Abbott*, 25 N. Y. Supp. 590, Follett, J., said in respect to an injunction to protect the manufacturer of 'Angostura Bitters': "We do not think courts of equity should be swift or vigilant to protect the manufacturer of a compound advertised and sold as a valuable medicine, which is not shown to contain a single medical ingredient or to possess a single merit claimed for it, as against another manufacturer, producing and selling a like compound. Citing *Dale v.*

physiological impossibility.⁶ But it has been decided that one who puts up a patent medicine will not be deprived of his right to an injunction restraining the infringement of his trade-mark by another on the ground that the trade-mark used by the complainant falsely states that the preparation is purely vegetable, where it also appears that the ingredients used in the medicine are cor-

Smithson, 12 Abb. Pr. 237; *Fowle v. Spear*, 7 Penn. L. J. 176, where an injunction to restrain the use of labels and bottles similar to those used by plaintiff, was refused on the ground that the plaintiff had misrepresented by his labels the qualities and properties of his medicine."

6. *Kohler Mfg. Co. v. Beeshore*, 59 Fed. 572, per Shiras, J.: "It has been more than once held in this circuit that courts of equity will not intervene by injunction in disputes between the owners of quack medicines, meaning thereby remedies or specifics whose composition is kept secret, and which are sold to be used by the purchasers without the advice of regular or licensed physicians. *Fowle v. Spear* (Nov. Term. 1847), 7 Penn. L. J. 176; *Heath v. Wright*, 3 Wall. Jr. 141. A similar view has prevailed in several State courts. *Wolfe v. Burke*, 56 N. Y. 115; *Smith v. Woodruff*, 48 Barb. 438; *Laird v. Wilder*, 9 Bush, 132. In the present case, the so-called 'trade-mark' 'One Night Cough Cure,' asserts a manifest falsehood or physiological impossibility. A cough or cold so far seated as to require medical treatment cannot be cured in a single night, and a pretense to the contrary is obviously an imposition on the ignorant. If it be said that the court cannot take notice of such a state of facts, and that there is no evidence from which the court can infer it, we can, at all events, take notice of the

plaintiff's evidence, whereby it is shown that the trade-mark in question was not selected because experience had shown that the nostrum availed to cure coughs and cold within the period of a single night, but because a similar trade-mark or designation, 'One Night Corn Cure,' had proved to be a popular and taking one. This view of the case was not called to the attention of the court below, nor has it been urged in this court. As the contest is really for the ownership of the trade-mark, the defendant could not be expected to resort to a defense which, if successful, would deprive the coveted words of any market or legal value. It does not appear that the Supreme Court of the United States has, in any reported case, expressed an opinion on the right of owners of so-called patent medicines to protection by injunction. The reports do show that that court has dealt with trade-mark cases in which proprietary medicines, whose composition was not disclosed, were involved, without condemning them as unfit to receive the protection of courts of equity. Thus, the case of *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828, is a leading case, often referred to, and related to a trade-mark of a patent medicine. So, too, in the Southern District of New York, in the case of *Filkins v. Blackman*, 13 Blatchf. 440, Judge Shipman protected the trade-mark 'Dr. I. Blackman's Healing Balsam,'"

rectly stated on the wrapper.⁷ And though the assertion that the preparation will afford immediate relief may be untrue yet it is held that a complainant will not on this ground alone be denied an injunction.⁸

§ 792a. **Same subject; trade name.**—The rule that one who seeks the aid of a court of equity to restrain an infringement of a trade-mark must come into court with clean hands is also held to apply where one seeks to enjoin the use of a trade or business name. So where persons who were engaged in fortune telling sought to enjoin the use by others of the name used by them in their business, it was held that as they were engaged in deceiving the public they could get no property rights in a name or appellation which a court of equity would protect and that it was no answer to say that the defendants were themselves guilty of wrong, as equity will not adjust the differences between wrongdoers.⁹

§ 793. **Clean hands; where no deception intended.**—Where a distiller mixes thirty-five per cent. of other whiskies, bought for the purpose, with his own brand of whisky, and sells the mixture under his trade label, with cautions to avoid imitations, and to the effect that the mixture was “bottled at the distillery warehouse, and is warranted perfectly pure and unadulterated,” a court of equity will not protect the distiller or his privies in contract from infringement of the trade-mark thus fraudulently used.¹⁰ The

7. *Centaur Co. v. Robinson*. 91 Fed. 889.

8. *California Fig Syrup Co. v. Worden*, 95 Fed. 132.

9. *Fay v. Lambourne* (N. Y. App. Div. 1908), 108 N. Y. Supp. 874.

10. *Krauss v. Peebles*, 58 Fed. 585, per Taft, J.: “The only case which it is necessary to refer to is that of *Manhattan Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup Ct. Rep. 436, 27 L. Ed. 706, where the principle which must govern this court in cases like the present is authoritatively settled. It was there held that ‘a court of equity will extend no aid

to sustain a claim to the trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine.’ Mr. Justice Field refers to the leading English case of *Leather Cloth Co. v. American Leather Cloth Co.*, 4 DeGex, J. & S. 137, and 11 H. L. Cas. 523, and quotes with approval this language of the court, as follows: ‘When the owner of a trade-mark applies for an injunction to restrain the defendant

fact that in one year, eight years before bringing suit, and forty years after the business was established, complainant issued a circular misrepresenting the character of the article sold by him, will not prevent his obtaining relief against infringement of the trade-mark or trade name borne by such article, and the fact that complainant falsely stated on his packages that the trade-mark was registered November 11, 1843, will not deprive him of his right to protection from infringement, when he in fact on that date filed the name of the article as a book title under the copyright law. and since the public could not have been deceived by such statement, there being no provision for registering trade-marks at that early date.¹¹

from injuring his property by making false representations to the public, it is essential that the plaintiff should not, in his trade-mark or in the business connected with it, be himself guilty of any false or misleading representation; for if a plaintiff makes any material false statement in connection with the property he seeks to protect he loses, and very justly, his right to claim the assistance of a court of equity. Where a symbol or label claimed as a trade-mark is so constructed or worded as to make it contain a distinct assertion which is false, I think no property can be claimed in it; or, in other words, the right to the exclusive use of it cannot be maintained.' See, also, *Buckland v. Rice*, 40 Ohio St. 526; *Palmer v. Harris*, 60 Pa. St. 156; *Prince Mfg. Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 31 N. E. 990. The distinction sought to be made between a trade-mark containing an express statement of a falsehood and words intentionally so used as necessarily to raise an implication that is false, cannot be supported either on reason or authority. Moreover, in the present case, the false statements are express. Counsel for

complainants rely much on the case of *Appeal of Pratt*, 117 Pa. St. 401, 11 Atl. 878. In that case it appeared that farmers engaged in making butter under a trade-mark 'Darlington' did not always use their own cream, and in rare instances, in an emergency, even bought butter made by others and sold it. The court disregarded this deception of the public, apparently on the maxim '*de minimis non curat lex.*'"

11. *Simmons Med. Co. v. Mansfield Drug Co.*, 93 Tenn. 84, 23 S. W. 165, per Neil, J.: "We think that there is no doubt that the statement made in 'Humor and Facts' that M. A. Simmons was the discoverer of the medicine or formula, being false, and being known to be false and material, would disentitle complainants to any relief, if otherwise entitled, but for the fact that this statement was not made after the year 1883. It is certainly true that where a business has been built upon the publication of a particular falsehood for a considerable time, as in *Seabury v. Grosvenor*, 14 Blatchf. 262, the omission of such fraudulent and untrue language from circulars before bringing suit, will not relieve the plaintiff of the conse-

§ 793a. **Damages; profits; interest.**—Where, upon the trial of an action to enjoin the defendant from using the name of the plaintiff in connection with the manufacture sale of certain articles and for damages, it is determined that the plaintiff has suffered no damages and is entitled to recover only the profits on the sales unlawfully made, in determining the amount of such profits the percentage of expenses of sale in the general business of the defendant should be deducted from the amounts realized from the sales of the article in question in addition to the cost of manufacture and the trade discount, even though it does not appear that the selling expenses of the defendant were increased by such sales. And in such a case interest is held to be properly allowable on the amount recovered from the time of the commencement of the action since the amount of profits was capable of ascertainment by the defendant at the time of the sale.¹²

quences of the previous wrong; but we do not think this rule should be applied to a single circular issued in one particular year, eight years before suit brought, although a very large number of copies of that circular were issued in that year, especially in view of the fact that this publication occurred simply as one incident in a long career of previously established business, reaching back more than forty years. As to the statement on complainant's packages, 'Trade-mark, registered, consisting of name, picture, and autograph, November 11th, 1843.' While this was not and could not be true, we do not think that it was intended thereby to mislead the public as to any material matter, or that it did so mislead the public. This statement must be understood in the light of the controversies that have been waged between the complainant and defendants for many years past. As to the next statement upon complainant's package animadverted upon by the defendants, that "this is the original and only genuine Simmons' Liver

Medicine, the first that was ever advertised of that or any similar name. Dr. M. A. Simmons advertised it extensively, peacefully, and alone for twenty-five years, before any of the others who are now making the different grades of imitations of it commenced. No other Simmons ever did so,' etc. This is substantially correct in its statement as to advertisement, and the maintenance of the reputation of the medicine, and as to its being original, in the sense of being made from the original formula and by one of the original proprietors; but it is not correct as to complainant's preparation being the only genuine preparation made from the original formula, because the proof makes it clear that the preparation made and sold by Zeilin & Co. is equally genuine with complainant's in the sense of being made from the same original formula. Was this misstatement made fraudulently? We think not."

12. *Cutter v. Gudebrod Bros.*, 190 N. Y. 252, modifying 112 App. Div. 894.

CHAPTER XXVII.

AGAINST INFRINGEMENT OF PATENTS.

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Section 794. The nature of patentable inventions.—The history of inventions shows that between the conception of an idea

and its realization in the form of an invention there is often severe labor and repeated failures, and that success is not always achieved by the originator of the idea. In order to constitute an invention a person must have reduced his idea to practice and embodied it in some distinct form.¹ A suggestion or principle or idea is not a complete device or machine, but is a mere abstraction which is unpatentable.² And an applicant cannot by the wide generalization and ambiguous language of an all-embracing claim,

1. *Lamson v. Martin*, 159 Mass. 557, 35 N. E. 78, per Morton, J.: "The invention in this case did not consist in the discovery of a new application of a natural force, like that, for instance, of the telegraph or the telephone, or the making of iron rolls (see *McClurg v. Kingsland*, 1 How. 202, 11 L. Ed. 102; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601; *Burr v. Duryee*, 1 Wall. 568, 17 L. Ed. 650; *Telephone Cases*, 128 U. S. 533, 8 Sup. Ct. 778, 31 L. Ed. 988); but was for the combination in a new form of well-known mechanical devices, which produced the desired result in a cheaper and better manner than it had been produced before. It was the machine as a whole which constituted the invention and was the subject of the patent. If it be admitted that an invention of such a character may exist without being presented in some physical form or description, at least it must appear, in order to amount to an invention, that the inventor has contemplated his idea as a perfected and practicable arrangement. *Loom Co. v. Higgins*, 105 U. S. 593, 26 L. Ed. 1177. If Martin had done no more than to describe his ideas in the manner thus testified to by plaintiffs' witnesses, and another person had afterwards invented the system used by the defendants, we think that nothing which Martin had done would have

constituted a prior invention, so far as to have prevented such person from being regarded as the first and original inventor, and, as such, from obtaining a patent for his invention. *Whittlesey v. Ames*, 12 Fed. 898; *Reed v. Cutter*, 1 Story, 590; *Alden v. Dewey*, Id., 336; *Washburn v. Gould*, 3 Story, 122; *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504. In *Seymour v. Osborne*, 11 Wall. 552, 20 L. Ed. 33, it is said that, 'in order to constitute an invention, the party must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form.' See, also, to the same effect, *Coffin v. Ogden*, 18 Wall. 124, 21 L. Ed. 821; *The Corn Planter Patent*, 23 Wall. 210, 211, 23 L. Ed. 161; *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 11 Sup. Ct. 846, 35 L. Ed. 521; *Agawam Co. v. Jordan*, 7 Wall. 602, 19 L. Ed. 177; *Winans v. Railroad*, 4 Fish. Pat. Cas. 1; *Reed v. Cutter*, 1 Story, 590; *Loom Co. v. Higgins*, *supra*; *Webb v. Quintard*, 9 Blatchf. 357, 358; *Parkhurst v. Kinsman*, 1 Blatchf. 488; *Goodyear v. Day*, 2 Wall. Jr. 283; *Bedford v. Hunt*, 1 Mason, 304; *Washburn v. Gould*, 3 Story, 122; *Heath v. Hildredth*, 1 McCa. Pat. Cas. 12; *Whittlesey v. Ames*, 13 Fed. 898; *Gayler v. Wilder*, 10 How. 496, 13 L. Ed. 504."

2. *Leroy v. Tatham*, 22 How. 132, 16 L. Ed. 366; *Burr v. Duryee*, 1

close the field of invention to others in the same department of industry.' Thus in a claim for railway brake shoes, the use of the words, "or otherwise so shaping them as to bear upon the flange and those portions of the tire which are not worn in rolling," cannot operate to shut out subsequent inventors, when the specifications and drawings failed to exemplify, in a practical form, the idea of bearing on the parts not worn by the rail.⁴

§ 795. **Exclusive jurisdiction of Federal courts over patent infringements.**—While State courts may pass upon the title and validity of patents, they have no jurisdiction, as before seen, of suits to enjoin their infringement; but of such suits Federal courts have exclusive jurisdiction.⁵ Nor will such jurisdiction to enjoin patent infringements be entertained by a State court, though the defendant stipulate in the cause not to raise jurisdictional objections, as consent cannot confer such jurisdiction.⁶ The act of Congress which confers power on courts having jurisdiction of

Wall. 531, 17 L. Ed. 650; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103.

3. *Carlton v. Bokee*, 17 Wall. 472, 21 L. Ed. 517.

4. *Consol. Brake Shoe Co. v. Detroit Spring Co.*, 59 Fed. 902. And see *Bonnell v. Stoll*, 61 Fed. 767, and cases cited.

5. Section 56, *ante*.

The exclusive jurisdiction is conferred upon the federal courts by Act of Congress of July 4, 1836. The owners of certain patents granted to complainant the exclusive right to make, use, and vend the patented machines in specified territory of the United States, and also, "so far as they could control the same, the exclusive right to make the patented machines for sale in Europe, Australia, and South America." Thereafter the owners conveyed all their right in the patents to defendant, subject to the rights of the complainant, from

which time complainant paid to defendant the royalties under its license. Subsequently complainant sued defendant to restrain it from manufacturing machines under the patent, for sale in Europe, Australia and South America. It was held that under the conveyance to it defendant assumed no contract relation with complainant, and thereafter the suit was not founded upon the contract, but was an ordinary suit for infringement of a patent, in which the complainant must establish his right in the usual way and to which the defendant is at liberty to interpose all the defenses which exist in an infringement suit. *Adriance v. McCormick, etc., Co.*, 55 Fed. 287.

6. *Dudley v. Mayhew*, 3 N. Y. 9. In *Lamson v. Martin*, 159 Mass. 557, 35 N. E. 78, *Morton, J.*, said: "It is to be observed that the question is not one of priority between rival inventors, nor whether another party

patent cases to grant injunctions to prevent the violation of any right "secured by patent," does not authorize such courts to issue an injunction in favor of one who has failed to secure a patent.⁷

§ 796. **Jurisdiction of Circuit Courts.**—The Federal Circuit Court has jurisdiction of a suit in equity which is purely a bill to prevent infringement of letters patent, where the defense is non-infringement and the lawful right of the defendants to do what they did.⁸ In a suit in which the jurisdiction of the Federal Cir-

had anticipated the defendant Martin, nor whether the patent issued to him infringed the patents of the Martin and Hill cash-carrier company. This court would have no jurisdiction of such questions except perhaps as matters of purely collateral inquiry. *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295; *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756, 31 L. Ed. 683." Where the court has jurisdiction as to the parties and subject matter of an action for cancellation of a license to manufacture a patented article, and to enjoin further manufacture thereunder, an injunction not in terms limited to restraint of manufacture under the license, and unnecessary, for the reason that the judgment revoked the license, is voidable, not void. *Mark v. Hyatt*, 135 N. Y. 306, 31 N. E. 1099.

7. *Illingworth v. Atha*, 42 Fed. 141, construing U. S. R. S., § 4921, which provides that "The several courts vested with jurisdiction of cases arising under the patent law shall have power to grant injunctions according to the cause and principles of equity, to prevent the violation of any right secured by the patent." In the same case it was also held that U. S. R. S., § 4915, which gives an unsuccessful applicant for a patent the right to apply to a court

of equity, and which provides that an adjudication by the court in the applicant's favor shall authorize the commissioner to issue such patent to the applicant, confers no power on the court to enjoin the commissioner from issuing letters patent in favor of one who whom he has adjudged entitled thereto.

8. *White v. Rankin*, 144 U. S. 628, 12 Sup. Ct. 768, 36 L. Ed. 569, per Blatchford, J.: "We are of opinion that the decree of the Circuit Court must be reversed. That decree was that the bill of complaint be dismissed for want of jurisdiction. The jurisdiction is clear on the face of the bill. The case stated by the bill arises on the patents. There is no suggestion in the bill that there was ever any contract or agreement, or attempt to make one between the plaintiff and the defendant Thompson, or that either the plaintiff or the defendants claim anything under any contract. The averment in the bill that the defendants have made, used and sold machines containing the patented inventions without the license of the plaintiff and without any right so to do, cannot be regarded as raising any question on any alleged license or contract. The Circuit Court did not decide the case upon the facts contained in the stipulation, nor did it adjudicate upon the legal

cuit Court is founded wholly or partly upon the patent laws, a corporation organized under the laws of another State cannot be

effect of those facts. It did not hold that those facts were facts in the case and then dismiss the bill because the existence of those facts as facts removed the case from the cognizance of the court. It appears to have dismissed the bill on the simple ground that the defendants set up a contract of license from White. The bill being purely a bill for infringement, founded upon patents, what was set up by the defendant was set up as a defense and as showing the lawful right in them to do what they had done, and as a ground for the dismissal of the bill because they had not infringed the patents, although they had made and sold more than four furnaces involving the inventions covered by the patents. The decree was not one upon the facts of the case, but was simply a decree that the court had no jurisdiction to try the case. The subject matter of the action, as set forth in the bill, gave the court jurisdiction, and exclusive jurisdiction, to try it. All of the parties to the suit were citizens of California, and if jurisdiction did not exist under the patent laws it did not exist at all. Reliance is placed by the defendants upon the cases of *Wilson v. Sandford*, 51 U. S. (10 How.) 101, 13 L. Ed. 344; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. Ed. 357, and *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295. In *Hartell v. Tilghman*, *supra*, the headnote of the report is that 'a suit between citizens of the same State cannot be sustained in the Circuit Court, as arising under the patent laws of the United States, when the defend-

ant admits the validity and his use of the plaintiff's latter patent, and a subsisting contract is shown governing the rights of the parties in the use of the invention.' But in the case now before the court, the Circuit Court did not find that there was a subsisting, valid contract governing the rights of the defendants in the use of the invention. The Circuit Court found nothing as to the existence or validity of the contract, decree or deed mentioned in the stipulation. The stipulation provides that, at the hearing, the contract, complaint, answer, decree, and deed, set forth in the stipulation, may be offered in evidence, subject to such objections as might be urged against the originals thereof. The stipulation further states that the defendants do not admit that anything is due to the plaintiff from Thompson, and that they do admit that nothing had been paid by Thompson to the plaintiff under the decree of the State court of August 26, 1884, and since the making thereof. All these matters and questions ought to have been adjudicated by the Circuit Court before it could find ground to determine whether or not it should dismiss the bill. Until it had so adjudicated those questions, the decision in the case of *Hartell v. Tilghman* could not apply. The case of *Wilson v. Sandford*, 51 U. S. (10 How.) 99, 13 L. Ed. 344, is cited by the court in *Hartell v. Tilghman*. In that case the bill was filed to set aside a contract which the plaintiff had made with the defendants for the use of machines under a patent belonging to the

sued in a State where it does business by a citizen of a third State.⁹

§ 797. **Grounds of jurisdiction.**—One of the main grounds of equity jurisdiction of infringements of letters patent is the prevention of a multiplicity of actions at law for damages; for if each infringement of a patent were to be made a distinct cause of action an inventor would be constantly involved in expensive litigation, without ever being able to have a final establishment of his rights.¹⁰

plaintiff, and to restrain the use of them, as infringements, on the ground that the contract had been forfeited by the refusal of the defendants to comply with its condition. The case of *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295, was the case of a bill where the parties were citizens of the same State, brought in a court of that State for moneys alleged to be due under a contract whereby certain patents granted to the plaintiff were transferred to the defendant. The bill prayed for an accounting of the amounts due the plaintiff for royalties under the contract, and for a decree therefor. The case was removed into the Circuit Court of the United States, but that court held, on final hearing, that it had no jurisdiction, because the case did not arise under any law of the United States, and remanded the case to the State court. This court affirmed the decree, citing as authority *Wilson v. Sandford* and *Hartell v. Tilghman*. In *Dale Tile M'fg Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756, 31 L. Ed. 683, the cases above referred to were reviewed, and it was stated that it had been decided in those cases that a bill in equity in the Circuit Court of the United States, by the owner of a patent, to

enforce a contract for the use thereof, or to set aside such a contract because the defendant had not complied with its terms, was not a case arising under the patent laws; and it was said that the bill in *Hartell v. Tilghman* alleged that the defendants had broken a contract by which they had agreed to pay the plaintiff a certain royalty for the use of his invention and to take a license from him, and thereupon he forbade them to use it, and they disregarded the prohibition. The same view was taken of *Albright v. Teas*. The case of *Marsh v. Nichols*, 140 U. S. 344, 11 Sup. Ct. 798, 35 L. Ed. 413, is to the same purport. We are entirely satisfied that the Circuit Court ought not to have dismissed the bill in this case for want of jurisdiction, but ought to have proceeded to hear it upon the merits, and the proofs put in; and the decree is reversed and the cause remanded to that court with a direction to hear it upon the merits."

9. *Adriance v. McCormick, etc.*, Co., 55 Fed. 287; *Shaw v. Quincy Mining Co.*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768.

10. *Beach, Mod. Eq. Jur.*, § 747; *Morte v. Bennett*, 2 Fish. Pat. Cas. 645; *Hogg v. Kirby*, 8 Ves. 215, 223;

As to the right to an injunction to prevent an infringement of a patent the United States Supreme Court says in a recent case: "From the character of the right of the patentee we may judge of his remedies. It hardly needs to be pointed out that the right can only retain its attribute of exclusiveness by a prevention of its violation. Anything but prevention takes away the privilege which the law confers upon the patentee. If the conception of the law that a judgment in an action at law is reparation for the trespass, it is only for the particular trespass that is the ground of the action. There may be other trespasses and continuing wrongs and the vexation of many actions. These are well recognized grounds of equity jurisdiction, especially in patent cases, and a citation of cases is unnecessary. Whether, however, a case cannot arise where, regarding the situation of the parties in view of the public interest a court of equity might be justified in withholding relief by injunction we do not decide." ¹¹

§ 797a. Right to injunction as affected by non-user.—In a recent case in which the objection was raised that the patent was not put into commercial use before the filing of the bill of complaint and that there was also a failure to prove why it was not put into such use and that therefore the complainants were not entitled to equitable relief by way of injunction, the court said that the point seems never to have been passed on by the Supreme

Harmer v. Plane, 14 Ves. 132. See § 535, *ante*. In *Price v. Joliet Steel Co.*, 46 Fed. 107, Gresham, J., treated the infringement as a trespass upon the patentee's property, and said: "An injunction would stop the trespass and prevent a multiplicity of actions at law, which would be expensive and afford inadequate relief."

11. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 430, per Mr. Justice McKenna, who also said in this case that the source of the rights of a

patentee is the law conferring such rights upon him and "we are admonished at the outset that we must look for the policy of a statute, not in matters outside of it—not to circumstances of expediency and to supposed purposes not expressed by the words. The patent law is the execution of a policy having its first expression in the Constitution, and it may be supposed that all that was deemed necessary to accomplish and safeguard it must have been studied and provided for."

Court but that the weight of authority in the inferior courts of the United States is against such contention.¹² In a late case in the United States Supreme Court, however, the doctrine enunciated by the Circuit Court is sanctioned and the rule is laid down that the right given to an inventor who patents his invention is an exclusive one, and that he will not be deprived of his right to an injunction to prevent an infringement of the patent on the ground of a non-user by him of the invention, except, perhaps, where public interests may be involved. He may exclude others from a use of his patent as this right of exclusion is said to be the very essence of the right conferred upon him and it is the privilege of an owner of property to use or not to use it.¹³

§ 798. Enjoining assignee from incumbering patent.—In the exercise of their limited jurisdiction over patents, the granting of injunctions by State courts is a question which rests in their sound discretion, as in other cases, and an injunction will be granted when to deny it would work irreparable damage to the complainant; and the rule is not absolute that the injunction shall not be granted even though the defendant's answer and affidavits fully deny the equities disclosed by the bill. Thus where, on a preliminary hearing of an application to enjoin defendant from selling or incumbering a patent assigned to him, and claimed by plaintiff under a prior unrecorded assignment, it appears that complainant is entitled to equitable relief as against his assignor, that defendant acknowledged to a person other than complainant that he had notice of complainant's claim, and that defendant, unless enjoined, can sell the patent to as many individuals as he can find as purchasers, which, if done, would work irreparable damage to complainant, a temporary injunction should be granted, though defendant makes affidavit resisting the application, denying that he ever had such notice.¹⁴

12. Morton Trust Co. v. American Car & F. Co., 161 Fed. 546.

13. Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, affirming 150 Fed. 741.

14. Stanton M'fg Co. v. McFarland, 52 N. J. Eq. 85, 27 Atl. 828, per Bird, V. C.: "The question in this case is not whether an injunction which has been issued shall be re-

§ 799. Defeat of jurisdiction by expiration of patent.—If a bill in equity to restrain an infringement be filed before the expiration of the patent, the jurisdiction of the Circuit Courts is not

tained or not, but whether one shall be allowed. The order to show cause rested chiefly upon the allegation that the defendant, McFarland, had notice of the rights of the complainant before he took an assignment of the patent in question. The complainant's right, or what it claims to be a right, rests upon an assignment which antedates the assignment under which the defendant, McFarland, claims, but the former assignment was not recorded. Notwithstanding there was no such record, the complainant alleges that he (McFarland) acknowledged that he was aware of the title of the complainant before he took the assignment under which he claims a preference to the complainant. The defendant, upon the return of the order to show cause, comes with his answer, in which he positively denies the allegation of notice, and supports it by his affidavit. Two questions are presented by the bill for consideration: First, does the complainant show an equitable right to the patent in question? and, second, has he made a case by his bill and proofs which the defendant has not, in this preliminary inquiry, fully met? or, supposing, in the application of the ordinary rule in such cases, the defendant has by his answer and affidavit met the allegations of the complainant's bill and the proofs annexed thereto, does there appear to be any reason why the ordinary rule which requires that the injunction should not go should not be applied in this case? 1. As to the rights of the complainant under his

assignment, independently of the rights of the defendant, McFarland, I think, as the authorities now stand, they go far enough to justify me at this stage of the case in concluding that, if the allegations are sustained, the complainant would be entitled to relief upon final hearing, as between itself and Stanton. 2. The more important question at this inquiry is whether or not, as the pleadings and proofs now stand, an injunction ought to be allowed, restraining the defendant, McFarland, from attempting to sell, assign or incumber the patent. The court, in such cases, is controlled by what is regarded as a sound discretion. It seems to be well established that, even though the answer and proofs negative the allegations of the bill, which are the foundation for a claim to an injunction, the court may nevertheless grant or continue the injunction until the final hearing. In the case of *Chetwood v. Brittan*, 2 N. J. Eq. 438, the chancellor used the following language: 'This is a question which must always rest upon discretion, and yet that discretion should not be arbitrary, but yield to well established rules. The equity may be answered, and yet the court will continue the injunction to the hearing, and especially so if a dissolution would work a greater injury than a continuance of the process.' In speaking on this point in the case of *Fleischman v. Young*, 9 N. J. Eq. 620, Chancellor Williamson, after using language very similar to that above quoted, added that these principles

defeated by the expiration of the patent, by the lapse of time before the final decree.¹⁵ If the suit be begun in such time that an injunction can be obtained, under the rules of the court, before the

should be applied, 'but not in such slavish obedience to them as to defeat the ends of justice.' See, also, *Stotesbury v. Vail*, 13 N. J. Eq. 390; *Irick v. Black*, 17 N. J. Eq. 200; *Firmstone v. De Camp*, Id. 316; *Murray v. Elston*, 23 N. J. Eq. 129. In this case the court said: 'The answer denies, fully and explicitly, the equities of the bill. Under the general rule in such cases, the injunction should be dissolved. But this rule is subject to exceptions, and does not necessarily prevail where, by continuing the injunction, the ends of justice will be better subserved. The motion to dissolve in such instances has been often denied by this court, in the exercise of its appropriate discretion, having regard to the circumstances of the case, and the effect which a dissolution would have upon the relative situation of the parties in the further prosecution of the suit. *Van Syckle v. Rorback*, 6 N. J. Eq. 234. In *McKibbin v. Brown*, 14 N. J. Eq. 13, one so cautious and learned as Chancellor Green said that, in cases of real doubt as to the equitable rights of the complainant, an injunction may be denied until final hearing, notwithstanding the denial in the answer. In *Hilles v. Parrish*, Id. 380, it was said that the granting and continuing of injunctions rests mainly on equitable grounds, and is not exercised for the mere purpose of protecting legal rights, irrespective of the claim of the parties to equitable relief. *Manko v. Chambersburgh*, 25 N. J. Eq. 168; *Henwood v. Jarvis*, 27 N. J. Eq. 247; *French v. Snell*, 29 N. J. Eq. 95;

High, Inj., § 1467. The cases above referred to were decided upon motion to dissolve injunctions which had been granted. I have referred to them upon the belief that the same principles should control the court upon the application for the injunction, upon an order to show cause, when the answer of the defendant and affidavits are presented by way of resistance. This view is sustained by the case of *Society v. Low*, 17 N. J. Eq. 19. Therefore, it appearing that the complainant is entitled to equitable relief as against Stanton, and a party other than the complainant swearing that the defendant, *McFarland*, acknowledged to him that he had notice of the claim of the complainant, and it also appearing that the defendant has it in his power to make sale of the patent to as many different individuals as he could find as purchasers in all parts of the United States if he were not restrained from doing so, which, if done to any considerable extent, would certainly work irreparable mischief to the complainant, it seems to me that the rule stated in the above-named cases not only would justify me, but require me, to advise that the order to show cause be made absolute, notwithstanding the emphatic denial of the defendant, *McFarland*, of any notice in his answer and affidavit. If the defendant, *McFarland*, asks for a speedy hearing, the complainant will be required to proceed at an early day, or suffer the dissolution of the injunction."

15. *Beedle v. Bennett*, 122 U. S. 71, 7 Sup. Ct. 1090, 30 L. Ed. 1074.

patent expires, though only a few days remain for the patent to run, it is within the discretion of the court to take jurisdiction; and if it does so, it may, without enjoining the defendant, proceed to grant the other incidental relief sought.¹⁶ If the bill for infringement is filed after the expiration of the patent, and merely for an account of profits and damages, equity has no jurisdiction to entertain it unless it be shown that complainant has not an adequate remedy at law.¹⁷

§ 800. **Same subject.**—Equity takes jurisdiction of suits for infringement only where it appears from the bill that the complainant is entitled to an injunction or other equitable relief.¹⁸ Therefore, a bill for an injunction to restrain the infringement of a patent filed only four days before the patent expires, has been held demurrable where no preliminary injunction is asked, since it would be impossible to obtain a final decree before the expiration

16. *Clark v. Wooster*, 119 U. S. 322, 7 S. Ct. 217, 30 L. Ed. 392; *Cotton Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. 52, 27 L. Ed. 79; *Lake Shore & M. S. R. Co. v. National Car-Brake Co.*, 110 U. S. 229, 4 Sup. Ct. 33, 28 L. Ed. 129; *Consol. Valve Co. v. Crosby Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939; *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105.

17. *Root v. Railway Company*, 105 U. S. 189, 26 L. Ed. 975. See *Vaughan v. Central Pac. R. Co.*, 4 Sawyer, 280, where the bill was not filed for several years after the patent expired and the court remarked that it "presented no ground for an injunction." In *American Cable R. Co. v. Chicago R. Co.*, 41 Fed. 522, it was held that equity would not entertain a bill for infringement of a patent which expired between the date of service and the return day, there being no special facts alleged entitling complainant to an injunc-

tion. *Blodgett, J.*, said: "In the case now in hand the patent had fourteen days of life when the bill was filed, and no application for an injunction *pendente lite* was made; and the patent had expired before the return day of the process and before the complainant would have been entitled to a default, even if defendants had not appeared and defended. As there is no special case made by the bill showing that an injunction was part of the remedy to which complainant would be entitled by reason of special facts alleged, it follows that no injunction would have been awarded if the complainant had obtained a decree *pro confesso*. The case, therefore, comes clearly within the rule in *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975, and the bill must be dismissed for want of jurisdiction."

18. *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975.

of the patent.¹⁹ And after a patent, the infringement of which has been enjoined, expires, the injunction will be dissolved without reference to such articles as were manufactured while the patent was alive. The patentee may recover damages for such acts of infringement.²⁰

§ 801. Same subject; enjoining infringing sales.—Where a patent has been sustained after long litigation and against all

19. Bragg M'fg Co. v. Hartford, 56 Fed. 292, per Townsend, J.: "The test of jurisdiction applied in the later cases is whether the bill is filed in season to enable complainant under the rules and practice of the court to move for and obtain an injunction before the expiration of the patent."

In Singer M'fg Co. v. Wilson Sewing Machine Co., 38 Fed. 586, the jurisdiction was sustained because the 4½ months of the life of the patent was enough to allow time for proofs and final hearing.

American Sulphite Pulp Co. v. Great Northern Paper Co., 159 Fed. 167, in which case an injunction was refused where patent had less than two months to run.

Diamond Stone S. M. Co. v. Seus, 159 Fed. 497. Injunction refused in this case where patent had only thirteen days to run.

In Overweight Counterbalance E. Co. v. Standard Elev. & M. Co., 96 Fed. 231, the court refused to entertain jurisdiction of a suit for an injunction where the suit was commenced only ten days before the expiration of the patent.

In Vermilya v. Erie R. Co., 89 Fed. 96, where it was sought to enjoin the use of a railroad switch on the ground of infringement, the court refused to grant an injunction *pendente lite*, it appearing that the patent

would expire in about two months from the date of the application.

In American Cable R. Co. v. Chicago, etc., R. Co., 41 Fed. 522, the bill was dismissed on demurrer because the patent had only 14 days of life when the bill was filed and no application had been made for a preliminary injunction.

See, also, Clark v. Wooster, 119 U. S. 322, 7 S. Ct. 217, 30 L. Ed. 392; American Cable R. Co. v. Citizens' R. Co., 44 Fed. 484; Washburn M'fg Co. v. Freeman Wire Co., 41 Fed. 410.

Where a bill is filed only four days before the expiration of the patent, and a notice cannot be made returnable until after its expiration, and no special grounds for equitable relief are shown, the bill is demurrable. Mershon v. Pease Furnace Co., 24 Fed. 741. And see Keyes v. Eureka M'fg Co., 45 Fed. 199.

A bill filed twenty-six days before the expiration of a patent may support an injunction where the bill alleges that the defendant has made, and is making and selling machines embodying plaintiff's patent, and threatens to put a large number of machines already made on the market after the patent expires. Toledo Mower & Reaper Co. v. Johnston Harvester Co., 24 Fed. 739.

20. Westinghouse v. Carpenter, 43 Fed. 894.

the defenses ordinarily set up in patent cases, and such decision has been followed in another court, the question of the patent's validity is hardly to be considered as an open one, and in such a case and where the patent has only a short time to run, the owner of the patent is entitled to be protected in his monopoly until the defendant is able to show that the former decisions were wrong.²¹ And where defendants were advised of the claim that their manufacture was an infringement of complainant's patent, and a suit was pending for such infringement, it was held that there was a proper case for interference by injunction, after the patent expired, to restrain the selling of infringing articles made during its term.²² For to permit an infringer to make machines covered by the patent and hold them till it expired and then use them as if made after, would be to permit the infringer to appropriate so much of the patentee's property which the patent law intended to secure to him.²³ But the only ground of equitable jurisdiction for infringement of a patent being relief by injunction, where the patent expired before defendant was required to answer, no injunction could be granted on final decree, and the only remaining cause of action being for royalties under an implied license, the remedy is purely legal, and, in the absence of a proper showing as to citizenship, there is no element of national jurisdiction, and the suit must be dismissed.²⁴

§ 802. Enjoining infringement before patent issues.—Equity has no jurisdiction to enjoin the infringement of an invention before a patent has been issued, notwithstanding an application for the same has been made and is still pending in the Patent Office.²⁵ This rule would seem to be a reasonable deduction from the fact that a patent is void until signed by the Secretary of the

21. *Cary v. Domestic Spring Bed Co.*, 27 Fed. 299.

22. *New York Belting Co. v. McGowan*, 27 Fed. 111.

23. *American Diamond Co. v. Rutland Marble Co.*, 2 Fed. 356; *American Diamond Co. v. Sheldon*, 1 Fed. 870; *Root v. Railway Co.*, 105 U. S.

189, 26 L. Ed. 975; *Crossley v. Gas Light Co.*, 4 L. J. Ch. (N. S.) 25.

24. *Keyes v. Eureka Con. Mfg. Co.*, 45 Fed. 199.

25. *Rein v. Clayton*, 37 Fed. 354, overruling *Butler v. Ball*, 28 Fed. 754.

Interior;²⁶ and also from the fact that the monopoly secured to an inventor by his patent does not exist at common law but only by force of the patent laws, and that the inventor has no exclusive right to his invention until he obtains his patent.²⁷

§ 803. **Enjoining slander of title to letters patent.**—Equity has no jurisdiction to enjoin a slander of title to letters patent till after the question of slander has been determined by a jury in an action at law; and where title to letters patent is slandered, the unfair competition, resulting in loss of business, when added to the slander of title, will not give an equity court jurisdiction to interfere by injunction.²⁸ But in connection with the right to sue for the infringement of a patent a patentee also has the right, and will not be enjoined from exercising it, of warning by letters, circulars or by advertisements in newspapers against possible infringements of his patent where the title of the party seeking the injunction against him has not been adjudicated.²⁹ So it is said in another case that there seems to be no good reason why a

26. *Marsh v. Nichols*, 15 Fed. 914, 128 U. S. 605, 9 Sup. Ct. 168, 32 L. Ed. 538, where the court said: "Until the patent is issued there is no property right in it, that is, no such right as the inventor can enforce. Until then there is no power over its use which is one of the elements of a right of property in anything capable of ownership." See, also, *Machine Co. v. Tool Co.*, 4 Fish. Pat. Cas. 284, 294.

27. *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504; *Brown v. Duchesne*, 19 How. 183, 195, 15 L. Ed. 595.

28. *Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 492, 19 S. W. 804, per Black, J.: "Whitehead v. Kitson, 119 Mass. 484, was quite like the present case. These plaintiffs and defendant held letters patent for inventions. After plaintiffs had intro-

duced their invention and spent much time and money in doing so, the defendant falsely represented to persons likely to deal with plaintiffs that their patent interfered with his patent, and that persons using the patent of plaintiffs would be infringers and become liable as such. The court held that the case made by the bill was not within the jurisdiction of a court of equity. *Clark v. Dean*, 143 Mass. 292, asserts the same principle. These Massachusetts cases were cited with approval in *Consumers' Gas Co. v. Gaslight Co.*, 100 Mo. 501. To the same effect are the following cases: *Singer M'fg Co. v. Domestic M'fg Co.*, 49 Ga. 70; *Kidd v. Horry*, 28 Fed. 773; *Baltimore Car Wheel Co. v. Bemis*, 29 Fed. 95."

29. *Computing Scale Co. v. National Computing Scale Co.*, 79 Fed. 962.

patentee may not notify persons using his device of his claim and call attention to the fact that by selling or using it they are making themselves liable to prosecution.³⁰ So a patentee who has begun a suit to restrain an infringement will not be restrained from issuing circulars cautioning the public against using the infringing article, if the circulars are issued in good faith and the infringement suit is promptly prosecuted.³¹ And where the owner of patents in Belgium and England granted a license to manufacture under the patents in Belgium but not elsewhere, upon the licensee's manufacturing articles under the patents in Belgium and selling them in England, it was held that the patent owner could not be enjoined from issuing a circular warning persons engaged in the trade that the sale in England, except by himself, of articles made in foreign countries under his patents would be an infringement.³² In an action under the English Trademarks Act of 1883, to restrain a patentee from issuing threats of legal proceedings, the only issue is infringement or no infringement, and the validity of the patent cannot be tried.³³ It is also decided, however, that there is undoubtedly authority for holding that if the language of such letters or circulars be false, malicious, offensive, or approbrious, or used for the wilful purpose of inflicting an injury, the party is

30. *Kelley v. Ypsilanti Dress Stay Mfg. Co.*, 44 Fed. 19, 10 L. R. A. 686, Brown, J., said: "It would seem to be an act of prudence, if not of kindness, upon the part of a patentee, to notify the public of his invention, and to warn persons dealing in the article of the consequence of purchasing from others, and in such cases an injunction has been uniformly denied." Citing *Chase v. Tuttle*, 27 Fed. 10; *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69; *Kidd v. Horry*, 28 Fed. 773.

31. *Dunlop Pneumatic Tyre Co. v. New Seddon P. T. & S. T. Co.*, 76 Law T. R. 405; *Household v. Fairburn*, 51 L. T. 498. One may be enjoined from issuing notices which

are untrue when he would not be liable in damages because of his good faith. *Halsey v. Brotherhood*, L. R. 15 Ch. D. 514. In *Kurtz v. Spence*, *supra*, Chitty, J., observes that the "32d section of the act contains a proviso that the section is not to apply if the person making the threats with due diligence commences and prosecutes an action for infringement of his patent."

32. *Societe Anonyme v. Tighman's Patent Co.*, L. R. 25 Ch. D. 1; distinguishing *Betts v. Willmott*, L. R. 6 Ch. 239, where the articles had been both manufactured and sold in a foreign country.

33. *Kurtz v. Spence*, L. R. 33 Ch. D. 579.

entitled to his remedy by injunction but that this is the extent to which the authorities go.³⁴

§ 804. **Parties; joinder and misjoinder.**—The sole owner of the patent and exclusive licensee of another may, in one action, joining his licensor as plaintiff, enjoin an apparatus infringing both patents.³⁵ But where the owner of a patent makes an assignment pending a suit by him to restrain an infringement, and for damages, but expressly reserves past damages, and there is no proof or claim of infringement subsequent thereto, the assignee cannot maintain a suit against the defendant, and should not therefore be joined as complainant.³⁶ And where it was claimed that two companies for whom the complainants held the patents in trust, should have been joined as plaintiffs, it was held that if those companies were but licensees under the complainants, their interest was not such, in the sense of the patent law, as required them to be joined.³⁷ Where there are several infringers, the complainant is not obliged to sue all of them, but may elect whether to proceed against all or only a part.³⁸ In the case of a suit in which a corporation and its officers are both joined as defendants, it was held proper to grant the injunction against both.³⁹ But it has also been decided that on a bill for infringements of patents, where an individual defendant has no interest in the machines alleged to be infringements, except as an officer of a defendant

34. *Kelley v. Ypsilanti Dress Stay Mfg. Co.*, 44 Fed. 19, 10 L. R. A. 686. Per Brown, J.

35. *Huber v. Meyers Sanitary Depot*, 34 Fed. 752, per Lacombe, J.: "The complainant Huber, if sole owner of both patents, could in a single suit enjoin an apparatus which infringed both. *Nourse, v. Allen*, 4 Blatchf. 376. He is in fact the sole owner of one, and except for the payment of his royalties entitled to the sole beneficial interest in the other. As exclusive licensee, however, he is required to join the owner of the legal title. *North v. Kershaw*, 4

Blatchf. 70. It would multiply expensive litigation to hold that the consequence of bringing in the owner must be to compel complainant to bring two actions instead of one to suppress a single infringing apparatus."

36. *New York Belting Co. v. New Jersey Car Spring Co.*, 47 Fed. 504.

37. *Potter v. Wilson*, 2 Fish Pat. Cas. 102.

38. *Huston Elec. Co. v. Sperry Co.*, 46 Fed. 75; *Smith v. Rines*, 2 Sumn. 338.

39. *Hart & H. M. Co. v. Anchor Elec. Co.*, 92 Fed. 911, 34 C. C. A.

corporation, and there is no evidence that he as an individual has violated any of complainant's rights, or that defendant corporation is insolvent, or that a decree against it would not protect complainant, the bill will be dismissed as to him.⁴⁰ And where it is sought to restrain an infringement by the United States, government officers who are not personally interested in the controversy are not the proper defendants and an injunction should not be granted in a suit against them.⁴¹ A city may be a party defendant in an infringement suit, and may be enjoined from permitting an infringing pavement from being laid by its contractors.⁴² Defendants infringing in concert may be jointly enjoined, though they are stockholders and servants of a corporation.⁴³ Each stockholder of an infringing corporation is liable to be enjoined and made a party defendant; but the officers are not liable to be enjoined unless they are stockholders.⁴⁴

§ 805. Agents, etc., as parties defendant; foreign ship-masters.

—The fact that defendant who has sold an infringing article was a mere salesman for the owner, and otherwise had no interest in it or its sale, is no ground for refusing to grant an injunction against him.⁴⁵ And when the patentee of an original invention,

606. See, also, *Thomson-Houston Elec. Co. v. Johns Mfg. Co.*, 78 Fed. 364.

40. *Boston Woven Hose Co. v. Star Rubber Co.*, 40 Fed. 167, per *Wale, J.*: "A decree for an injunction against the Star Rubber Company would bind its officers and agents without making them personally parties to the bill, and so a decree for an account could be made fully operative without their being joined individually as defendants. *Howard v. Plow Works*, 35 Fed. 745. See, also, *Nickel Co. v. Worthington*, 13 Fed. 392; *Ambler v. Chateau*, 107 U. S. 586, 27 L. Ed. 322, 1 Sup. Ct. 556; *Smith v. Machinery Co.*, 19 Fed. 826." And see *Kane v. Huggins*

Cracker Co., 44 Fed. 287, where a president of a company which had sold out was held not to be a proper party defendant.

41. *Belknap v. Schild*, 160 U. S. 10, 40 L. Ed. 599, 16 Sup. Ct. 443, 74 Off. Gaz. 1121.

42. *Bliss v. Brooklyn*, 8 Blatchf. 533; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000.

43. *Poppenhusen v. Falke*, 4 Blatchf. 493.

44. *Tyler v. Galloway*, 13 Fed. 477.

45. *Maltby v. Bobo*, 14 Blatchf. 53, per *Johnson, J.*: "A wrongdoer cannot set up that he is doing wrong on account of a third person, as a bar to his own responsibility. The principal also may be liable if the injured

and the inventor of an improvement obtain a re-issue covering the two inventions in their joint names, each can enjoin the other from using the invention, except for their joint benefit.⁴⁶ And a patentee may enjoin his former partners after the firm is dissolved.⁴⁷ And a master in possession and command of a vessel, the machinery of which is an infringement of a patent, may be enjoined, though it was in the vessel when he took command and he is not interested in the ownership.⁴⁸ But the use of an improvement covered by an American patent by the master of a foreign vessel while she is coming into or going out of port of the United States, is not an infringement of the American patent, provided the improvement was placed on the vessel in a foreign port, and authorized by the laws of the country to which the vessel belongs.⁴⁹ And the equitable owner of a patent will not be enjoined on the application of the legal owner.⁵⁰

§ 806. Enjoining licensees; effect of sale by patentee.—Where a licensee undertakes to use a patent without paying the license fee, whether the license thereby becomes voidable at law or not, he will be so far enjoined that unless he pays he will not be allowed to use the patent.⁵¹ But where a patentee seeks to enjoin the use of a patented machine it has been decided that instead of granting a preliminary injunction it is proper to allow the deposit of the amount

party elects to look to him; but the person who is actually doing the wrong cannot escape liability."

Compare Edison Electric Light Co. v. Kaelber, 76 Fed. 804, 77 Off. Gaz. 1430.

46. Duke v. Graham, 19 Fed. 647. And see Herring v. Gas, etc., Ass'n, 9 Fed. 556.

47. Pentlarge v. Beeston, 14 Blatchf. 352.

48. Adair v. Young, L. R. 12 Ch. D. 13. In this case James, L. J., dissented on the ground that the master found the infringing pump in the vessel when he assumed command and that "to the master when out at sea,

injunction or no injunction, *salus navis est suprema lex*; for myself I believe that a master would be practically as safe in disobeying an injunction under a pressing emergency as he would be in shooting a mutineer. And in my opinion, if a single life was lost through the master's neglect to use such appliances, the injunction would be no defense to an indictment for manslaughter."

49. Brown v. Duchesne, 19 How. 183, 15 L. Ed. 595. And see Caldwell v. Van Vlissingen, 9 Hare. 415.

50. Clum v. Brewer, 2 Curtis, 506.

51. Day v. Hartshorn, 3 Fish. Pat. Cas. 32; Brooks v. Stolley, 3 McLean,

for which the patentee offered to license its use.⁵² A licensee of the right to make a specified number of articles will not be enjoined until all of them are made.⁵³ Where a licensed firm assigns the license to one of its members and he uses the invention in concert with a third person, the latter will not be enjoined.⁵⁴ A licensee under a patent is estopped to deny its validity on any question arising out of that relation between the parties;⁵⁵ and where defendant had been a licensee under the patents on which he was sued and at one time claimed to own them, and had dealt extensively in the patented articles, it was held that he was not in a position to deny the validity of the patents and that his infringement being clear a preliminary injunction should issue against him.⁵⁶ And where, in consequence of litigation, a corporation has been compelled either to take a license or pay damages for past infringements, thus recognizing the validity of the patent, a corporation subsequently organized will be presumed to have notice of the patent and a preliminary injunction against it will be granted restraining an infringement by it where such corporation is composed of a large majority of the stockholders of the former corporation.⁵⁷ But where a licensee under a patent repudiated the license and infringed the patent, and on a motion for a preliminary injunction undertook to show that the plaintiff did not make the invention, it was held that sufficient doubt was raised as to the validity of the patent to warrant the denial of the motion.⁵⁸ As one tenant in common of letters patent has the same rights as another to make, use and sell the thing patented, a licensee under one tenant in common cannot be enjoined by a co-tenant so long as he keeps within his license.⁵⁹ Patented articles which have been once sold by the patentee thereby pass out of the limits of the

523; *Woodworth v. Weed*, 1 Blatchf. 165.

52. *Arlington & C. M. Co. v. Booth*, 72 Fed. 772.

53. *Aspinwall Mfg. Co. v. Gill*, 33 Fed. 702.

54. *Belding v. Turner*, 8 Blatchf. 321.

55. *Kinsman v. Parkhurst*, 18 How. 289, 15 L. Ed. 385.

56. *Burr v. Kimbark*, 28 Fed. 574.

57. *Ryan v. Newark Spring Mattress Co.*, 96 Fed. 100.

58. *Brown v. Lapham*, 23 Blatchf. 475, 27 Fed. 77.

59. *Clum v. Brewer*, 2 Curtis, 506

monopoly, and one who subsequently sells them to others is not an infringer.⁶⁰

§ 806a. **Injunction against bringing of suits.**—The granting of a patent confers upon the patentee the right to bring suits for its infringement and it follows that until that patent has been declared to be invalid he should not be restrained from bringing such suits.⁶¹ But one in whose favor a judgment has been rendered in a suit for the infringement of a patent will be entitled to an injunction restraining the defeated party from bringing other infringement suits which are based on the same patents against customers of the successful party.⁶²

§ 807. **Injunction against owner of patent in favor of licensee; parties.**—A licensee who has the exclusive right to manufacture

60. *Morgan Envelope Co. v. Albany Wrapping Co.*, 152 U. S. 425, 38 L. Ed. 500, 14 Sup. Ct. 627, per Brown, J.: "So far as fixtures sold by defendants which had been originally manufactured and sold by the patentee to other parties, are concerned, it is evident that by such original sale by the patentee they passed out of the limits of the monopoly, and might be used or sold by any one who had purchased them from the original vendees. The patentee having once received his royalty upon such device, he cannot treat the subsequent seller or user as an infringer. *Bloomer v. McQuewan*, 14 How. 539, 14 L. Ed. 532. As was said by Mr. Justice Clifford in *Chaffee v. Belting Co.*, 22 How. 217, 223, 16 L. Ed. 240: 'When the patented machine rightfully passes to the hands of the purchaser from the patentee, or from any other person authorized to convey it, the machine is no longer within the limits of the monopoly. . . . By a valid sale and purchase, the patented machine becomes the private individual prop-

erty of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the State in which it is situated.' See, also, *Bloomer v. Millinger*, 1 Wall. 340, 17 L. Ed. 581; *Paper Bag Cases*, 105 U. S. 766, 26 L. Ed. 559. In this latter case one Morgan had purchased a machine for making paper bags of the patentee, and it was held that, having the absolute ownership of the machine, he had the right either to use it during the existence of the letters patent, or to transfer such ownership and right to another. It was said that 'the power to sell the machine and transfer the accompanying right to use is an incident of unrestricted ownership.' *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244, 28 L. Ed. 768; *Woodworth v. Curtis*, 2 Woodb. & M. 524, Fed. Cas. No. 18,013; *Goodyear v. Rubber Co.*, 1 Cliff. 348."

61. *Asbestos Felting Co. v. United States & Foreign S. F. Co.*, 13 Blatchf. (U. S.) 453.

62. *Kessler v. Eldred*, 206 U. S. 285, 51 L. Ed. 1065.

and sell a patented article may enjoin an infringement by the owner of the patent;⁶³ and may join with the owner as defendants all other persons who have confederated with him as infringers,⁶⁴ and those who claim under him.⁶⁵ In such a case it is immaterial to the other defendants whether the owner be a party plaintiff or defendant; it suffices so far as they are concerned that all are parties who have any interest in the controversy, and that the decree will definitely determine their rights as between themselves and the owner of the patent, and as between themselves and the complainant.⁶⁶ The owner, however, must be made a party, either as plaintiff or defendant, or a mere licensee cannot maintain his suit against strangers who may have infringed.⁶⁷

§ 808. **As to purchasers from infringers; users.**—There are strong equities in favor of users who, prior to the decision in the Circuit Court, and at a time when judicial decisions in foreign countries interpreting the patent were in conflict, purchased from the infringers electric lighting plants which require the lamps of the patent for their operation, and who are now willing to accept their lamps from the owner of the patent on reasonable terms; and on application to the court these equities will be enforced. Users, however, who acquired their plants subsequent to the decision of the Circuit Court sustaining the patent, will be held to have proceeded with full knowledge of its invalidity, and must suffer the consequences of infringement.⁶⁸ In a suit for infringement of a patent, a court of equity has the power, upon petition

63. *Waterman v. Shipman*, 55 Fed. 982; *Littlefield v. Perry*, 21 Wall. 205, 223, 22 L. Ed. 577. As to exclusive right to manufacture in United States. see *Adrian v. McCormick Co.*, 55 Fed. 288.

64. *Perry v. Littlefield*, 17 Blatchf. 272, 285; *Adrian v. McCormick, etc., Co.*, 55 Fed. 288.

65. *National Heeling Mach. Co. v. Abbott*, 77 Fed. 462, holding that a complainant in such a case may be

granted an injunction *pendente lite* though the parties claiming under the patentee profess to be ignorant of the fact that the complainant was an exclusive licensee.

66. *Waterman v. Shipman*, 55 Fed. 982, 986.

67. *Waterman v. Shipman*, 55 Fed. 982, 986.

68. *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 3 C. C. A. 605, 53 Fed. 592.

of defendants, to restrain complainant from bringing further suits against the purchasers or users of the patented articles, and will do so when the affidavits filed by defendants show that the suits brought are vexatious and oppressive.⁶⁹ Where the question whether or not complainant can treat defendants as infringers of his patent depends on whether the latter purchased goods covered by the patent from a foreign corporation, operating under the same patent as complainant, with notice of a restriction against its resale in the United States when they paid the purchase price, and the evidence on this question is insufficient, no interlocutory injunction against the resale of the goods in the United States will issue.⁷⁰ Where the machine used by the defendant is clearly an infringement, it is no defense to a preliminary injunction that the manufacturer from whom the defendant bought it has been enjoined in another suit; and especially where it does not appear that the decree against the manufacturer was for the profits of a sale for use.⁷¹

§ 809. **Clean hands.**—A person owning a patent which has been sustained by an adjudication of the Circuit Court cannot be deprived of his right to an injunction *pendente lite* in a subsequent action against substantially the same parties for a further infringement, on the ground that he has entered into a combination with others owning similar patents for the purpose of securing an entire monopoly of the business in the United States.⁷² And the fact

69. National Cash Register Co. v. Boston Cash Indicator Co., 41 Fed. 51.

70. Dickerson v. Matheson, 47 Fed. 319. A made a machine protected by B's patent. C bought and used the machine. Held, that B had an adequate remedy at law against C, and could not maintain suit in equity for an injunction and an accounting. Smith v. Sands, 24 Fed. 470.

71. Thompson v. American Bank Note Co., 35 Fed. 203.

72. Edison Electric Light Co. v.

Sawyer Man Electric Co., 53 Fed. 592, 3 C. C. A. 605, per *Curiam*: "We are not disposed to investigate in the present case the character of the combination which has been formed under the name of the 'General Electric Company.' Whether that combination is intended to fetter competition and is illegal as one in restraint of trade, is a question which we should not undertake to decide upon the evidence before us, and in a suit to which it is not a party. The present complainants are entitled by

that a corporation owning letters patent upon a particular kind of machinery has entered into a combination with other manufacturers thereof to secure a monopoly in its manufacture and sale, and to that end has acquired all the rights of other manufacturers for the exclusive sale and manufacture of such machines under patents, will not entitle a stranger to the combination to enjoin the corporation from bringing any suits for infringement against him or his customers.⁷³ Where the order allowing an amendment to an answer in a suit for the infringement of a patent was made on motion supported by affidavits, among which was one having drawings attached showing the course of the water during the operation of the relief valve, which was the invention in suit, the fact that such drawing gives a wrong impression as to the operation of the valve is no ground for vacating the order, as having been procured by falsehood and fraud, as the error may have been one of judgment rather than a wilful misstatement of fact.⁷⁴

§ 810. Requiring bond from complainant; damages against him.—The court on granting a preliminary injunction may, in its discretion, require complainant to give a bond to cover any damages caused by the injunction to defendant in case his defense should be sustained on final hearing.⁷⁵ And the exacting of such

the patent laws to a monopoly for the time of the patent. The right to this monopoly is the very foundation of the patent system. They do not lose that right merely because they may have joined in a combination with others holding other patents securing similar monopolies, which combination may, when judicially examined in a proper forum, be held to be unlawful. We do not feel justified in assuming on the facts before us in the present suit that the use which the complainants propose to make of the injunction will be such as to promote any other monopoly. When it shall be made to appear that some

one, to whom in fairness and good conscience these complainants should sell their lamps, has been arbitrarily refused them save upon oppressive and unreasonable terms, it will be time to consider whether the complainants should be allowed to continue in possession of the injunction."

73. *Strait v. National Harrow Co.*, 51 Fed. 819.

74. *Campbell v. New York City*, 45 Fed. 243.

75. *Accumulator Co. v. Consol. Elec. Co.*, 53 Fed. 796. See §§ 160, 161, *ante*. In *Tobey Furniture Co. v. Colby*, 35 Fed. 592, *Blodgett, J.*,

a bond by the Federal court is in effect a finding that complainant's right to an injunction is so uncertain as to make it equitable to require a bond.⁷⁶ Where it appears, within a year after the issue of an injunction against the infringement of a patent, the bill for which was dismissed for want of equity on final hearing, that the demand for the alleged infringing articles fell off, defendant was allowed as damages a depreciation of one-half the cost price of the articles which he had on hand at the commencement of the suit, interest on what he paid for them, and his expenses in advertising them.⁷⁷ In such case another defendant, who was the manufacturer of the alleged infringing articles, and had made preparations to manufacture them on an extensive scale, should be allowed as damages the difference between the present value and the cost of making those he had on hand, and the damage sustained from stoppage of business; but he should not be allowed the profits he might have made if he had sold the articles, nor for storage, nor for interest on loss in value of the articles.⁷⁸

§ 811. Threatened infringements considered; actual infringement.—A failure to prove actual infringement before the filing of the bill, as alleged, does not require the dismissal of the bill, or prevent a decree for an injunction and an accounting of profits and damages for infringements subsequent to the filing of the bill and before decree, if the bill also avers anticipated infringements, and prays for injunction and general relief; for the right to injunction rests entirely upon anticipated infringements, and the right to recover damages for infringement between the filing of the bill and the final injunction is incidental to the injunction, and necessary to make the remedy complete.⁷⁹ The threat to

said: "The power of courts of equity on application for a preliminary injunction to require from the complainant a bond to indemnify the defendant sought to be enjoined as a condition on which such injunction is granted is too well established to be subject to question at this day. 2 Daniell, Ch. Pr. 1666; Walk. Pat., § 688; Shelly v. Brannan, 4 Fish. Pat.

Cas. 198; Fruit Jar Co. v. Whitney, 1 Ban. & A. 361."

76. Tobey Furniture Co. v. Colby, 35 Fed. 592.

77. Tobey Furniture Co. v. Colby, 35 Fed. 592.

78. Tobey Furniture Co. v. Colby, 35 Fed. 592.

79. Canton Steel Roofing Co. v. Kanneberg, 51 Fed. 599.

infringe is usually constructive. Thus, where infringing articles have been manufactured for the purposes of sale and use, and have been advertised for sale, an injunction will issue, although none of the articles have been actually used or sold.⁸⁰ When the court is satisfied that defendants intend to manufacture and sell an infringing article, a preliminary injunction will issue, and it is immaterial whether they have already made actual sales, or have only given out samples of the goods which they offer to sell.⁸¹ So long as a patentee's ideas are found in the construction and arrangement of the defendant's machine, no matter what may be its form, shape, or appearance, the party using it is appropriating his invention, and must be held to be an infringer.⁸² So where the possession of parts of patented machines is unlawful and the purpose to use them after they have been put together and completed is not denied, there is a threatened use which may be enjoined without awaiting its accomplishment.⁸³ But in another case it appeared that a railroad company had acquired by license from the patentee the right to make and use patented signals on its lines, and it contracted with defendant, a switch and signal company, to make and erect them for a stipulated compensation,

80. Butz Thermo Electric Co. v. Jacobs Electric Co., 36 Fed. 191, per Jenkins, J.: "There certainly has been a threatened invasion of complainant's rights. . . . It constitutes an infringement to manufacture for the purpose of use, even if not actually used. *Whittemore v. Cutter*, 1. Gall. 429; *Locomotive, etc., Truck Co. v. Erie R. Co.*, 10 Blatchf. 292; *Carter v. Baker*, 4 Fish. Pat. Cas. 404, 419." Prior to 1885 the Globe Telephone Company was incorporated under the laws of New York, the object of its formation being to manufacture, sell, license, and lease telegraphic and electric instruments, and supplies therefor, and to acquire and dispose of patents, which were shown to be infringements upon the Bell patent. They put up in their office

sample instruments of an infringing character. They also by advertisements invited the public to purchase their instruments, and become licensees of their patents and claims. No instruments, however, were actually made or used, except experimentally, and none were ever sold. Held, that the acts of the company were sufficient to warrant a decree restraining infringement. *American Bell Telephone Co. v. Globe Telephone Co.*, 31 Fed. 729.

81. *Sessions v. Gould*, 49 Fed. 855; *Minter v. Williams*, 4 Ad. & El. 251.

82. *Potter v. Wilson*, 2 Fish. Pat. Cas. 102.

83. *Tindel-Morris Co. v. Chester Forging & E. Co.*, 163 Fed. 304.

which defendant accordingly did. Another railroad company advertised for proposals to furnish materials and do certain work on its line, which included furnishing and erecting such patented signals. Defendant offered to do the work, and furnish everything required except the signals, representing that these could be obtained for an additional specific sum. The railroad company declined this offer, and defendant then proposed to furnish these signals for the additional sum, but a few days later it withdrew the proposal. It was held that this was not such a threat to infringe the patent as to warrant an injunction; for the presumption is that defendant intended to procure the signals by lawful means.⁸⁴

§ 812. **Accounting as incidental relief; profits.**—The complainant who applies for an injunction to restrain the infringement of his patent, ordinarily prays also for an account of profits and damages.⁸⁵ And such relief may be had where there is an apparent infringement and a failure on the part of the defendant to appear and show why it should not be granted.⁸⁶ The right to recover damages for infringement between the filing of the bill and the final injunction is incidental to the injunction and necessary to render the remedy complete.⁸⁷ The usual practice is to order a reference to a master in order to ascertain the damage to complainant caused by the infringement.⁸⁸ In case of laches on the part of complainant in bringing his suit, the court may enjoin for the future an admitted infringement where it will not decree an

84. Johnson Railroad Signal Co. v. Union Switch Co., 55 Fed. 487, 5 C. C. A. 204; reversing 52 Fed. 867.

85. Grant v. Walter, 148 U. S. 547, 13 Sup. Ct. 699, 37 L. Ed. 552, Haughey v. Lee, 151 U. S. 282, 14 Sup. Ct. 331, 38 L. Ed. 162. In taking an account of damages for infringement, established license fees are considered the best measure of damages. Cary v. Lovell Mfg. Co., 37 Fed. 654; Clark v. Wooster, 119 U. S. 326, 7 Sup. Ct. 217, 30 L. Ed.

392. But see Lovell Mfg. Co. v. Cary, 147 U. S. 623, 627, 13 Sup. Ct. 472, 37 L. Ed. 307.

86. Regina Music Box Co. v. Cuendet, 87 Fed. 478.

87. Canton Steel Roofing Co. v. Kanneberg, 51 Fed. 599.

88. Lamson Cash R. Co. v. Kep-linger, 45 Fed. 245. A decree on rehearing, reversing an order directing an accounting before it is finished, and after great expense has been incurred, will be made without preju-

accounting for past profits.⁸⁹ The entire profits derived by an infringer from the manufacture and sale of an article which owes its entire commercial value to the patented invention are recoverable in a suit for infringement.⁹⁰ A court of equity will not relegate an inventor to a court of law where he can recover money damages only in case of infringement, but will protect his interests by injunction when the circumstances and facts justify and require it.⁹¹

§ 813. **Same subject; measure of damages.**—The infringer is liable only for actual and not for possible gains.⁹² The profits realized by an infringer from the patented device as a part of machines made and sold by him, and containing other devices contributing to his profits, cannot be estimated from proof of the profits of other manufacturers from the sale of similar devices in similar machines; such a measure of damages is of comparatively easy application where the entire machine used or sold is the result of the plaintiff's invention, but of very difficult application where the patented invention is but one feature in a machine embracing other devices that contribute to the profits made by the infringer.⁹³ And in such a case, in the absence of proof to show how much of the profit was due to the other patents, the complainant is entitled only to nominal damages.⁹⁴ But in this connection it is decided that where there is an established license fee which has been charged and accepted for a use similar to that

dice to the use of the testimony taken in the accounting in case another accounting shall be finally decreed. *Campbell v. New York*, 35 Fed. 504.

89. *Price v. Joliet Steel Co.*, 46 Fed. 107; *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828.

90. *Hoke Engraving Plate Co. v. Schraubstadter*, 53 Fed. 817.

91. *Brick v. Staten Island R. Co.*, 25 Fed. 553.

92. *Tighlman v. Proctor*, 125 U. S. 136, 146. 8 Sup. Ct. 894, 31 L. Ed. 664.

93. *Keystone M'fg Co. v. Adams*, 151 U. S. 139, 14 Sup. Ct. 295, 38 L. Ed. 103.

94. *Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024; *Rubber Co. v. Goodyear*, 9 Wall. 788, 19 L. Ed. 566; *Mowry v. Whitney*, 14 Wall. 620; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 24 L. Ed. 1000.

As to the nature of the evidence to apportion the defendant's profits and the patentee's damages between the patented and unpatented features, see *Garretson v. Clark*, 111

use of the defendants which constitutes the infringement complained of, such license fee may be used as the basis in computing the damages.⁹⁵

§ 814. **Increased damages against defendant under the statute.**—In a suit for infringement of a patent, on a motion for the court to increase the damages under the provisions of the revised statutes,⁹⁶ it is the duty of the court to take into consideration the fact that the patent upon which the motion is founded is void, even though the proof which demonstrates its invalidity is then for the first time brought to the court's attention.⁹⁷

§ 815. **Destruction of infringing articles rarely decreed.**—The destruction of infringing articles will not be decreed, in addition to the relief ordinarily granted in a suit for the infringement of a patent, where it does not appear that defendant had *mala fide* set about to appropriate the patented invention, and there is nothing to show that he would attempt to use the infringing article in the future, or that it could be readily used surreptitiously.⁹⁸

U. S. 120, 28 L. Ed. 371, 4 Sup. Ct. 291.

95. Fox v. Knickerbocker Eng. Co., 158 Fed. 422.

96. U. S. R. S., §§ 4919, 4921.

97. Welling v. La Bau, 35 Fed. 302, per Coxe, J.: "The mere fact that a defense is unsuccessful does not warrant the court in punishing the defendant for interposing it. If he acts fairly and honestly in resisting the demands of his adversary, he does nothing worthy of censure, even though the debatable ground is contested inch by inch. On the contrary, where it is apparent that the defendant has been acting fraudulently and in bad faith; that he has been 'stubbornly litigious;' that his defense is without merit and interposed for delay, or to harass and injure the plaintiff and cause him unnecessary

annoyance and expense; where, in other words, the defendant's conduct is unlawful, unconscionable, and deserves punishment, the statutory relief should be given. Unless the cause is one of exceptional hardship, the motion should not be granted. Zane v. Peck, 13 Fed. 475; Schwarzel v. Holenshade, 3 Fish. Pat. Cas. 116; Brodie v. Mining Co., 4 Fish. Pat. Cas. 137; Guyon v. Serrell, 1 Blatchf. 244; Sanders v. Logan, 2 Fish. Pat. Cas. 167; Livingston v. Woodworth, 15 How. 546, 14 L. Ed. 809; Peek v. Frame, 9 Blatchf. 194. The limited number of reported cases upon this subject is proof of the care with which the courts have exercised the discretion given by the statute." Motion denied.

98. American Bell Telephone Co. v. Kitsell, 35 Fed. 521.

There is, however, no want of power or propriety to order property to be destroyed which has been created in defiance of the patentee's rights whenever it is essential to justice that this should be done. It is common in England to include an order to this effect in the decree.⁹⁹ And the power to make such a decree is recognized in this country, though rarely exercised.¹

§ 816. **Injunction barred by patentee's laches.**—The general rule is that an application for an injunction to restrain the infringement of a patent will not be entertained when it appears that the complainant, or those to whose rights he has succeeded, have acquiesced for a term of years in the infringement of the exclusive right conferred by the patent, or have delayed without legal excuse the prosecution of those who have openly violated it. From such silence and supineness, it is deemed the public has a right to assume that the patentee and his successors, if any, have relinquished their claim to the patent.² So where a patentee permits another to continue the infringement of his patent for several years with knowledge that the latter is building up a business and continually expending money in the equipment of a plant to manufacture the article which infringes upon his patent, the court will

99. *Frearson v. Loe*, L. R. 9 Ch. D. 67; *Betts v. De Vitre*, 37 L. J. Ch. 325; *Needham v. Oxley*, 8 L. T. (N. S.) 604. And see *Emperor v. Day*, 2 Giff. 628, where Kossuth, who assumed to be president of Hungary, and had caused notes to be prepared which he intended to issue as public paper money, was ordered to deliver up the notes and plates to be destroyed.

1. *Birdsell v. Shallol*, 112 U. S. 485, 487, 28 L. Ed. 768, 5 Sup. Ct. 244.

2 *Germer Stove Co. v. Twentieth Century H. & V. Co.*, 157 Fed. 842; *Kittle v. Hall*, 29 Fed. 508; *Piatt v. Vattier*, 9 Pet. 405, 9 L. Ed. 173; *Wyeth v. Stone*, 1 Story, 273; *Mc-*

Laughlin v. Peoples R. Co., 21 Fed. 574; *Speidell v. Henrici*, 15 Fed. 753; *The Fleming*, 9 Fed. 474; *Estes v. Worthington*, 22 Fed. 822; *Barden v. Duluth*, 28 Fed. 14; *Wagner v. Baird*, 7 How. 234, 12 L. Ed. 681; *Concord City v. Norton*, 16 Fed. 477; *Badger v. Badger*, 2 Wall. 87, 17 L. Ed. 836; *Wollensak v. Reiher*, 115 U. S. 101, 29 L. Ed. 350, 5 Sup. Ct. 1132, 1137; *Brown v. Buena Vista County*, 95 U. S. 157, 24 L. Ed. 422; *Lansdale v. Smith*, 106 U. S. 391, 27 L. Ed. 219, 1 Sup. Ct. 350; *Godden v. Kimmell*, 99 U. S. 201, 25 L. Ed. 431; *Maxwell v. Kennedy*, 8 How. 210, 12 L. Ed. 1051; *Sperry v. Ribbans*, 3 Ban. & A. 260.

not grant a preliminary injunction.^{2a} And where a defendant has been manufacturing an infringing article for ten or eleven years, and the patentee has known of it for five or six years without making objection, a preliminary injunction will not be granted to restrain the infringement.³ The poverty or pecuniary embarrassment of a patentee is not a sufficient excuse for postponing the assertion of his rights or preventing the application of the doctrine of laches.⁴ But where the laches relied on consist of a mere delay only and there is no element of estoppel shown, a complainant will not be deprived of his right to an injunction on the final hearing.⁵

§ 817. **Laches continued.**—The test case involving the validity of the Edison patent for incandescent electric lamps was brought in May, 1885, and prosecuted with all due diligence. After its determination another suit was begun against defendant corporations which were not organized until a year or two after the commencement of the test suit, and did not commence active operations in incandescent lighting until three years after that date, and it was held that plaintiffs had not been guilty of such unreasonable delay or laches in commencing suit as to deprive them of the right to a preliminary injunction.⁶ Where, on motion for a pre-

2a. *Blakey v. Kurtz*, 78 Fed. 368, so holding in the case of a delay for five years. See *Safety Car H. & L. Co. v. Consolidated Car Co.*, 160 Fed. 476.

3. *Waite v. Chichester Chair Co.*, 45 Fed. 258.

In an action for infringement of letters patent, where it is shown that defendants took a license from plaintiff to make and vend the patent, and subsequently denied plaintiff's rights and claimed to make under another patent; that shortly after such denial plaintiff became bankrupt, and the assignee in bankruptcy sold the patent after two years; that plaintiff tried to get back the patent from the vendee; that though the vendee took no steps to prevent the patent being

plundered, plaintiff gave defendants notice he intended to hold them accountable for their infringements; that after his discharge in bankruptcy and he had reacquired the patent, plaintiff sued defendant for infringement, it was held that the court, sitting in equity, would, considering all the circumstances, take jurisdiction of the cause, even after a delay of seven years. *Kittle v. Hall*, 29 Fed. 508.

4. *Leggett v. Standard Oil Co.*, 149 U. S. 287, 13 Sup. Ct. 902, 37 L. Ed. 737; *Hayward v. National Bank*, 96 U. S. 611, 618, 24 L. Ed. 855.

5. *Taylor v. Sawyer Spindle Co.*, 75 Fed. 303, 22 C. C. A. 203; *Sawyer Spindle Co. v. Taylor*, 69 Fed. 837.

6. *Edison Elec. Light Co. v. Mt.*

liminary injunction, it is shown that six months prior to commencement of the suit complainant's attorneys visited the factory of respondent, and there saw in operation respondent's machine, and it further appears that complainant had then pending, but undecided, in the same circuit a suit against another party upon a machine involving some, if not all, of the questions involved in the case at bar, complainant had a right to wait until a decision was rendered in the suit against the other party before bringing suit against respondent; and, where complainant commenced his suit against respondent two weeks after the decision against such other party in the other case, he is not guilty of laches such as

Morris, etc., Co., 57 Fed. 642, per *Curiam*: "This defense of laches or delay on the part of the owners of the patent was urged upon the Court of Appeals at very great length, upon most voluminous evidence, in *Edison Electric Light Co. v. United States Electric Lighting Co.*, 52 Fed. 300, 3 C. C. A. 83; and that court decided that no case was shown to authorize the refusal of an injunction on any theory of laches or equitable estoppel, by reason of undue delay in bringing suit, or acquiescing in known infringement. Subsequently, the same point was urged upon the same court, again at great length, in *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 53 Fed. 592, 3 C. C. A. 605, and the same opinion expressed. The facts presented here do not change the situation, so far as the complainants are concerned. The same measure of delay is also shown, and the same excuse for that delay is also shown. Twice has the Court of Appeals held that the original test suit (that against the United States Electric Lighting Company) was timely begun, and pressed with proper diligence. It has also held that, such suit proceeding with due dili-

gence, no other infringers of the patent can be heard to complain, with reason, that separate suit was not brought against them. Further discussion of the same facts in this court is unnecessary and out of place. The situation is not changed by the circumstances that these are different infringers, with a different history from that of the defendants in the earlier suits. No doubt, in determining whether, in any particular case, there has been such delay or laches as will effect a party's right to the aid of a court of equity, there are always two things to be considered—the delay of the one party, and the effect of that delay upon the other; and, where a person has unreasonably delayed taking some particular action, that delay is sometimes not charged against him, where it is shown it operated in no way to the other's prejudice. Where, however, the court holds that there has been no unreasonable delay, but due diligence shown by the one party, I am not aware of any authorities which support the contention that he must be denied relief because he was not quite diligent enough to prevent the other party from making invest-

will disentitle him to a preliminary injunction.⁷ On a motion for a preliminary injunction against infringing a patent, complainant cannot be held guilty of laches because a suit on the same patent was pending in another circuit in June, which might have been heard at the October term following, if complainant had labored diligently during July and August.⁸

§ 818. **Laches in applying for reissue.**—Where a bill to restrain by injunction an alleged infringement of reissued letters patent sets forth the issue of the patent and a reissue with expanded claims after a lapse of two or more years, and furnishes no sufficient explanation of the cause of delay, it presents a question of laches which may be availed of as a defense upon general demurrer, for want of equity, and whether such delay is reasonable or unreasonable is a question of law for the determination of the court, and not a question of fact for the Patent Office.⁹ But

ments which have proved improvident. As the Circuit Court of Appeals has held that other infringers cannot complain because only one test suit—that against the United States Company—was brought, and has further twice held that that suit was prosecuted with due diligence, and as the defendants here were not even organized till a year or two after the institution of that suit, in May, 1885, and did not begin active operations in incandescent lighting till three years after that date, there seems to be nothing left for this court to decide on that branch of the case."

7. *Norton v. Eagle, etc., Can Co.*, 57 Fed. 929, per Hawley, J.: "It appears to me that, with the knowledge which both parties have been shown to possess in this case, the complainants having established the validity of the Norton patent and its infringement by Jensen, in the case of *Norton v. Jensen*, and having com-

menced the suit against Wheaton, they had a right to wait until that suit was determined before bringing suits against other parties, and especially as against parties who had full knowledge of all of the facts with reference to the adjudications with respect to the respective patents. I do not think that complainants can be charged with laches for waiting until that suit was decided, which was only about two weeks, or thereabouts, before the commencement of this action. The parties had a right to wait until it was determined by the court whether or not the Wheaton patent was an infringement of the Norton patent, because, as I said, it involved many, at least, of the same questions that are involved in this case, and it also appears to me plain that the respondent could not have been misled by their delay."

8. *Carter v. Wollschlaeger*, 53 Fed. 573.

9. *Wollensak v. Reiher*, 115 U. S.

where the defendant does not deny the fact of infringement but alleges in defense that the complainant was guilty of laches in applying for a reissue, the court will not on this ground refuse a preliminary injunction where the Circuit Court of Appeals has determined the validity of the reissue patent.¹⁰

§ 819. Effect of laches where infringement admitted.—An unexplained delay of seven and a half years in bringing suit for infringement of a patent will deprive complainants of the right to a preliminary injunction, and perhaps to an account; but, inasmuch as it would be inequitable to allow an admitted infringement to continue in the future, a court of equity will entertain jurisdiction to grant an injunction notwithstanding such laches, and overrule a demurrer based on the ground that the long delay in bringing the suit deprives the complainant of standing in a court of equity.¹¹

96, 29 L. Ed. 350. And see *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783; *Mahn v. Harwood*, 112 U. S. 354, 28 L. E. 665. In *Wollensak v. Reiher*, *supra*, *Matthews, J.*, said: "This rule of equity pleading applies in analogous cases; as where it otherwise appearing on the face of the bill that the claim is stale, or is barred by lapse of time and it is sought to avoid the effect of such bar on the ground that the fraud complained of was concealed, and has been only recently discovered, it is necessary that the particular acts of fraud or concealment should have been set forth by distinct averments as well as the time when discovered, so that the court may see whether by the exercise of ordinary diligence the discovery might not have been before made. *Beaubien v. Beaubien*, 23 How. 190, 16 L. Ed. 484; *Stearns v. Page*, 7 How. 819, 12 L. Ed. 418; *Moore v. Greene*, 19 How. 69, 15 L. Ed. 533; *Marsh v. Whitmore*, 21 Wall. 178, 185, 22 L. Ed. 482; *God-*

den v. Kimmell, 99 U. S. 201, 25 L. Ed. 431; *Wood v. Carpenter*, 101 U. S. 135, 25 L. Ed. 807; *Lansdale v. Smith*, 106 U. S. 391, 27 L. Ed. 219."

10. *Thomson-Houston Elec. Co. v. International Controller Co.*, 141 Fed. 128.

11. *Price v. Joliet Steel Co.*, 46 Fed. 107, per *Gresham, J.*: "The demurrer admits that the complainants own the patent; that it is valid and for a valid invention; that the public has generally respected it; that the defendant has derived large gains by unlawful infringement and is prepared and expects to continue the trespass during the remainder of the life of the patent. Assuming that the complainants and their predecessors in ownership were guilty of laches in asserting their right to the invention, infringement under no claim of right is admitted, and it would be inequitable to allow it to continue during the remaining two years of the patent. An injunction would stop the trespass and prevent

The mere fact that eight years have elapsed between the rendering of a judgment declaring a patent valid and the filing of a bill to restrain its infringement, does not render it demurrable on the ground of laches, and the question of laches may properly be deferred until the final hearing.¹²

§ 820. **Failure to mark device as patented not a bar.**—Where the infringement is shown, the failure of the patentee to mark the devices “Patented,” with the date of the patent, will not affect his right to an injunction, whatever may be its bearing on the question of damages.¹³

§ 821. **Defendant’s bond instead of injunction.**—A court will frequently refuse to grant a preliminary injunction either upon condition that the defendant give, or where he offers and does give, a bond or undertaking securing the complainant against any loss or damages which he may sustain in case of a final decree in his favor.¹⁴ So where the validity of certain patents had never been

a multiplicity of actions at law, which would be expensive and afford inadequate relief. In *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828, which was a suit for infringement of a trade-mark and an account, the court said: ‘Equity courts will not in general refuse an injunction on account of delay in seeking relief when the proof of infringement is clear, even though the delay may be such as to preclude the party from any right to an account for part profits.’”

12. *Bragg Mfg Co. v. Hartford*, 56 Fed. 292. And see *Root v. Railway Co.*, 105 U. S. 189, 26 L. Ed. 975; *Burdell v. Comstock*, 15 Fed. 395; *Dick v. Struthers*, 25 Fed. 103.

13. *Anderson v. Monroe*, 55 Fed. 398, per *Buffington, J.*: “It is alleged that Anderson, having simply stamped his mantels, ‘Our Designs

Patented,’ and omitted the date, until October or December, 1890, respondent cannot in any way be held liable for a sale made in August, 1890, before he knew of the issue of the patent. What the effect of this might be, were it the sole issue, and the only infringement, we are not called upon to discuss, for the respondent tendered a number of other issues, denied novelty and patentability, which have not been sustained. And it has been held (*Goodyear v. Allyn*, 6 Blatchf. 33, and *Association v. Tilden*, 14 Fed. 741; 2 Rob. Pat., § 628, note 4) that this omission does not affect the right to an injunction, however it may affect the question of damages. We are of opinion the complainant’s bill must be sustained. But see *Anderson v. Germain*, 48 Fed. 295.”

14. *Westinghouse Air Brake Co. v.*

denied except by one other party who, after suit brought for infringement, compromised it, and ever after paid a royalty, it has been decided that on an application in another suit for a preliminary injunction, the infringement being plain, the patents would be presumed to be valid and the injunction granted unless defendants gave a sufficient bond to secure any damages decreed against them.¹⁵ And where a corporation charged with infringing a patent was found with a small capital in order to avoid liability for such infringement, it is proper, as a condition of refusing a preliminary injunction against such corporation, to require it to give security for observing the decree in case it should be defeated in the suit.¹⁶ And where the patentee has made no use of his patent, an interlocutory injunction should not be granted him, if defendant will give security.¹⁷ And in a recent case in the Circuit Court of Appeals, in which it appeared that the patent would expire in a short time, it was said that it might be that the Circuit Court should make an alternative provision so that the respondent corporation might at its option be relieved from an injunction if it compensates the plaintiff for profits, damages and royalty or the equivalent thereof, so far as the complainant may be justly entitled to all or any of them, or if it satisfies the court that it will so compensate the complainant by giving security therefor or otherwise.¹⁸ And in this connection it has been decided in England that a complainant will be refused an injunction where an undertaking is given by the defendant that he will not infringe the patent and also securing to the complainant the relief desired and the payment of his costs.¹⁹ But a bond should not be substituted for an injunction when defendant is not a manufacturer, but merely a user, and the value of the infringing articles used is but

Burton Stock Car Co., 77 Fed. 301, 23 C. C. A. 174, 33 U. S. App. 692. See, also, cases cited in this and the following sections.

15. *Palmer v. Mills*, 57 Fed. 221. And see *Consolidated Roller Mill Co. v. Richmond, etc., Works*, 40 Fed. 474; *Macbeth Co. v. Lippencott Glass Co.* 54 Fed. 167.

16. *Edison Elec. Light Co. v. Columbia Light Co.*, 56 Fed. 496. And see *New York Belting Co. v. Magowan*, 23 Fed. 596.

17. *Hoe v. Knap*, 27 Fed. 204.

18. *Draper v. American Loom Co.*, 161 Fed. 728 (C. C. A. 1908). Per Putnam, J.

19. *Jenkins v. Hope* [1896], 1 Ch.

trifling.²⁰ And one who invests his money in an infringing business, knowing that the patent has been sustained by the Federal Supreme Court, will not be permitted to give a bond for damages instead of submitting to an injunction, merely because the patent will expire in a few months.²¹

§ 822. **Same subject; illustrations.**—In further illustration of the general rule considered in the preceding section, a bond was ordered instead of enjoining defendant, where a decision of the Supreme Court rendered the law of the case questionable;²² and pending a writ of error in the Supreme Court;²³ and where the defendant's machine involved valuable features not covered by plaintiff's patent;²⁴ and which could not be used without the original;²⁵ and where there were two patents, one valid and the other doubtful, and an injunction on the valid patent would operate as an injunction on the other;²⁶ and where the patent is not denied and the infringement is clear, but there has been no adjudication and the evidence of public acquiescence is insufficient and no claim was made on defendant for three years;²⁷ and where the defendant was responsible and intended to make a contest;²⁸ and where the defendant is not only responsible, but the priority is doubtful and the plaintiff grants licenses;²⁹ and where the patentee had never used his invention or permitted others to use it;³⁰ and where the injunction would do the defendant irreparable injury, or would injure him more than it would benefit plaintiff;³¹ and

278, 73 Law T. Rep. 705, 65 L. J. Ch. N. S. 249.

20. *Carter v. Wollschlaeger*, 53 Fed. 573.

21. *American Bell Tel. Co. v. Western Tel. Co.*, 58 Fed. 410.

22. *Eastern Paper Bag Co. v. Nixon*, 35 Fed. 752.

23. *Wells v. Gill*, 6 Fish. Pat. Cas. 89.

24. *Stainthorp v. Humiston*, 2 Fish. Pat. Cas. 311.

25. *Howe v. Morton*, 1 Fish. Pat. Cas. 586.

26. *Goodyear v. Hills*, 3 Fish. Pat. Cas. 134.

27. *Sykes v. Manhattan Elevator Co.*, 6 Blatchf. 496.

28. *American, etc., Purifier Co. v. Christian*, 4 Dillon, 448.

29. *National Hat Pouncing Co. v. Hedden*, 29 Fed. 147. And see *Mc-Millan v. Conrad*, 16 Fed. 128; *Greenwood v. Bracher*, 1 Fed. 856.

30. *Hoe v. Knap*, 27 Fed. 204. And see *Westinghouse Air Brake Co. v. Carpenter*, 32 Fed. 545.

31. *Eastern Paper Bag Co. v.*

be a serious inconvenience to the public;³² and where the defendant has acted in good faith and his device is essential to his business and is made under a later patent.³³

§ 823. **Royalty instead of injunction.**—On a bill to restrain the infringement of a patent for an improvement which constitutes but a small part of the machine, when the question of infringement is open, and defendant avers that he had no knowledge of complainant's patent before suit brought, and that he obtained no aid from the invention specified in it, and for some years has manufactured the improved machines, a preliminary injunction will be refused, on condition that defendant files periodical statements of the number manufactured since suit brought, and deposits with the clerk a reasonable royalty for each, and files a bond for performance and for payment of damages.³⁴ And where, in a suit for the infringement of letters patent issued for improvements in sewerage and draining towns, it appeared that defendant had paid a royalty on the flush tanks used, and that, before it put in its system of sewers, plaintiff had notified defendant, in response to a question, that he claimed a royalty of ten cents per foot, it was held that, defendant having acted under an implied license, a bill for injunction and accounting would not lie; the proper remedy being an action at law for recovery of the royalty.³⁵ And an injunction will not be granted at the instance of a manufacturer of an infringing machine, to restrain the collection of a royalty from the user of such machine, although the manufacturer, in a suit against him for his infringement, has included the machine in an accounting had before the master, no final decree having been entered against him, and nothing having been paid by him to the owner of the patent.³⁶

Nixon, 35 Fed. 752; McCrary v. Pennsylvania Canal Co., 5 Fed. 367; Dorsey, etc., Rake Co. v. Marsh, 6 Fish. Pat. Cas. 387.

32. Westinghouse Air Brake Co. v. Burton Stock Car Co., 77 Fed. 301, 23 C. C. A. 174, 33 U. S. App. 692.

33. United States Bell Tel. M'fg Co. v. Sanderson, 3 Blatchf. 184.

34. Eagle M'fg Co. v. Chamberlain Plow Co., 36 Fed. 905.

35. Drainage Construction Co. v. City of Chelsea, 41 Fed. 47.

36. Tuttle v. Matthews, 28 Fed. 98.

§ 824. **Balancing convenience and equities.**—The fact that a manufacturer charged with infringement has been so engaged for a long time without opposition and has an extensive business, is strongly adverse to the granting of a preliminary injunction against him.³⁷ The balance of convenience in such cases is frequently a determining factor upon the question of granting a preliminary injunction.³⁸ And a provisional injunction will not be granted, against the infringement of a patent whose validity is dependent upon the result of an appeal in a former suit for its infringement, where it appears that defendant has been carrying on its business in good faith, and in ignorance of the alleged infringement, and that a stoppage would be an irreparable injury, while plaintiff has an adequate remedy in damages.³⁹ And where the owner of a patent for an invention used in car couplings is not merely a user of the patent, but licenses its use by others, a railroad company will not be temporarily enjoined, in a suit for infringement and damages, from using such infringing couplings as it already has in use, where the parties are wide apart in their views as to the proper amount of royalty, but may be enjoined from the use of any others which may infringe.⁴⁰ But where it appears that the infringement by the defendant was done with full knowledge by him of the rights of the complainant the question of the balance of convenience will not influence the court upon the question of granting a preliminary injunction,⁴¹ as infringers are not entitled to consideration where they have entered upon their business with full knowledge of its risks and of adverse adjudications.⁴² So

37. *Johnson v. Aldrich*, 40 Fed. 675; *Root v. Mt. Adams, etc., R. Co.*, 40 Fed. 760; *Hurlburt v. Carter*, 39 Fed. 802; *Hat Sweat M'fg Co. v. Davis, etc., Co.*, 32 Fed. 401; *Southwestern Brush, etc., Co. v. Louisiana, etc., Co.*, 45 Fed. 893; *Stahl v. Williams*, 52 Fed. 648.

38. *American Sulphite Pulp Co. v. Great Northern Paper Co.*, 159 Fed. 167; *Bowers Dredging Co. v. New York Dredging Co.*, 77 Fed. 980.

39. *Consolidated Roller-Mill Co. v. Richmond City Mill-Works*, 40 Fed. 474.

40. *Campbell Printing-Press Co. v. Manhattan R. Co.*, 47 Fed. 663.

41. *United Indurated Fibre Co. v. Whippany Mfg. Co.*, 87 Fed. 215, 30 C. C. A. 615, 57 U. S. App. 270, so holding where the organizer and manager of the defendant corporation was previously connected with another corporation against which an injunction had been granted for infringement of the same patent at the time of his connection with it.

42. The owner of letters patent for an incandescent electric light, having seasonably brought suit in 1885

where a patent has been fully adjudicated and held valid by the court of last resort, and the respondent, though aware of this fact, builds and puts in operation infringing machines at large expense, and enters into large contracts for operating the same, relying upon the opinions of his experts, as opposed to the decision of the court, that said machines are not an infringement, he cannot avert a preliminary injunction on the ground of hardship; it being clear to the court that, under the prior adjudications, his machines are an infringement.⁴³

against the United States Electric Lighting Company for infringement, no other company engaged in manufacturing infringing lamps can complain that the owner of the patent was guilty of laches in not bringing suit against it for infringement prior to the decision of that case in the Circuit Court (October 4, 1892), for all persons interested in having the patent defeated must have been familiar with the litigation, and with the fact that it was very expensive and arduous, and they entered upon their business with an understanding of its risks, and of the consequences which would befall them as infringers if the patent should be sustained. *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 53 Fed. 592, 3 C. C. A. 605.

43. *Norton v. Eagle Automatic Can Co.*, 57 Fed. 929, per Hawley, J.: "It is shown in this case that the Norton patent has been upheld in the suit of *Norton v. Jensen*, in the Circuit Court of Appeals in this circuit (1 C. C. A. 452, 49 Fed. 859); and also in the case of *Norton v. Wheaton*, 57 Fed. 927. I understand the rule to be well settled that, where the validity of a patent has been sustained, as in this case, by prior adjudication in the same circuit, the only question open before the court,

on motion for a preliminary injunction, in a subsequent suit against other parties, is the question of infringement; and that the consideration of all other questions should be postponed until all of the testimony is taken in the case, and the case is presented upon final hearing. There is, perhaps, an exception to this rule, that in cases where new evidence is presented, that is itself of such a conclusive character that if it had been presented in the former case it would probably have led to a different conclusion. The burden, however, of showing this is upon the respondent. The record shows that respondent, prior to the time of operating its machines, had submitted the matter of its infringement to several experts. It shows that it was informed by experts, many of whose affidavits were presented in this case, that the Kendall patent was not an infringement upon the Norton patent. It is therefore claimed that the respondent acted in good faith in proceeding to erect expensive machinery and enlarging its business. It is unnecessary, in this proceeding, to question the good faith of the respondent. If it relied upon the opinion of experts as opposed to the decision of the court in *Norton v. Jensen*, it shows that re-

§ 825. **Same subject.**—A preliminary injunction against an alleged infringement will not be granted where the proofs leave complainant's case in doubt, when defendants pecuniary responsibility is not questioned, and when very serious injury would be caused to defendant's business by the injunction, while no irreparable damage would accrue to complainant by a denial of it.⁴⁴ And

spondent took the chances of having that matter determined by the court. In other words, the affidavits offered in this case clearly showed that the respondent, in erecting its machinery, acted with its eyes wide open as to the exact condition of affairs concerning those patents, and took the chances of having it determined by the court in its favor that the Kendall patent was not an infringement of the Norton machine." On a motion for a preliminary injunction in a suit for infringing the Edison patent for incandescent electric lamps, defendants claimed that they were mere users, who installed plants prior to the decision establishing the validity of the patent, and were misled by the obscurity of the patent, and the conflict of foreign decisions, into investing large sums of money in their plants, and asked that complainants be compelled to supply lamps on reasonable terms, on the ground that otherwise defendants' plants would be rendered valueless. The business of defendants was the furnishing of incandescent electric lighting to consumers. It was held that the equities of defendants were not superior to those of the patentees, who had engaged in a similar business relying on the patent, and had strenuously attempted to enforce their rights by suit, and ultimately succeeded, and that a preliminary injunction should issue, especially in view of the fact that defendants had failed to show that they could not

obtain incandescent lamps which did not infringe the patent. *Edison Electric Light Co. v. Mt. Morris Electric Light Co.*, 57 Fed. 642; *Same v. United Electric Light & Power Co.*, *Id.*

44. *Rogers Typographic Co. v. Linotype Co.*, 58 Fed. 693, per Acheson, J.: "The views of the experts of the respective parties to this suit, as expressed in their affidavits, are wide apart in material matters. Upon the *ex parte* affidavits and accompanying documentary evidence it cannot be confidently affirmed that the plaintiff's case is entirely free from doubt. The proofs lack completeness. Moreover, the defendant has an established manufacturing business, employing a great force of hands and a large capital. Interference therewith by a preliminary injunction would cause serious injury to the defendant. On the other hand, no irreparable damage can result to the complainant by the denial of summary relief. The pecuniary responsibility of the defendant is not questioned. These combined considerations lead to the conclusion that the court should avoid summary interposition. For such course, in the circumstances of this case, there are safe precedents. *Dickerson v. Machine Co.*, 35 Fed. 143; *Ironclad Mfg. Co. v. Vollrath Mfg. Co.*, 52 Fed. 143. It is hardly necessary to add that with respect to the ultimate rights of the parties the court has formed no opinion. They are to be

a preliminary injunction will not be granted where the affidavits of experts disclose a conflict that cannot be decided in complainant's favor without danger of unjustly interfering with the business of defendants, who are merely users of the device in question, and whose financial responsibility is not questioned.⁴⁵ But where it appears that defendants have kept and offered for sale an infringing article, an injunction will not be refused on a suggestion that an improper use may be made thereof by advertising to embarrass defendants in the sale of non-infringing articles, since it must be presumed that the injunction was sought in good faith, and, should the contrary appear, the court could reconsider its action.⁴⁶ And in a suit against a railroad company for infringement, defendant cannot escape the injunction on the ground of hardship to itself or to the public, since the decree may provide for a gradual removal from its cars of the patented article, so as not to cause the withdrawal from service of a large amount of rolling stock at any one time; and for that purpose the amount of rolling stock required and available for its business may be proved by affidavits or the oral examination of its superintendent as master mechanic.⁴⁷ And where an action was brought to restrain a publisher from using a printing press on the ground that it was an infringement upon the machines of the complainant, it was held that the question of inconvenience was not determinative of the right to the injunction where it appeared that the defendants still had in their possession the press previously used by them and that it could be again used at only slight trouble and expense.⁴⁸ And a preliminary injunction will not be denied

determined upon full proofs at final hearing. The motion for a preliminary injunction is denied." See, also, *Bowers Dredging Co. v. New York Dredging Co.*, 77 Fed. 980.

45. *Williams v. McNeely*, 56 Fed. 265.

46. *New York Belting Co. v. Gutta Percha Co.*, 56 Fed. 264.

47. *Westinghouse Air-Brake Co. v. Great Northern R. Co.*, 86 Fed.

132; *Campbell Printing-Press Co. v. Manhattan R. Co.*, 49 Fed. 930.

Compare *Westinghouse Air-Brake Co. v. Burton Stock Car Co.*, 77 Fed. 301, 23 C. C. A. 174, 33 U. S. App. 692, refusing an injunction in such case upon the condition that the defendant give a bond.

48. *Campbell Printing Press Co. v. Prieth*, 77 Fed. 976.

merely on the ground that the infringement is so small that it does not seriously imperil complainant's business.⁴⁹

§ 826. **Objection of public injury.**—An injunction against an infringer will be so framed as to inconvenience the public as little as possible.⁵⁰ And in many cases a preliminary injunction will be denied where to grant it would seriously inconvenience the public or endanger public safety.⁵¹ So where it appeared that no irreparable injury would be suffered by plaintiff if a preliminary injunction was refused, but that if enjoined the defendant railroad company would be forced to dispense with some of its appliances to the increased risk of public travel, the injunction was refused.⁵² And a preliminary injunction will not be granted *pendente lite* to restrain an electric light company, which is extensively engaged in the business of lighting the streets and other public and private places in a large city, from using certain patented lamps, when it appears that complainant is insolvent, without any plant or property of any sort, and unable itself to conduct the business of lighting, so that the injunction would greatly inconvenience the public, and seriously injure defendant, which would have to take out the lamps and substitute others, not so well adapted to the purpose, while it would be of no benefit to complainant, which is protected by defendant's ability to respond in damages should the infringement be established at the final hearing.⁵³ The question of public inconvenience should not, however, in all cases be controlling but due consideration should be given to the rights of the complainant, having in view the fact that the patent has conferred upon him an exclusive right and also the fact that a refusal to grant a preliminary injunction might cause him an irreparable injury in respect thereto.⁵⁴ The objection that public policy forbids the granting

49. *Carter v. Wollschlaeger*, 53 Fed. 573.

50. *Campbell Printing Press Co. v. Manhattan R. Co.*, 49 Fed. 930.

51. See *Westinghouse Air-Brake Co. v. Burton Stock Car Co.*, 77 Fed. 301, 23 C. C. A. 174, 33 U. S. App. 692.

52. *Root v. Mt. Adams, etc.*, R. Co., 40 Fed. 760.

53. *Southwestern Brush Elec. Light & Power Co. v. Louisiana, etc., Light Co.*, 45 Fed. 893.

54. *Bowers Dredging Co. v. New York Dredging Co.*, 80 Fed. 119; *Westinghouse Air-Brake Co. v. Bur-*

of an injunction cannot be raised by demurrer to the bill, since that is a question addressed to the discretion of the court, especially where the bill alleges a reason to fear that defendant will continue his infringements.⁵⁵

§ 827. **Plaintiff's right to be clear; not so defendant's.**—To entitle a patentee to a preliminary injunction, in cases of alleged patent infringements, not only should the validity of his patent be clear, either by prior adjudication or by public acquiescence, and the fact of the infringement be without reasonable doubt, but the defendant should also be shown not to be financially able to respond in damages. And where there is a substantial controversy, a preliminary injunction should not be granted if more likely to produce than to prevent irreparable mischief.⁵⁶ So a preliminary

ton Stock Car Co., 70 Fed. 619. See *New York Filter M. Co. v. Niagara Falls Waterworks Co.*, 80 Fed. 924, 26 C. C. A. 252, 51 U. S. App. 355.

55. *Bragg Mfg. Co. v. Hartford*, 56 Fed. 292.

56. *St. Louis Street F. M. Co. v. Sanitary Street F. M. Co.*, 161 Fed. 725 (C. C. A. 1908); *American Electrical Novelty & M. Co. v. Stanley & Patterson*, 142 Fed. 754 (C. C. A. 1905); *Wilson v. Consolidated Store S. Co.*, 88 Fed. 286, 31 C. C. A. 533, 50 U. S. App. 400; *Whippany Mfg. Co. v. United Indurated F. Co.*, 87 Fed. 215, 30 C. C. A. 615, 57 U. S. App. 270; *Bigelow Co. v. American Pneumatic Tool Co.*, 77 Fed. 988, 23 C. C. A. 603, 45 U. S. App. 350, 79 Off. Gaz. 2198; *Williams v. Breitling Metal Ware M. Co.*, 77 Fed. 285, 23 C. C. A. 171, 46 U. S. App. 254; *George Eitel Co. v. Stahl*, 65 Fed. 517, 13 C. C. A. 29, 24 U. S. App. 563; *Rogers Typographic Co. v. Mergenthaler Linotype Co.*, 58 Fed. 693; *Williams v. McNeely*, 56 Fed. 265.

In *Standard Elevator Co. v. Crane*

Elevator Co., 56 Fed. 718, 6 C. C. A. 100, *Jenkins, J.*, said: "The principles upon which courts of equity grant the writ of injunction in advance of a decree upon the merits are elementary. The purpose of the interlocutory writ is not to conclude the question of right, but to protect against material injury pending the litigation. In patent cases, to warrant the writ, not only must the infringement be without reasonable doubt, but the rights of the patentee must be clear. Failing prior adjudication in favor of the validity of the patent, there must be shown such continued public acquiescence in the exclusive right asserted as raises a presumption of validity, a presumption not arising from the letters patent, unless accompanied by public acquiescence. The object of the provisional remedy is preventive largely; and it will not be granted if it is more likely to produce, than to prevent, irreparable mischief. If the controversy between the parties be substantial, and not, as to the alleged

injunction against an infringement should not be granted when there is a doubt if the invention was not anticipated by another. The complainant in such a case must show a clear right, but a defense which puts that right in doubt is sufficient to defeat the application for an injunction.⁵⁷

§ 828. **Establishing right by jury.**—In England the more general rule was, but resting on the sound discretion of the court, not to grant a final injunction in patent cases, when the answer denied the validity of the patent, without sending the parties to a jury to have that question decided.⁵⁸ In the United States the courts do

infringer, colorable, merely, courts of equity are not disposed to adjudicate upon the rights of the parties otherwise than according to the approved usages of chancery, when the defendant's rights might, by the issuance of a writ of injunction, be put in great jeopardy, and the complainant can be compensated in damages. Without passing any opinion upon the complainant's right, or the defendant's infringement, it suffices to say that upon the proofs in the record we cannot declare that the right or the infringement is so clear from doubt as to warrant the issuance of a preliminary injunction. The evidence as to construction of claims and infringement, upon which the court below was called to pass, was largely and necessarily *ex parte*. There was no opportunity of probing the witnesses. Scientific expert evidence is not wholly reliable when not subjected to the searchlight of intelligent cross-examination. It would, we think, be most unsafe to determine this controversy without full and orderly proof. It would be most unwise to imperil, and presumably wholly ruin, the large capital and interests involved in the business of the

appellants, by arresting the enterprise in advance of a final decree, when the damages which the appellee may sustain can be compensated in money. The financial ability of the appellants to so respond has not, in our judgment, been successfully attacked."

57. *Edison Elec. Light Co. v. Columbia, etc., Light Co.*, 56 Fed. 496, per Hallett, J.: "There is not the measure of proof demanded by complainants' counsel, who maintain that the court should require proof of the fact of anticipation beyond reasonable doubt. This degree of certainty is not often attained upon testimony in the form of affidavits, where the issue is contested, and it is not reasonable to demand such certainty as to the defense. Complainants must show a clear right in support of a preliminary writ, and a defense which puts the case in doubt is sufficient to defeat the application. *Goodyear, etc., Co. v. Dunbar*, 1 Fish. Pat. Cas. 472; *Glaenzer v. Wiederer*, 33 Fed. 583; *Fraim v. Iron Co.*, 27 Fed. 457; *Cary v. Spring-Bed Co.*, 26 Fed. 38; *Rob. Pat.* 1171."

58. *Goodyear v. Day*, 2 Wall. Jr. 283; *Bacon v. Jones*, 4 Myl. & C. 433.

not always consider it a proper exercise of their discretion to order such an issue to be tried at law before granting a final injunction.⁵⁹ And it is often no objection to granting a final injunction that the patent has not been established at law and that no preliminary injunction has been applied for or granted in the suit.⁶⁰ In later years the tendency of courts of equity, both in England and this country, has been not to send patent cases to a jury, but to consider them themselves on full proof.⁶¹ A patentee is not always compelled to establish the validity of his patent in a suit at law as a condition precedent to injunctive relief, though where the validity of the patent is doubtful a court of equity may, in its discretion, require the doubt to be removed in a court of law before awarding an injunction against the alleged infringer.⁶²

§ 829. **Absence of equities illustrated.**—An injunction will not be granted to restrain an alleged infringement when there is a substantial controversy as to the equities of the parties.⁶³ And the question of infringement will not be determined on affidavits in a case where no serious injury will be done by postponing the decision until the final hearing.⁶⁴ And it has been decided that where, in a suit to restrain the infringement of two letters patent, complainants' title is uncertain, and the patents have never been adjudicated, and proof of acquiescence is inadequate, and infringement is not conclusively established, and defendant's financial ability is unquestioned, a preliminary injunction will not issue.⁶⁵

59. Buchanan v. Howland, 5 Blatchf. 151.

60. Buchanan v. Howland, 5 Blatchf. 151; Bacon v. Jones, 1 Beav. 387. And see Isaacs v. Cooper, 4 Wash. C. C. 259; Wilson v. Tindall, Webst. Pat. Cas. 730, note; Baily v. Taylor, 1 Russ. & M. 73, 76.

61. Potter v. Fuller, 2 Fish. Pat. Cas. 251.

62. Wise v. Grand Ave. R. Co., 33 Fed. 277.

63. Bowers Dredging Co. v. New York Dredging Co., 77 Fed. 980; Pullman v. Baltimore & O. R. Co., 5 Fed. 72; Smith v. Cummings, 1 Fish. Pat. Cas. 152.

64. Celluloid M'fg Co. v. Eastman, etc., Co., 42 Fed. 159; Fire Hose M'fg Co. v. Callahan, 41 Fed. 50; Carey v. Miller, 34 Fed. 392; New York Grape Sugar Co. v. American, etc., Co., 20 Blatchf. 386.

65. Dietz Co. v. Ham M'fg Co., 47 Fed. 320, per Coxe, J.: "Where these circumstances concur and the defendant's financial ability is unquestioned, a preliminary injunction should not issue except in extraordinary circumstances. If the court can see that there is any likelihood that the defendant may succeed on final hearing, it should not permit the writ of injunction to issue. Brown

§ 830. **Complainant's estoppel by acquiescence in Patent Office decisions.**—Where an applicant for a patent has acquiesced in the decision of the Patent Office that a certain feature of his invention is anticipated by a patent referred to, he is estopped to claim an infringement of that feature of his patent thereafter.⁶⁶ And where a patentee amends his application so as to exclude an improvement described in a rejected application cited by the Patent Office, and obtains a patent in such amended application, his assignee cannot enjoin, as an infringement, the use of the device described in the rejected application, even though the same was improperly cited.⁶⁷

v. Hinkley, 6 Fish. Pat. Cas. 370; *Keyes v. Smelting, etc., Co.*, 31 Fed. 560; *Tillinghast v. Hicks*, 13 Fed. 388; *Upton v. Wayland*, 36 Fed. 691; *Hurlburt v. Carter*, 39 Fed. 802; *Neilson v. Thompson*, Webst. Pat. Cas. 278; *Pavement Co. v. Elizabeth City*, 4 Fish. Pat. Cas. 189." On bill for the infringement of a patent, it appeared the patent had never been adjudicated, and that many infringing devices existed. An averment in the moving papers that the patent had been recognized by the public was not supported by the facts. The defense involved the validity of two patents. Defendant had invested large sums in business, with the knowledge of complainants, who were guilty of laches in asserting their rights. Defendant was amply responsible, and it appeared would suffer greater injury from a preliminary injunction than complainants would if it was refused. Held, that a preliminary injunction would not be granted even though defendant did not cast serious doubt on the validity of complainant's patent. *Hurlburt v. Carter*, 39 Fed. 802.

66. *Merritt v. Middleton*, 55 Fed. 976, per Townsend, J.: "Upon ci-

tation of anticipations the patentee canceled the first two claims for certain elements of the combination, leaving only the third and narrowest claim for all the elements combined, as therein described. The effect of such action on the part of the patentee is to confine him strictly to the limited scope of the invention as a combination, as described in the specification and stated in the claim. Having acquiesced in the construction placed upon his claims by the patent office, he is estopped to thereafter attempt to enlarge the scope of his invention beyond the precise terms of the grant. *McCormick v. Talcott*, 20 How. 402, 15 L. Ed. 930; *Keystone Bridge v. Phoenix Iron Co.*, 95 U. S. 274, 24 L. Ed. 344; *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303; *Roemer v. Peddie*, 132 U. S. 317, 10 Sup. Ct. 98, 33 L. Ed. 382; *Williams v. Shoe Co.*, 49 Fed. 245."

67. *Lapham Dodge Co. v. Severin*, 40 Fed. 762, per Gresham, J.: "By submitting to the decision of the office and amending his claim so as to exclude the Swinburn improvement. Heath excluded the defendant's board, and what he thus disclaimed

§ 831. **In cases of withdrawn patent; disclaimer.**—A patentee who has put his device into extensive use, and is receiving an income therefrom, may have an injunction against its infringement, though he has withdrawn it from a particular State because of legislative interference limiting the rate of charges.⁶⁸ But a preliminary injunction will not be granted to restrain alleged infringements of a patent in which there is a disclaimer of what is covered by another application, where a copy of such other application is not produced, so that the court can ascertain the extent of the disclaimer.⁶⁹

§ 832. **Estoppel further considered.**—The voluntary act of a patentee in causing his patent to be amended after issuance, so as to be limited to expire with a foreign patent secured by him, even though taken under the mistaken view that the law required such limitation to appear on the face of the patent, estops him, as against one who invested money in a manufacturing plant on the faith of his action, from claiming that the amendment was invalid and of no effect, or from relying upon a subsequent annulment of the amendment secured by him only a short time before the amended patent would have expired; and where the petition for correction, in such case, states that, while the inventor's American application was pending, "he applied for and obtained" letters patent for the same invention in several foreign countries,—enumerating such patents, with their dates,—and prays that the American patent may be amended so as to be limited to expire with the expiration of that one of them having the shortest time to run, the petition does not, by reason of the indefiniteness of

the complainant cannot now claim. The complainant insists that the Swinburn reference was waived by the patent office, but that position is fully met by the fact that Heath was obliged to accept a patent with a claim too narrow to cover all the features of the Swinburn board. The invention was for a combination; the claim is clear; Heath was not a pioneer in the art; and the patent must

be strictly construed. *Water Meter Co. v. Desper*, 101 U. S. 337, 25 L. Ed. 1024; *Goodyear Dental Vulcanite Co. v. Davis*, 102 U. S. 227, 26 L. Ed. 149."

68. *American Bell Tel. Co. v. Cushman Tel. Co.*, 36 Fed. 488.

69. *National Typographic Co. v. New York Typograph Co.*, 46 Fed. 114.

this language, put the public upon investigation as to the laws of the various countries, so as to affect them with notice that the British patent, which was the one first expiring, did not begin to run on the day of its date, but upon the day of its sealing and issuance.⁷⁰

§ 833. **Estoppel by acquiescence in defendant's acts.**—A complainant may be estopped from claiming an infringement of a patent by his acquiescence in defendant's repeated acts substantially the same as those which he now seeks to enjoin, if a sufficient reason for the acquiescence is not given.⁷¹ Thus, where it appears on a bill to restrain the infringement of a patent by making and selling duplicate parts of the patented machine, that defendants had been accustomed to make duplicate parts for plaintiff and its assignors, and to repair the patented machine for others, of which plaintiff was aware, a preliminary injunction should be denied.⁷² But while long continued acquiescence in an

70. *Edison Elec. Light Co. v. Buckeye Co.*, 59 Fed. 691, per Ricks, J.: "Even conceding that said petition was filed under mistaken advice as to the law, and that is asked only for such action as the patent office might lawfully take, and that the terms in which said action was invoked were such as to put the defendant upon its inquiry as to the law, it was nevertheless a solemn and public act, by which it limited the duration of its own patent to a term shorter than that granted in the original patent. The petition and prayer was for such a limitation, and the complainants are bound by such declaration and conduct. Can there be any doubt as to their right and power to have made such a declaration and abandonment of an existing right? Such power is clearly recognized in *Insurance Co. v. Mowry*, 96 U. S. 547, 24 L. Ed. 674."

71. *Empire Cream Separator Co. v. Sears, Roebuck & Co.*, 157 Fed. 238; *Mundy v. Kendall*, 23 Fed. 591; *Ladd v. Cameron*, 25 Fed. 37.

72. *Amazeen Machine Co. v. Knight*, 39 Fed. 612. In a suit for infringement of patent, for an "improvement in clamping apparatus for connecting street cars," etc., "with endless traveling devices," it appeared that neither the complainant nor the defendant were engaged in the manufacture or sale of gripping devices; that defendant's use of his device had been continued about four years without notice or intimation from complainant that he claimed for the patent in suit any construction that would interfere with defendant's use; that no irreparable injury would be suffered by complainant if a preliminary injunction were refused, but that the operation of such order might be disastrous to the de-

infringement of a patent may in some cases be fatal to a motion for a preliminary injunction yet it is decided that it will not on a final hearing prevent the court from granting such relief as may be just and equitable.⁷³ And where the questions involved depend solely on the construction of two patents which have been fully examined in many of the United States Circuit Courts, and an injunction at the final hearing appears to be inevitable, an injunction *pendente lite* will be granted, notwithstanding laches of the complainant in asserting its rights.⁷⁴

§ 834. **Employees' inventions.**—When an employee in a certain line of work, devises an improved method or implement for doing the work, and uses the employer's property and other employees to put his invention into practicable form, and permits the employer to use the invention, he may thereby give him such a license to use the invention as will disentitle him to enjoin his employer as an infringer of the patent.⁷⁵ And where, in an action for infringement, brought only a few days before the expiration of the patent, it appeared that the invention was made and patented while the patentees were in the employment of defendant, though they soon afterwards left it; that defendant had, with plaintiffs' knowledge and approval, used the invention prior to the issue of the patent, and such use had continued to the commencement of the suit, without any contract for compensation, though one of the patentees had notified defendant's president that, after he left its employment, defendant must pay for the use of the invention at the same rate that others paid, it was held that there was no ground for equitable interference to restrain such use for the few remaining days of the life of the patent by preliminary injunc-

defendant, and might increase the risk of travel in forcing defendant to do away with some of his appliances upon his cable road. Held, that a preliminary injunction would be denied. *Root v. Mt. Adams, etc., R. Co.*, 40 Fed. 760. And see *Hurlburt v. Carter*, 39 Fed. 802.

73. *Taylor v. Sawyer Spindle Co.*,

75 Fed. 303, 22 C. C. A. 203; *Empire Cream Separator Co. v. Sears, Roebuck & Co.*, 157 Fed. 238.

74. *Brush Electric Co. v. Electric Imp. Co.*, 45 Fed. 241.

75. *Lane & B. Co. v. Locke*, 150 U. S. 193, 14 Sup. Ct. 78, 37 L. Ed. 1049; *Solomons v. United States*, 137 U. S. 342, 11 Sup. Ct. 88, 34 L. Ed.

tion.⁷⁶ Where, however, complainant in a suit for infringement of a patent testifies that he made the invention before entering the employment of defendant, who testifies that certain changes in the design were made after such employment at his suggestion, which is denied by complainant, the invention will be held to be complainant's, since the defendant has the burden of proof.⁷⁷

§ 834a. **Employees' inventions; right of employer to; injunction; damages.**—The fact that a person is in the employ of another does not give the latter, independent of any agreement to that effect, the right to the invention or the patent thereon. In a recent case in Massachusetts the rule announced by the court is that the invention and the patent thereon belong to the inventor, to whom the patent has been issued, unless he has made either an assignment of his right or a valid and enforceable agreement for such an assignment, even though it was his duty to use his skill and inventive ability to further the interests of his employer by devising improvements generally in the appliances and machinery used in his employer's business.⁷⁸ And Judge Gray in a case before the United States Supreme Court, said: "A manufacturing corporation which has employed a skilled workman for a stated compensation to take charge of his work and to devote his time and service to devising and making improvements in articles there manufactured is not entitled to a conveyance of patents obtained by him for inventions made while so employed in the absence of express agreement to that effect."⁷⁹ In this connection it is de-

667; *McClurg v. Kingsland*, 1 How. 202, 11 L. Ed. 102.

76. *Keyes v. Eureka M'fg Co.*, 45 Fed. 199.

77. *Locke v. Lane & Bodley Co.*, 35 Fed. 289.

78. *American Circular Loom Co. v. Wilson* (Mass. 1908), 84 N. E. 133. Per Sheldon, J., who says that this is the settled doctrine of the Federal courts and cites *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; *Hapgood v. Hewitt*, 119 U. S. 226, 7 Sup. Ct.

193, 30 L. Ed. 369; *Sendebach v. Gillette*, 22 App. D. C. 168; *Pressed Steel Car Co. v. Hansen*, 137 Fed. 403, 71 C. C. A. 207, 2 L. R. A. (N. S.) 1172; *Barber v. National Carbon Co.*, 129 Fed. 370, 64 C. C. A. 40, 5 L. R. A. (N. S.) 1154; *Whitney v. Graves*, Fed. Cas. No. 17577; *Barry v. Crane Bros. Mfg. Co.*, 22 Fed. 396, 398.

79. *Dalzell v. Dueber Mfg. Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749.

cided in this case that where it is sought to enjoin an employee from disposing of letters patent taken out in his name the question is one wholly within the discretion of the court to determine whether it will issue, continue or dissolve an injunction and what terms, if any, it will impose upon either party and whether it will require the plaintiff to give any bond as a condition of issuing an injunction and that where no bond is ordered or given, the defendants are not entitled to an assessment of the damages sustained by them by reason of the injunction restraining them from disposing of the patents which by the final decree they were allowed to retain.⁸⁰

§ 835. **Defendant's solvency as defense.**—A preliminary injunction to restrain the alleged infringement of a patent should not be granted, where the financial ability of the defendant to respond in damages is not successfully attacked, and the proof of complainant's rights and defendant's infringement is not free from doubt.⁸¹ In accordance with the general rule as to the court's discretion, a preliminary injunction to prevent the infringement of a patent will not be granted in doubtful cases, where the defendant is able to respond in damages and will suffer greater injury if the injunction is granted than the complainant will if it is denied.⁸² The defendant's financial ability is a material fact to be considered on the application for a preliminary injunction, and unless his want of it is made to appear, the application should be denied, in those cases where damages will fully compensate him for the injury sustained.⁸³ In the absence of a prior adjudication of the validity of a patent and of proof of general

80. *American Circular Loom Co. v. Wilson* (Mass. 1908), 84 N. E. 133.

81. *Standard Elevator Co. v. Crane Elevator Co.*, 56 Fed. 718, 6 C. C. A. 100. And see *Williams v. McNeely*, 56 Fed. 265; *Hurlburt v. Carter*, 39 Fed. 802; *Ironclad M'fg Co. v. Vollrath M'fg Co.*, 52 Fed. 143.

82. *Hurlburt v. Carter*, 39 Fed. 802; *Consolidated Roller Co. v. Richmond, etc., Works*, 40 Fed. 474.

83. *American Ordnance Co. v. Driggs Seabury Co.*, 87 Fed. 947; *Overweight Counterbalance Elev. Co. v. Cahill & H. E. Co.*, 86 Fed. 338; *Westinghouse Air-Brake Co. v. Burton Stock Car Co.*, 70 Fed. 619; *Bur-*

acquiescence therein, the court will not grant an injunction *pendente lite* on a bill to restrain infringement, where the proof leaves it uncertain as to the patentability of the patented article, and where it appears that respondents have large and valuable property, and are perfectly solvent, and the measure of complainant's damages in case his patent is finally established can be easily ascertained.⁸⁴ And where a bill for an injunction alleged that complainants were the owners of certain patents on coal mining machines, and entitled to the exclusive right of sale thereof; that defendants were using machines that were of the same pattern as complainants' machine, without a license from complainants; and that such use was an infringement of complainants' patent, it was held that complainants were not entitled to a preliminary injunction, where it was shown that defendants were solvent.⁸⁵

§ 836. **Protecting patentee of improvements; proof of prior use.**—Two patents may be valid when the second invention is an improvement on the first, and if it includes the first, neither patentee can, without consent, use the other's invention; but a stranger who is enjoined from infringing the second patent cannot defend by setting up the existence of the first. And any defendant who, on being enjoined from infringing, sets up prior use and want of novelty as a defense, has the burden of proof upon him to establish the facts set up beyond all reasonable doubt.⁸⁶ In

leigh Drill Co. v. Lobdell, 1 Holmes, 450; Morris v. Lowell, 3 Fish. Pat. Cas. 67.

84. Kane v. Huggins Cracker & Candy Co., 44 Fed. 287.

85. Whitcomb v. Girard Coal Co., 47 Fed. 315; Same v. Mt. Olive Coal Co., Id.; Same v. Wolf Coal & Min. Co., Id.; Same v. Glendale Coal & Min. Co., Id.; Same v. Madison Coal Co., Id.

86. Anderson v. Monroe, 55 Fed. 398. In Cantrell v. Wallick, 117 U. S. 689, 9 Sup. Ct. 970, 29 L. Ed. 1017, a decree restraining a patent

infringement was affirmed on the following opinion of Woods, J.: "The first defense is based on the theory that a patent cannot be valid unless it is new in all its elements as well as in the combination, if it is for a combination. But this theory cannot be maintained. If it were sound, no patent for an improvement on a known contrivance or process could be valid. And yet the great majority of patents are for improvements in old and well-known devices, or on patented inventions. Changes in the construction of an old ma-

this connection the rule is announced in recent decisions of the United States Supreme Court that where a patent does not embody a primary invention, but only an improvement on the prior art, and the defendant's machines can be differentiated, the charge of infringement is not sustained and an injunction will not be

chine which increase its usefulness are patentable. *Seymour v. Osborne*, 11 Wall. 516, 20 L. Ed. 33. So a new combination of known devices whereby the effectiveness of a machine is increased, may be the subject of a patent. *Loom Co. v. Higgins*, 105 U. S. 580, 22 L. E. 241; *Hailes v. Van Wormer*, 20 Wall. 353, 26 L. E. 1177. Two patents may both be valid when the second is an improvement on the first, in which event if the second includes the first, neither of the two patentees can lawfully use the invention of the other without the other's consent. *Star Salt Caster Co. v. Crossman*, 4 Cliff. 568. Therefore, letters patent for an improvement on a patented invention cannot be declared void because they include such patented invention. Much less does it lie in the mouth of a party who is infringing both the improvement and the original invention to set up the existence of the first patent as an excuse for infringing the improvement. It is only the patentee of the original invention who has the right to complain of the use made of his invention. It remains to inquire whether prior use and want of novelty have been shown. The prior use and consequent want of novelty alleged by defendant was the making in 1866, and the use from that date until 1871, by Werner, of a box for enamelling mouldings, in which the invention described in the patent of the plaintiff was embodied. Werner testified to this making and

use, and to the further fact that in 1874 he sold the box to Ladd, who some time afterwards began using it. The burden of proof is upon the defendants to establish this defense. For the grant of letters patent is *prima facie* evidence that the patentee is the first inventor of the device described in the letters patent and of its novelty. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Lehnbeuter v. Holthaus*, 105 U. S. 94, 26 L. Ed. 939. Not only is the burden of proof to make good this defense upon the party setting it up, but it has been held that 'every reasonable doubt should be resolved against him.' *Coffin v. Ogden*, 18 Wall. 120, 124, 21 L. Ed. 821; *Washburn v. Gould*, 3 Story, 122, 142. On the question of infringement a comparison of the model of the complainant's patent with the model of the device shown to be in use by the defendants, makes it clear that the defendants have adopted substantially the invention of the plaintiff. It would baffle the ingenuity of the most skilled expert to show a substantial difference between the invention claimed by the plaintiff and that which it is conceded that the defendants use. It may be true, as contended by the defendants, that the device used by them is in some respects better than that of the plaintiff, but this cannot relieve them from the charge of infringement if the devices are substantially alike. The rule was well stated by Clifford, J., in render-

granted.⁸⁷ And where a patent is granted for a combination of elements already in use and is not for a pioneer invention the range of infringing equivalents is restricted to those which perform the same functions in the same way, and where this is not the result the charge of infringement is not sustained and an injunction will not be granted.⁸⁸

§ 837. **Infringer enjoined in spite of his promise.**—It does not necessarily follow that a preliminary injunction will not be granted against a person who has infringed a patent, but has stopped the infringement and promises to infringe no more. The granting of the injunction, in such a case, rests in the sound discretion of the court; for if the defendant intends to keep his promise, the injunction will not harm him, and if he does not, the complainant ought not to have his rights again invaded, and to be subjected to the expense of renewing his application.⁸⁹ The

ing judgment in *Machine Co. v. Murphy*, 97 U. S. 121, 125, 24 L. Ed. 935, where he said that ‘in determining the question of infringement the court or jury are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and to find that what thing is substantially the same as another, if it perform substantially the same function in the same way to obtain the same result; always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result.’

87. *Cimiotti Unhairing Co. v. American Fur Ref. Co.*, 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100; *Kokomo Fence Mach. Co. v. Kitselman*, 189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689.

88. *American Can Co. v. McGinnis*, 156 Fed 784.

89. *Sawyer Spindle Co. v. Turner*, 55 Fed. 979, per Townsend, J.: “A number of cases were cited on the hearing, as to whether the court should grant a preliminary injunction when the defendant has stopped infringement, and denies that he intends to thereafter infringe. While this is one of the questions which must necessarily rest in the discretion of the court, the preponderance of authority is to the effect that such a state of facts furnishes no reason for withholding the writ. The rule is well stated in *Robinson on Patents*, § 1191, approved in *Electrical Works v. Henzel*, 48 Fed. 377. Judge Robinson says: ‘The intention of the defendant to practice the invention in violation of the plaintiff’s rights may be shown from his past acts of infringement in reference to the same invention. . . . When the defendant has once knowingly invaded the exclusive domain of the

defendant cannot avert an injunction by merely showing that he has ceased to infringe, and has promised to infringe no more.⁹⁰ And where it appears that defendants have kept and offered for sale an infringing article, it is not unfair to issue a preliminary injunction, though they profess to have no present intention of continuing such sales.⁹¹ But an injunction to restrain infringement of a patent will not be granted against a corporation which has disposed of the business in which the patented device was used before the bill was filed, and has not since used it.⁹² And a preliminary injunction will not be issued if the infringement has ceased since the commencement of the suit.⁹³

§ 838. **Necessary averments of bill.**—A bill relied upon for a preliminary injunction against an infringement must allege either a prior adjudication of the patent's validity, or the complainant's use of his public rights, and the public acquiescence in such use,⁹⁴

plaintiff, there is a strong presumption that the wrong will be repeated, although he may have since desisted, and promised to refrain, or even sworn that it is his purpose no further to infringe. This presumption arises, whatever may have been the extent of the infringement, or the damage thence resulting to the plaintiff. The facts in the case of *Kane v. Candy Co.*, 44 Fed. 287, cited by defendant, only show that the question is one which rests in the sound discretion of the court. As against one of the respondent corporations, the court refused the writ because it was satisfied that said corporation, three months before the filing of the bill had sold out its plant, and retired from business. The complainants have shown past infringement by defendant. 'Nothing but a mere promise stands in the way of its doing so again. . . . If the defendant intends, in good faith, to keep its promise, the injunction will not harm it;

otherwise, it will be a security for the plaintiff that its rights will not again be invaded.' Judge Wales, in *Celluloid Mfg. Co. v. Arlington Mfg. Co.*, 34 Fed. 324; *White v. Walbridge*, 46 Fed. 526; *Facer v. Midvale Co.*, 38 Fed. 231; *Chemical Works v. Vice*, 14 Blatchf. 179; *Walk. Pat.*, §§ 676, 701. The application for a preliminary injunction is granted."

90. *Celluloid Mfg. Co. v. Arlington Mfg. Co.*, 34 Fed. 324.

91. *New York Belting Co. v. Gutta Percha Co.*, 56 Fed. 264.

92. *Kane v. Huggins Cracker Co.*, 44 Fed. 287.

93. *White v. Heath*, 10 Fed. 291; *Rumford Works v. Vice*, 14 Blatchf. 179; *Potter v. Crowell*, 1 Abb. U. S. 89; *Jenkins v. Greenwald*, 2 Fish. Pat. Cas. 37.

94. *Gutta Percha Mfg. Co. v. Goodyear, etc., Co.*, 3 Sawy. 542; *Parker v. Brant*, 1 Fish. Pat. Cas. 58; *Isaacs v. Cooper*, 4 Wash. C. C. 259; *Sullivan v. Redfield*, 1 Paine,

and must allege that the invention was not in public use or on sale for more than two years prior to the application for the patent by complainant, and that defendant is the owner of the alleged interfering patent.⁹⁵ General allegations as to infringement are not sufficient, but the particular facts must be set forth so that the court may determine if an injunction is necessary for the complainant's protection.⁹⁶ If the patent has expired, the bill must aver that the infringements were made during its life and in violation of it.⁹⁷ On an application for a preliminary injunction, the plaintiff cannot have the benefit of certain conditions contained on licenses taken by the defendant, by which he covenanted not to contest the validity of the patent, and to consent to the issuing of an injunction in case of a violation of the license agreement, if the bill does not aver that a license was granted by the plaintiff and accepted by the defendant.⁹⁸ Where no preliminary injunction is asked for, a bill to enjoin the infringement of a patent need not show that the complainant is engaged in making or selling the articles described in his patent, that such patent has been a source of profit to him, or that the validity of the patent has been established by prior adjudication or by public acquiescence;⁹⁹ for the power of the court under the statute to issue an injunction to prevent an infringement does not depend upon the magnitude of the injury which the plaintiff has suffered.¹

§ 839. **Multifarious bill.**—A bill which claims relief because of an alleged interference between the patents of plaintiff and defendant, and also because of defendant's alleged infringement of plaintiff's patent is not multifarious.² In a suit for the in-

452; *American Bell Tel. Co. v. Southern Tel. Co.*, 34 Fed. 803. And see *McCoy v. Nelson*, 121 U. S. 484, 487, 7 Sup. Ct. 1000, 30 L. Ed. 1017, where the bill was analyzed by Blatchford, J., and held to be sufficient in its averments as to public acquiescence, etc.

95. *Nathan Mfg. Co. v. Craig*, 47 Fed. 522.

96. *Kirby Bung Mfg. Co. v. White*,

1 Fed. 604, 1 McCrary, 155.

97. *American, etc., Boring Co. v. Rutland Marble Co.*, 2 Fed. 355.

98. *Tooth Crown Co. v. Mills*, 22 Fed. 659.

99. *Wirt v. Hicks*, 46 Fed. 71.

1. *Colgate v. Telegraph Co.*, 17 Blatchf. 308.

2. *Stonemetz Printers, etc., Co. v. Brown Folding Co.*, 46 Fed. 72; *Leach v. Chandler*, 18 Fed. 262; *Holliday v.*

fringement of the petition of a third party to be permitted to defend, which alleges that petitioner makes and sells certain machines which he is informed and believes complainant claims to be an infringement of the patent sued on, and that if successful in that case, complainant intends to sue petitioner for infringement, and that petitioner believes there is no infringement, but which fails to aver that petitioner's machines are identical with those made by defendant, or to show any privity with the latter, would, if granted, render the proceeding multifarious by including in one action different infringements of one patent by different persons and different machines, and must be denied.³

§ 840. **Surplusage in answer; prior public use of two years.**—On a bill for infringement of a patent granted under the statutes of 1836 and 1839, which invalidated patents because of a public use or sale of the invention prior to the application for a patent, the words "with the knowledge, acquiescence and consent of the inventor," in an allegation of prior use in the answer, are mere surplusage and may be disregarded.⁴ For under the statute of 1839 if more than two years before the application for a patent the invention covered by it was in public use, whether with or without the use of the subsequent patentee, the patent would be invalid.⁵

§ 841. **Demurrer to infringement bill.**—A demurrer to a bill for infringement must be overruled, unless the patent is so void on its face as to require no defense to a suit upon it.⁶ In another case a bill alleged that complainant, owning patents for button-fastening machines, had sold the patented machines upon condition that they

Pickardt, 29 Fed. 853; Swift v. Jenks, 29 Fed. 642. And see Electrical Accumulator Co. v. Brush Co., 44 Fed. 602.

3. Huston Electric Co. v. Sperry Co., 46 Fed. 75.

4. Campbell v. New York, 35 Fed. 504.

5. Andrews v. Hovey, 123 U. S.

267, 8 Sup. Ct. 101, 31 L. Ed. 160; Egbert v. Lippmann, 104 U. S. 333, 334, 26 L. Ed. 755.

6. U. S. Rev. Stat., § 4920; New York Belting Co. v. New Jersey Car Spring R. Co., 137 U. S. 445, 11 Sup. Ct. 193, 34 L. Ed. 742; Blessing v. Copper Works, 34 Fed. 753; Indurated, etc., Co. v. Grace, 52 Fed. 124;

be used only with fasteners made by complainant, and that defendants were manufacturing similar button fasteners, intended for use in complainant's machines, and were inducing purchasers of those machines to use such fasteners; and it prayed that defendants be restrained from making for sale, or selling, any fasteners, intended for use or capable of being used in the machines sold by complainant under such conditions, and from inducing purchasers of such machines to buy or use in them any fasteners other than those made by complainants. On the bill and affidavit substantiating its charges, complainant moved for a preliminary injunction. Defendants demurred to the bill, and opposed the motion for injunction, but subsequently their counsel withdrew from the case. It was held that orders should be entered, as upon default, overruling the demurrer and allowing an injunction, pursuant to the prayer of the bill.⁷ Objection to an immaterial allegation in a bill should be taken by exception and not by demurrer.⁸

§ 842. **Violation of injunction.**—Violation of an injunction is not excused by the fact that the infringing machine is made according to a junior patent, for, on a question of infringement, such patent cannot be introduced, even as *prima facie* evidence of a substantial difference; but if in such a case there does not appear to have been a wilful violation, the defendant may be mulcted with only a nominal fine and the costs of the proceedings.⁹ An

Goebel v. Supply Co., 55 Fed. 825; Rodwell Mfg. Co. v. Housman, 58 Fed. 870.

7. Heaton Peninsular Button-Fastener Co. v. Dick, 55 Fed. 23, 52 Fed. 667.

As to demurrable cases, see Mershon v. Pease Furnace Co., 24 Fed. 741; Bragg Mfg. Co. v. Hartford, 56 Fed. 292.

A complaint for the infringement of letters patent, which does not show that the invention was not in public use or on sale for more than two years prior to the application for patent, is insufficient on demurrer.

Blessing v. Copper Works, 34 Fed. Rep. 753, followed; Nathan Mfg. Co. v. Craig, 47 Fed. 522. A complaint for the infringement of letters patent which does not disclose that defendants are the owners of the alleged interfering patent, is insufficient on special demurrer. Nathan Mfg. Co. v. Craig, 47 Fed. 522.

8. Stonemetz Printers, etc., Co. v. Brown Folding Co., 46 Fed. 72; Stirrat v. Mfg. Co., 44 Fed. 142.

9. Norton v. Eagle Automatic Can Co., 59 Fed. 137, per McKenna, J.: "In Truax v. Detweiler, 46 Fed. 118, it was held on the authority of

injunction against an infringement will not be deemed violated where the continued use is clearly distinguishable from the use which is prohibited.¹⁰ And where, in a suit for infringement of a patent, a decree granting a perpetual injunction was entered by default and afterwards a second patent was issued for an invention similar to complainant's, and the defendant began to manufacture articles under such second patent, it was held that the court would not on motion declare defendant guilty of violating the injunction,

Onderdonk v. Fanning, 2 Fed. 568, that the issuing of a later patent is *prima facie* evidence that there are substantial differences between the devices described in the two patents; and, in the case cited from 2 Fed. Rep. it was decided that the new patent shows that the action of defendant was not so plainly colorable as to entitle plaintiff to an attachment against the defendant for contempt. It was also held as late as March 2d of this year, in Harrow Co. v. Hanby, 54 Fed. 493, that, in a suit for infringement, the fact that the defendant's machine is patented is *prima facie* proof that it does not infringe. To sustain this doctrine the court quotes Brown v. Selby, 2 Biss. 457 (a Circuit Court case), and quotes Burden v. Corning, 2 Fish. Pat. Cas. 477, 497, which case, as we have seen, was overruled in Blanchard v. Putnam. But the cases at circuit may be reconciled with Blanchard v. Putnam, applying them no further than affecting intention. At any rate, I cannot say, in view of them and the advice of counsel, that defendant acted in willful contempt of the order of the court. In view, however, of the construction of the Norton patent by the Circuit Court of Appeals, and the decisions on it of the Circuit Court, I do not consider defendant blameless. It would have been more considerate

to have taken the judgment of the court on the Merriam machine before using it, and risking disobedience of the order of the court and injury to plaintiff. Therefore, I think it should be punished by at least a nominal fine, and the cost of the proceedings." An injunction having issued restraining defendant from making any secondary or storage batteries embodying the invention covered by letters patent issued to Charles F. Brush, defendant subsequently, after a full hearing, procured, upon certain conditions, a modification thereof, allowing it to supply to a certain street railway company, with which it had a contract, certain batteries required by that company in renewal of batteries already furnished, which were of a size and form that complainants could not supply. Held, that, although the order of modification merely permitted defendant to "supply" such batteries, it must be construed to also permit defendant to supervise their operation according to the contract, and defendant was not guilty of contempt in so doing. Brush Electric Co. v. Accumulator Co., 53 Fed. 804.

As to violations of such injunctions, see, also, § 255 herein.

10. Celluloid Mfg. Co. v. Comstock, 23 Fed. 38.

complainant's remedy being to bring a new suit.¹¹ And a defendant who manufactures and sells a patented article, in violation of an injunction restraining him from doing so, should not be punished therefor as for contempt, where it appears that the complainant was in no way damaged by his acts, and that the prosecution for contempt was for the sole purpose of affording relief between the parties.¹² And where a motion is made to punish for contempt for violation of an injunction and the claim is put forth that the patent is a pioneer patent, it has been decided that the motion will be denied unless the claimants have either established the validity of the patent in a contested litigation or have been ready to do so without delay whenever an opportunity has been offered and there is sufficient doubt whether such patent is a pioneer patent.¹³ But where a person is enjoined from infringing an invention it is incumbent upon him to avoid not only what he is doing at the time but to refrain from otherwise infringing upon it and where he enters upon a different practice which is also an infringement he will be guilty of contempt.¹⁴ A new question as to the novelty of and the invention involved in a defendant's alleged infringing device will not be tried in a contempt proceeding.¹⁵

§ 843. **Dissolution of injunction.**—An injunction against infringement will not be dissolved where the evidence shows that

11. *Truax v. Detweiler*, 46 Fed. 117.

12. *People v. Diedrich*, 141 Ill. 665, 30 N. E. Rep. 1038.

13. *Electric Vehicle Co. v. De Dietrich Import Co.*, 157 Fed. 492.

14. *Blair v. Jeannette-McKee Glass Works*, 161 Fed. 355.

15. Defendants, having been enjoined from infringing letters patent issued January 30, 1883, to John G. Baker, for a machine for mincing meat, etc., constructed a machine in exact accordance with those claims, but having in addition thereto a detachable frame containing three sta-

tionary blades, through which the meat is pressed by the forcing screw, thus cutting it to some extent before it reaches the rotating knives. Plaintiff moved for an attachment for contempt, on the ground that the detachable frame was of no practical value, but defendants filed affidavits alleging that with the attachment from 21 to 38 per cent. more meat was cut than without it. Held, that this presented a new question, which could not be tried in a contempt proceeding. *Enterprise Mfg. Co. v. Sargent*, 48 Fed. 453.

on the final hearing the patent will not be defeated;¹⁶ nor will it be dissolved on the same facts as induced another judge to grant it.¹⁷ And where the owner of a patent, after long and expensive litigation, secured an injunction against infringement, and afterwards the defendant was allowed to amend his answer by setting up that the invention was covered by a Spanish patent, and that the same had recently expired, which allegation, if proved, invalidated plaintiff's patent, and plaintiff denied both allegations, it was held that defendant was not entitled to a dissolution of the injunction pending the hearing on the issues thus raised.¹⁸ In opposition to a motion for an injunction a general allegation by affidavit on information and belief, that the thing patented existed before, without disclosing the particulars of the information leading to the belief, is insufficient, and would be equally so on a motion to dissolve.¹⁹

§ 843a. **Dissolution of injunction continued.**—The burden of proof is on defendant to show cause for dissolving a temporary injunction, but nevertheless a dissolution will be granted upon new evidence sufficient to raise grave doubts as to the complainant's right to such injunction, and in particular where it is shown that defendant was honestly misled by complainant's conduct, and in good faith made considerable investments by reason of being so misled.²⁰ The injunction will be dissolved on the production of

16. *Richardson v. Croft*, 11 Fed. 800; *Woodworth v. Rogers*, 3 W. & M. 135.

17. *Hussey v. Whitely*, 2 Fish. Pat. Cas. 120; *Woodworth v. Rogers*, 3 W. & M. 135.

18. *Electrical Accumulation Co. v. Julien Electric Co.*, 47 Fed. 892.

19. *Young v. Lippman*, 5 Fish. Pat. Cas. 230.

20. *Edison Elec. Light Co. v. Buckeye Co.*, 59 Fed. 691, per Ricks, J.: "The application for a dissolution of the injunction is based upon evidence as to a fact which did not exist at the time the temporary in-

junction was allowed. At the time such application was made, the complainants' patent had not then expired, according to the limitation put upon it by its proceedings in the patent office. The rule is well settled that on such an application the complainants' rights to an injunction must be clearly established. While it is true that, on a motion to dissolve, the burden of proof is on the defendant, yet the rule is equally well settled that evidence which would prevent the allowance of an injunction would be sufficient to dissolve it, and that an injunction will be dissolved

evidence raising serious doubts as to the patent's validity;²¹ as where it is shown that the infringing device was known in the United States before the patent;²² or where it appears that the defendant was acting under a license.²³ And the expiration of a patent is held to *ipso facto* dissolve an injunction against its infringement and to leave nothing requiring the interposition of a

on new evidence raising grave doubts as to the complainant's right to the temporary injunction in force. The rule is well expressed by Judge Nixon in the case of *Cary v. Bed Co.*, 26 Fed. 38. In that case, the complainants' patent, for the protection of which a temporary injunction was asked, had been sustained by three different Circuits prior to the filing of the bill in Judge Nixon's district. Upon the strength of those prior adjudications, Judge Nixon ordered the injunction, 'without an examination of the merits, or expressing anything upon the validity of the patent.' But, upon motion to dissolve, new affidavits were offered to show prior use. After an examination of these affidavits, Judge Nixon says: 'It does not appear that such testimony of prior discovery, knowledge, and use of the invention was brought to the notice of either of the learned judges who granted the injunction in the other cases. . . . I do not think that I should have seen my way clear to allow the preliminary injunctions in the present case if it had been presented on the original motion, and the rule is a good one that the evidence which would prevent the issuing of an injunction ought to be regarded as sufficient to dissolve one already granted.' For the reasons hereinbefore stated, if, on the application for the injunction now in force, the facts now relied upon in support of the motion to dissolve had been avail-

able as a defense, I would not have allowed the temporary injunction. The complainants' right to such an injunction under such a defense would have been so doubtful that it would not have been entitled to it under the rules cited. To continue the injunction now, in view of these doubts, would certainly be a great hardship upon the defendant. According to the affidavits now before the court, the defendant is a solvent corporation. Under the Ohio law, the personal liability of the stockholders is an additional indemnity to which the complainants may look in case, upon a final hearing, its right to a permanent injunction should be established. As the case is now presented on the motion to dissolve, one of the two parties must suffer loss. If the injunction is continued, the defendant is wholly without remedy. It has shown that it was honestly misled by complainants' conduct, and in good faith made additional investments upon the belief so formed. The complainants cannot complain if, for this reason, the benefit of the doubts expressed are given to the defendant, and the injunction is dissolved."

21. *Cary v. Spring Bed. Co.*, 26 Fed. 38; *Hussey v. Whitely*, 2 Fish. Pat. Cas. 120.

22. *Young v. Lippman*, 9 Blatchf. 277.

23. *Goodyear v. Bourn*, 3 Blatchf. 266.

court of appellate jurisdiction and an appeal from the order granting such an injunction will be dismissed.²⁴ And where an interlocutory injunction was granted without notice to the defendants, upon the plaintiff's affidavit alleging that the defendants had conspired to injure the plaintiff's business as a dealer in gas burners by stating that one of the defendants owned a valuable patent in gas burners which the plaintiff was infringing and that purchasers from the plaintiff would be liable to suit for such infringement, it was held that the injunction was properly dissolved upon defendants' affidavits which denied all the material averments in the plaintiff's affidavits, and alleged in positive terms that the defendants owned the alleged patent and that the goods sold by the plaintiff were an infringement thereon.²⁵

§ 844. **Where plaintiff's right admitted or adjudicated.**—A bill will lie for an injunction to prevent the infringement of a patent where the patent right has been adjudicated or is admitted, and there is satisfactory proof of defendant's intention to infringe.²⁶ And where complainant has a clear title to a patent as assignee and licensee, and has made and sold the patented article for several years without any interference by others, and an infringement has already been enjoined in another circuit, the complainant is *prima facie* entitled to further protection against infringements.²⁷

24. Gamewell Fire-Alarm T. Co. v. Municipal Signal Co., 61 Fed. 208, 9 C. C. A. 450, followed in Lockwood v. Wickes, 75 Fed. 118, 21 C. C. A. 257; National Folding Box & P. Co. v. Robertson, 104 Fed. 552, 44 C. C. A. 29.

25. Walker v. Backus Heating Co., 97 Wis. 160, 72 N. W. 230.

26. Sherman v. Nutt, 35 Fed. 149.

27. On an application for a preliminary injunction to restrain infringement of letters patent No. 336,385, granted February 16, 1886, to Charles E. Chamberland for certain new and useful improvements in filtering compounds, it appeared that

complainant had an undoubted title to the patent as assignee and licensee; that it made and sold the article for several years without any attempt by others to make or sell the same; that the invention had been used from the date of the patent until 1892, only under license of the patentee; and that an interlocutory injunction had been granted in another circuit in a suit between the same parties. Held, that these circumstances created so strong a presumption of the validity of the patent as to authorize the issuance of a preliminary injunction, in the absence of clear proof of invalidity. Blount

An injunction should also be granted where, in other suits, the validity of the patent has been established and devices identical with defendant's have been held infringements.²⁸ And an injunction will issue if a *prima facie* case of infringement is made out, which defendant makes no effort to rebut.²⁹

§ 844a. **Prior adjudications; generally.**—It may be stated generally that, to entitle a complainant to a preliminary injunction restraining the infringement of a patent, it is essential that there should have been a prior adjudication establishing its validity or such public acquiescence as will raise a presumption thereof or other clear evidence to that effect.³⁰ And where the validity of a patent is established by a prior adjudication the only question ordinarily open to consideration is that of infringement so far as the right to a preliminary injunction is concerned.³¹ This latter rule, however, is not absolute but is only subject to the qualifica-

v. *Societe Anonyme du Filtre Cham-berland Systeme Pasteur*, 53 Fed. 98, 3 C. C. A. 455.

28. *Putnam v. Keystone Bottle Co.*, 38 Fed. 234.

29. *Peterson v. Simpkins*, 25 Fed. 486.

30. *Hildreth v. Norton*, 159 Fed. 428 (C. C. A. 1908); *Earll v. Rochester S. & E. R. Co.*, 157 Fed. 241; *Standar Roller B. Co. v. Hess-Bright M. Co.*, 145 Fed. 356; *Bristol Oil & G. Co. v. Beacom*, 143 Fed. 550; *Bowers Dredging Co. v. New York Dredging Co.*, 77 Fed. 980; *Union Switch & S. Co. v. Philadelphia & R. R. Co.*, 75 Fed. 1004; *Consolidated Fastener Co. v. Columbian Fastener Co.*, 73 Fed. 828; *Columbia Wire Co. v. Freeman Wire Co.*, 71 Fed. 302.

See §§ 854, 857 herein in this connection.

In a recent case it is said: "Neither the original nor the amended bill warranted a preliminary

injunction. They contained no showing that the patents charged to have been infringed had ever been admitted to be valid by the defendant, or held valid by any court of competent jurisdiction, or that their validity had been generally acquiesced in by the public. Without a showing of one or the other of these facts, no preliminary injunction ought to be granted in a patent case." *St. Louis Street F. M. Co. v. Sanitary Street F. M. Co.*, 161 Fed. 726 (C. C. A. 1908). Per Adams, J.

Decree not a bar.—A decree in favor of the patentee upon a bill in equity against one person for making and selling a patented machine is no bar to a subsequent suit by the patentee against another person for afterwards using the same machine within the terms of the patent. *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244.

31. See § 851 herein.

tion that where there has been such a previous adjudication the consideration of matters other than an infringement or which may be interposed as a defense to the bill for a preliminary injunction will be postponed to the final hearing except where they are so cogent and conclusive that if presented in the former case, a different conclusion would probably have been reached.³² But where there is an appeal pending and undetermined from a prior decree this is held not to be such a prior adjudication as will be conclusive upon the question of the right to a preliminary injunction.³³ And this has also been held true in regard to decrees entered by consent.³⁴

§ 845. Conclusive prior adjudications; of Supreme Court, etc.

—A decision of the Supreme Court of the United States, sustaining a patent, must be regarded as conclusive, upon a motion for preliminary injunction.³⁵ And the production of additional *ex parte* evidence attacking the validity of a patent, is not a sufficient reason for denying an injunction when the patent has been sustained by the Supreme Court and by various Circuit Courts after exhaustive litigation.³⁶ And complainant, in a suit for the in-

32. *Doig v. Morgan Mach. Co.*, 91 Fed. 1001, 33 C. C. A. 683, 63 U. S. App. 95; *New York Filter M. Co. v. Niagara Falls W. Co.*, 80 Fed. 924, 26 C. C. A. 252, 51 U. S. App. 355.

See § 851 herein.

33. *Whittemore Bros. & Co. v. World Polish Mfg. Co.*, 159 Fed. 480; *Huntington Dry-Pulverizer Co. v. Alpha Portland Cement Co.*, 91 Fed. 534; *Bowers Dredging Co. v. New York Dredging Co.*, 77 Fed. 980.

34. *Earll v. Rochester S. & E. R. Co.*, 157 Fed. 241; *Bowers Dredging Co. v. New York Dredging Co.*, 77 Fed. 980.

35. *American Bell Tel. Co. v. McKeesport Tel. Co.*, 57 Fed. 661; *Purifier Co. v. Christian*, 3 Ban. & A. 42; *American Bell Tel. Co. v. Southern Tel. Co.*, 34 Fed. 795.

36. *American Bell Tel. Co. v. Cushman*, 57 Fed. 842; *Same v. Hubbard*, Id., per Jenkins, J.: "The patent involved in these suits has passed under the review of the Supreme Court of the United States, Telephone Cases, 126 U. S. 1, 8 Sup. Ct. 778, 31 L. Ed. 863, and its validity sustained. The history of the Bell telephone patents is the history of an enormous litigation, involving the truth of alleged anticipations sought to be sustained by a marvelous mass of evidence. The invention was attacked as perhaps no other invention was ever before attacked. It was sustained, and its integrity established by the decision of the highest and the ultimate judicial tribunal of the land. That decision must be held conclusive. If there was omission of evidence in that case,

fringement of a patent is entitled to a preliminary injunction where it appears that the Supreme Court of the District of Columbia has in a prior suit sustained the validity of his patent, and held that it was infringed by a device which was substantially the same as that of the present defendant.³⁷

§ 846. **Patent sustained in other circuits.**—On a motion for a preliminary injunction the Circuit Courts will generally follow decisions in other circuits adjudging certain devices to be infringements of a patent, especially when the parties are substantially the same.³⁸ Where letters patent have been twice sustained in another circuit, a preliminary injunction against infringers will issue as a matter of course, and such injunction will not be denied because of *ex parte* affidavits of alleged new evidence in respect to anticipation, especially when it appears doubtful whether such evidence was not known to the defendant in such prior cases, and that the defendant corporation herein was closely allied with the corporations defendant in the prior litigation, and contributed to the expenses thereof, either directly or through its individual stockholders.³⁹ An exception to

sought to be here supplied by *ex parte* testimony, I do not feel at liberty, in view of the many decisions of the Federal courts sustaining this patent, to now give ear to such testimony upon the hearing of a motion for a preliminary injunction."

37. *Laas v. Scott*, 145 Fed. 195; *White Dental Mfg Co. v. Johnson*, 56 Fed. 262.

38. *American Bell Tel. Co. v. Cushman*, 57 Fed. 842, per Jenkins, J.: "In the Hubbard Case the Corwin telephone is the infringing device, and that was enjoined by Judge Acheson, and afterwards by Judge Lacombe. In the other case the Cushman telephone is used. That was also adjudged an infringing device by Judge Blodgett in *Telephone Co. v.*

Cushman, 45 Off. Gaz. 1193, 36 Fed. 488. I ought not, if I were so disposed—and I am not—to disregard these adjudications. In the one case the very device is adjudicated to infringe. In the other, not only so, but substantially as between these same parties, for I cannot but regard as a subterfuge the putting forward of Cushman's wife as the responsible infringer."

39. *Brush Electric Co. v. Accumulator Co.*, 50 Fed. 833, per Green, J.: "The rule is well settled that where as the result of a contested controversy letters patent have been sustained, preliminary injunctions will be granted against infringers as a matter of course, by the court which has adjudged the letters patent valid,

the general rule just laid down may sometimes arise where the new evidence is of such a conclusive character that if it had been introduced in the former case, it probably would have led to a different conclusion; but the burden is on the defendant to establish the exception, and every reasonable doubt must be resolved against him.⁴⁰ A decision of the Circuit Court of Appeals sustaining the validity of a patent is not conclusive in a second suit in a Circuit Court of another circuit, involving the same patent, where a different defense is made; and the granting of a preliminary injunction by a Circuit Court in a patent case does not require the issuance of such an injunction by another Circuit Court in a suit between different parties, when the defense, though the same, is supported by additional evidence.⁴¹ And in a recent case it is de-

and as a matter of comity by the Federal courts in other circuits."

See, also, *Duff Mfg. Co. v. Kalamazoo Railroad V. & C Co.*, 94 Fed. 154; *Huntington Dry Pulverizer Co. v. Newell Universal Mill Co.*, 91 Fed. 661; *Mast F. & Co. v. Stover Mfg. Co.*, 85 Fed. 782; *Thomson-Houston Electric Co. v. Johnson Co.*, 78 Fed. 361; *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 78 Fed. 139; *Campbell Printing Press Co. v. Prieth*, 77 Fed. 976. And see *Accumulator Co. v. Consol. Elec. Co.*, 53 Fed. 796, where the patent had been thrice sustained in another circuit after long and expensive litigation, and a preliminary injunction was granted, though defendant made a serious defense. And see *Cary v. Lovell M'fg Co.*, 24 Fed. 141.

A restraining order, pending suit for infringement, will be granted where the patent has been fortified by one final decision in its favor, and by numerous interlocutory orders of injunction granted by other courts, and there has been public acquiescence for several years in the validity of the

patent. *Schneider v. Missouri Glass Co.*, 36 Fed. 582.

Where new question raised.—

Where a question is raised affecting the validity of the patent which was not raised in the case in another circuit, in which a judgment sustaining the invention was rendered, as, for instance, the question of priority of invention, the court will not be controlled by such decision in determining the right to a preliminary injunction. *American Graphophone Co. v. Leeds*, 77 Fed. 193, 78 Off. Gaz. 802.

40. *Ladd v. Cameron*, 25 Fed. 37; *Lockwood v. Faber*, 27 Fed. 63; *Glaenzer v. Wiederer*, 33 Fed. 583; *Cary v. Spring Bed Co.*, 26 Fed. 38; *Norton Door Check Co. v. Hall*, 37 Fed. 691; *Winans v. Eaton*, 1 Fish. Pat. Cas. 181.

See § 844a herein.

41. *Edison Elec. Light Co. v. Columbia, etc., Light Co.*, 56 Fed. 496, per Hallett, J.: "It is also contended that the decree of the Circuit Court of New York against the United States Electric Lighting Com-

clared that a circuit judge is bound by the decisions of the Circuit Court of Appeals of his own circuit so far as such decision relates to the questions before that court for decision and decided by it, but that he is not bound at all by the decisions of the Circuit Courts of Appeals in other circuits except as he may be convinced by the reasoning of the opinion and that he should look to the record, the reasoning, and the law rather than to the high degree of such court for guidance.⁴²

pany, sustaining the patent (47 Fed. 454), which decree has been affirmed in the Court of Appeals of the Second Circuit (52 Fed. 300, 3 C. C. A. 83), is conclusive of complainants' right to the writ for which they now ask. No doubt is entertained as to the conclusive effect of that decree, here and elsewhere, as to all matters in issue in that cause; for, although respondent was not a party to that litigation, the court would not, on a preliminary motion, consider any matter which passed to judgment in that suit. But the Goebel defense was not made in that suit, and therefore the case has not the authority on this motion which has been ascribed to it. *Machine Co. v. Hedden*, 29 Fed. 147; *Lockwood v. Faber*, 27 Fed. 63; *Machine Co. v. Adams*, 3 Ban. & A. 96. Another suit by the complainants against the Beacon Vacuum Pump & Electrical Company in the Circuit Court for the district of Massachusetts is in a different attitude. In that suit the Goebel defense was made, and upon motion for preliminary injunction, recently heard and allowed, it was overruled. 54 Fed. 678. It is contended that the ruling in that case should be recognized and followed as a precedent in respect to the present motion. And perhaps, if the issue, the testimony, and the situation of the parties appeared to be

the same in both cases, such result might follow, more from the persuasive effect of the opinion of another court on the same matter than from any notice of authority ascribed to such opinion. In courts of equal jurisdiction, proceeding concurrently in the investigation of the same subject, the right and duty of each to exercise independent judgment cannot be denied. That they should in the end reach the same result is greatly to be desired, but one cannot become an echo to the other for that praiseworthy purpose. In this instance the consequences to flow from diverse opinions are not regarded as serious. In the Massachusetts circuit, and here as well, the motion is interlocutory, and in each case the ruling may well enough stand upon the situation of the parties; and we have much additional testimony to that upon which the court acted in the Beacon Case. So that upon all points I do not feel compelled to accept the opinion of the court in that case."

42. *Westinghouse Electric & M. Co. v. Condit Electrical M. Co.*, 159 Fed. 144. Per Ray, J. Compare *Mast F. & S. Co. v. Stover Mfg. Co.*, 85 Fed. 782.

That a decision of the Circuit Court of Appeals is binding where a suit is brought in the same circuit for a preliminary injunction,

§ 847. **Same subject; Patent Office decisions.**—On a motion for preliminary injunction, a prior adjudication in another circuit, finding infringement, and awarding a perpetual injunction, is not conclusive, when the alleged infringing devices are materially different in the two cases.⁴³ The court, being in doubt as to the infringement, will refuse a preliminary injunction, notwithstanding prior adjudications in other circuits, as the question of infringement is to be determined by the facts of each particular case as it arises.⁴⁴ The decision of the Patent Office in favor of the reissue of plaintiff's patent, in the face of vigorous opposition to the patent, and the decision of the judge of another circuit, are enough to justify a preliminary injunction, the fact of infringement being clear.⁴⁵ And it has also been decided that, where there is a decision of the Patent Office in favor of the complainant in interference proceedings, in whose favor also the Supreme Court of the District of Columbia has rendered a decision on appeal, such decisions raise a presumption in his favor upon the question of priority of invention which will entitle him to a preliminary injunction.⁴⁶ But a decision of the Patent Office in favor of a complainant in such proceedings is held not to be, of itself, sufficient to warrant the granting of a preliminary injunction.⁴⁷

see, also, *Cohen v. Stephenson & Co.*, 142 Fed. 467, 73 C. C. A. 583; *Bowers Dredging Co. v. New York Dredging Co.*, 80 Fed. 119.

43. *Stahl v. Williams*, 52 Fed. 648.

44. *Hammerschlag M'fg Co. v. Judd*, 28 Fed. 621.

45. *Consolidated Bunting Apparatus Co. v. Schoenhofen Brewing Co.*, 28 Fed. 428. The letters under which complainants seek to enjoin the defendants were issued July 22, 1884, to one Suckert for refrigerating machines. After the grant of this patent, one Block filed an application for improvements in refrigerating machines, and in an interference, which was declared and contested in the patent office, defendants in this pro-

ceeding were the real parties, paying all expenses. In that proceeding Block filed a motion to dissolve, attacking Suckert's patents on several grounds, but the motion was dismissed because of laches in filing it; and insufficiency of the grounds; and the decision was in favor of Suckert. Held, that the only question raised by the interference was as to which was the prior inventor, and this decision was not equivalent to an adjudication in favor of the patent, and would not justify a preliminary injunction in an action where the patent was assailed for want of novelty. *Dickerson v. De la Vergne Refrigerating Co.*, 35 Fed. 143.

46. *Laas v. Scott*, 145 Fed. 195.

47. *Wilson v. Consolidated Store*

§ 848. **Prior inconsistent decisions.**—The rule of comity obviously does not require prior patent adjudications in other Circuit Courts to be followed, when they are inconsistent with each other on material points.⁴⁸

§ 849. **Foreign adjudications, etc.**—On a motion for a preliminary injunction against the infringement of letters patent, for an improvement in duplicate memorandum slips, it appeared that the patent had been twice sustained in the Canadian courts, that a preliminary injunction had been granted after full argument in another circuit, and that the book of the patent was the most popular sales book in this country, and had superseded all other books of a similar character. There was also strong, though not entirely satisfactory, evidence of acquiescence by the public. These facts were held sufficient to warrant granting a preliminary

Service Co., 88 Fed. 286, 31 C. C. A. 333, 50 U. S. App. 400, *rev'g* 83 Fed. 201.

48. In *Pullman Palace Car Co. v. Wagner Palace Car Co.*, 38 Fed. 416, letters patent issued to the Pullman Company, as assignee of Henry H. Sessions, for an improvement in the connections between cars, was sustained by the Circuit Court for the Northern District of Illinois, mainly on the ground that the buffer-plates of the two cars were kept in contact under constantly opposing spring pressure, while rounding curve as well as upon a straight track, thus to a large extent overcoming the tendency to oscillation. In that suit George M. Pullman filed an affidavit showing that the oscillation was in fact largely overcome by the device, even upon roads of greatest curvature. In *Pullman Palace Car Co. v. Boston R. Co.*, 44 Fed. 195, the subsequent patent, issued May 14, 1889, to George M. Pullman, for a vestibule connection between cars, in com-

bination with a device similar to that of the Sessions patent, and intended to accomplish the same purpose, and the drawings for which were almost identically the same, was afterwards sustained by the Circuit Court for the district of Massachusetts upon the ground, among others, that it was not anticipated by the Sessions patent. In this suit Sessions gave testimony in behalf of the Pullman Company, limiting his invention to the exact device described by the specifications, and the Pullman Company contended for a construction thereof which would necessarily prevent the buffer-plates from being in contact under pressure while rounding curves. Held, that the Massachusetts decision was inconsistent with the Illinois decision, and therefore comity did not require the Illinois court to enjoin an infringement of the Pullman patent on the strength of the Massachusetts decision. *Pullman Palace Car Co. v. Wagner Palace Car Co.*, 44 Fed. 764.

injunction.⁴⁹ In determining whether an invention has been “previously patented” in a foreign country, so as to cause the American patent to expire with the foreign one, under the revised statutes, the date of the actual sealing and issuance of the foreign patent is to be taken, although it is antedated, as in the case of English patents.⁵⁰ It has been held in England that the grant of a license to use an English patent in Belgium does not imply permission to sell the manufactured article in England in violation of the patent.⁵¹

§ 850. **Re-examination by Circuit Court of Appeals.**—On appeal from an order enjoining infringement of a patent *pendente lite*, where the question of invention is presented with approximate accuracy upon the face of the patent, and does not depend

49. *Carter v. Wollschlaeger*, 53 Fed. 573, per Coxe, J.: “The patent has been upheld in every tribunal where it has been litigated. In the chancery division of the High Court of Justice of Ontario, after a vigorous defense, the chancellor having seen and heard the witnesses, gave judgment for the complainant in a clear and forceful opinion. . . . The patent a second time passed the ordeal of the Canadian courts before another chancellor, in a subsequent suit presenting additional evidence. Again it was upheld, the chancellor remarking that the ‘gigantic effort’ to show prior use had entirely failed, and that defendant had disclosed and proved no defense whatever. These decisions, though in no manner controlling, are entitled to consideration as embodying the opinions of a strong and dignified tribunal upon many of the questions now presented.” See, also, on the same point, *Edison Electric Light Co. v. Sawyer-Man Co.*, 53 Fed. 592. In *Steiner Extinguisher Co. v. Adrian City*, 59 Fed. 132, the

court referred to two English patents for the purpose of showing that in the use of a hose and reel in fire engines, it was old, by means of a hollow journal, to secure one end of the hose to the source of supply and force the liquid through the hose while wound on the reel. And see *Lalance, etc., M’fg Co. v. Haberman M’fg Co.*, 59 Fed. 143.

50. *Edison Electric Light Co. v. Waring Co.*, 59 Fed. 358, per Skipman, J.: “The defendants claim that the Edison patent, which was dated January 27, 1880, has expired, by reason of the expiration of the British patent No. 4,576, for the same invention, antedated to November 10, 1879, but not sealed, and the specification of which was not enrolled until after the United States patent in suit had been issued. This question was recently examined by Judge Jenkins in *Telephone Co. v. Cushman*, 57 Fed. 842. He refers to the various decisions upon the question, and concludes that the invention is not patented abroad before the actual seal-

upon controverted questions of fact, the Circuit Court of Appeals, giving due weight to a prior adjudication sustaining the patent, may re-examine such former adjudication, and dispose of the question in accordance with its own conviction.⁵²

§ 851. **Enjoining infringement when patent adjudicated; other questions postponed.**—When a patent has been sustained by prior adjudications in the same circuit, on motion for a preliminary injunction in a subsequent suit against other parties, the only question open is that of infringement, and consideration of other questions will be postponed until the final hearing, unless new evidence is presented, which is so conclusive that if presented in the former case it would have probably led to a different con-

ing and issuance of the patent, and that the term ‘patented,’ as used in section 4887 of the Revised Statutes, ‘does not mean the preliminary proceedings, but the actual issuance of the patent under the seal of the government, speaking the exercise of sovereign will, investing the patentee with the grant of a monopoly.’ In this conclusion I entirely concur.” In the case last cited, *Jenkins, J.*, said: “It is clear that no right exists in the patentee (when further and complete specification is required) before the actual granting of the patent. It is equally clear, I think, that under our statute this invention was not patented abroad at the time of the granting of the patent here. An application had been made, but not until after the granting of the patent here was the patent abroad issued. The invention is not patented abroad before the actual sealing and issuance of the patent. It seems to me clear that the meaning of our own statute is to limit the term of the monopoly so that it shall not exist longer than a previously

granted monopoly abroad. But it is not to be so limited unless the invention has been previously patented abroad. The term ‘patented,’ as used in our statutes, does not mean the preliminary proceedings, but the actual issuance of the patent under the seal of the government speaking the exercise of sovereign will, investing the patentee with the grant of a monopoly. *Gold & Stock Telegraph Co. v. Commercial Telegram Co.*, 31 Off. Gaz. 1559, 23 Fed. 340; *Emerson v. Lippert*, 42 Off. Gaz. 964, 31 Fed. 911; *Seibert Cylinder Oil Co. v. William Powell Co.*, 47 Off. Gaz. 1072, 35 Fed. 591; *Smith v. Goodyear Dental Vulcanite Co.*, 11 Off. Gaz. 246, 93 U. S. 486-498, 23 L. Ed. 952.”

51. *Societe Anonyme, etc., v. Tighlman's Patent Co.*, L. R. 25 Ch. D. 1.

52. *Curtis v. Overman Wheel Co.*, 58 Fed. 784, per *Shipman, J.*: “The vital question in this case is presented with approximate accuracy upon the face of the patent, and does not depend upon controverted questions of fact. This court has, there-

clusion;⁵³ and every reasonable doubt should be resolved against the new defense.⁵⁴ The fact that a court in another district in the same circuit has decreed a machine of the same style as defendant's an infringement of complainants' patent will not warrant the court in granting a preliminary injunction, where the validity of complainants' patent is questioned in the pending suit.⁵⁵

§ 852. **Postponing new defenses till final hearing.**—Where the validity of a patent has been sustained by the courts on final hearing, the only question that will be considered on a motion for preliminary injunction in a subsequent suit for infringement by

fore been at liberty, in accordance with its statement of the weight to be given to a prior adjudication upon an appealed order for a preliminary injunction, *American Paper Pail & Box Co. v. National Folding Box & Paper Co.*, 51 Fed. 229, to re-examine the former adjudication, and dispose of the question in accordance with its own convictions."

53. *Doig v. Morgan Mach. Co.*, 91 Fed. 1001, 33 C. C. A. 683, 63 U. S. App. 95; *Niagara Falls Waterworks Co. v. New York Filter M. Co.*, 80 Fed. 924, 26 C. C. A. 252, 51 U. S. App. 355; *Bresnahan v. Tripp Giant Leveller Co.*, 72 Fed. 920, 19 C. C. A. 237, 33 U. S. App. 421; *Electric Mfg. Co. v. Edison Elec. L. Co.*, 61 Fed. 834, 10 C. C. A. 106, 18 U. S. App. 637; *Thomson-Houston Electric Co. v. Jeffrey Mfg. Co.*, 144 Fed. 130; *Westinghouse Air-Brake Co. v. Great Northern R. Co.*, 86 Fed. 132; *Tannage Patent Co. v. Donallan*, 75 Fed. 287; *Arlington & C. M. Co. v. Lynch*, 71 Fed. 409; *Norton v. Eagle Automatic Can Co.*, 57 Fed. 929.

A preliminary injunction should be granted in a suit to restrain the infringement of a patent, where, in other suits for infringement of the same patent, the patent has been ad-

judged valid, and devices identical in every material respect with that of the defendant have been held infringements. *Putnam v. Keystone Bottle Stopper Co.*, 38 Fed. 234.

Where the validity of a patent has been sustained by the courts on final hearing, the only question that will be considered on motion for preliminary injunction in a subsequent suit for infringement by other parties is whether defendants infringe. *Sawyer Spindle Co. v. Turner*, 55 Fed. 979; *Atwood v. Same*, Id.

54. *Edison Electric Light Co. v. Electric Mfg. Co.*, 57 Fed. 616. On a motion for a preliminary injunction against the infringement of letters patent No. 223,898, issued January 27, 1880, to Thomas A. Edison, for an improved electric lamp, there were proofs of an alleged anticipation by Henry Goebel in 1854, and subsequently. Held, that these were insufficient to overcome the effect of the adjudications sustaining the patent. The injunction should issue. *Edison Electric Light Co. v. Electric Mfg. Co.*, 57 Fed. 616.

55. *Whitcomb v. Girard Coal Co.*, 47 Fed. 315; *Same v. Mt. Olive Coal Co.*, Id.; *Same v. Wolf Coal & Min. Co.*, Id.; *Same v. Glendale Coal &*

other parties is whether defendants infringe;⁵⁶ and the consideration of other defenses will not be entered into on the motion but postponed until final hearing in the subsequent suit.⁵⁷ On a motion for preliminary injunction against the infringement of a patent, the court will not go into the questions of infringement and validity as on final hearing, although numerous affidavits are filed by both parties, covering about all the ground of a record on final hearing, but, it appearing that defendant is upon debatable ground, will refuse an injunction, and require him to give a bond covering probable profits and damages, and to keep an account of his manufactures and sales, to be produced when called for by the court.⁵⁸

§ 853. **Same subject; court's discretion.**—In a suit for the infringement of a patent, which had been upheld by the Circuit Court of another circuit in a prior suit, it was shown that the de-

Min. Co., Id.; *Same v. Madison Coal Co.*, Id.

56. *Sawyer Spindle Co. v. Turner*, 55 Fed. 979.

57. *Edison Electric Light Co. v. Beacon Vacuum, etc., Co.*, 54 Fed. 678, where Colt, J., cites the following cases in support of the rule laid down in the text: *Brush Electric Co. v. Accumulator Co.*, 50 Fed. 833; *Robertson v. Hill*, 6 Fish. Pat. Cas. 465; *Cary v. Domestic Co.*, 27 Fed. 299; *Coburn v. Clark*, 15 Fed. 804; *Mallory Mfg. Co. v. Hickok*, 20 Fed. 116; *Green v. French*, 4 Ban. & A. 169; *Blanchard v. Reeves*, 1 Fish. Pat. Cas. 103; *Goodyear v. Rust*, 6 Blatchf. 229; *Cary v. Lovell Mfg. Co.*, 24 Fed. 141; *Sargent Mfg. Co. v. Woodruff*, 5 Biss. 444; *Kirby Bung Mfg. Co. v. White*, 1 Fed. 604; *Putnam v. Bottle Stopper Co.*, 38 Fed. 234; *Consolidated Bunting Co. v. Brewing Co.*, 28 Fed. 428; *Newall v. Wilson*, 2 DeG. M. & G. 282; *Davenport v. Jepson*, 4 DeG. F. & J. 440; *Bovill v. Goodier*, 35 Beav. 427. See,

also, *Tannage Patent Co. v. Adams*, 77 Fed. 191. See § 851 herein.

By a preliminary injunction the defendants were restrained, *pendente lite*, from infringing the second claim of the patent in suit, and specifically from manufacturing incandescent electric lamps which the courts of another circuit had held to infringe the claim. Held, that the court would not, at the instance of the defendants, against the objection of the plaintiff, undertake in a summary way to pass upon the question whether a new structurally different lamp, devised by the defendants, and by them put on the market, since the injunction, is an infringement, but that, unless the plaintiff moved for an attachment for a violation of the injunction, the decision of the question must await the final hearing. *Edison Electric Light Co. v. Westinghouse Electric & Mfg. Co.*, 54 Fed. 504.

58. *Macbeth Co. v. Lippencott Glass Co.*, 54 Fed. 167.

fendant company was the successor of the defendant in the prior suit, having the same president, operating the same plant, and doing the same business. Before the hearing of the motion for preliminary injunction, defendant had completed its proofs as to the expiration of a Spanish patent, alleged to be for the same device as that sued on, claiming that such expiration avoided the latter. It appeared that the prior suit had been opened to admit this defense, but the court, after the hearing, refused to suspend the injunction. It was held on appeal that it was within the discretion of the court in the present suit to grant the preliminary injunction, and require complainant to give bond to indemnify defendant in case the suit were determined in his favor.⁵⁹

§ 854. **Prior adjudication not absolutely essential; public acquiescence.**—A prior adjudication sustaining the patent is not an absolute prerequisite to granting a preliminary injunction; and while the right thereto should be clear, it may be made to

59. Consolidated Electric Storage Co. v. Accumulator Co., 55 Fed. 485, 5 C. C. A. 202, per Acheson, J.: "Whether or not legal privity, strictly speaking, exists between the enjoined New York corporation and the New Jersey corporation, the court below has found, and the fact seems to be, that the appellant company is substantially the old concern, with another name, acting under a new corporate organization. Mr. Bracken's affidavit impliedly concedes that since October, 1891, the appellant company has been doing that which Judge Lacombe held to be an infringement of Faure's patent. In October, 1891, the Julien Electric Company made application to Judge Coxé to dissolve the injunction which had been granted against that company, on the ground that Faure's American patent had terminated on June 27, 1891, by reason of the expiration at that date of a Spanish patent which

had been granted to him. While the court opened the case to admit this new defense, the motion to suspend the injunction was denied by Judge Coxé. Electrical Accumulator Co. v. Julien Electrical Co., 47 Fed. 892. Now, having regard to all the circumstances, we are not prepared to say that this conclusion was unreasonable, or that the granting of an injunction *pendente lite* upon the terms prescribed was an improvident exercise by the court of its legal discretion. True, in view of the fact that the case was nearly ready for final hearing in December, 1892, the court might well have declined then to hear the motion made the previous January. But if it is not satisfactorily shown to us that the plaintiff was responsible for that delay, or was guilty of any laches; and whether the motion should be heard at so late a day was peculiarly a matter for the determination of the

appear otherwise than by a judgment or decree.⁶⁰ And public acquiescence in the validity of a patent may be sufficient evidence of its validity to authorize the granting of a preliminary injunction.⁶¹ So where, in a suit to restrain the infringement of a patent, it appears that defendant is using the precise thing described in the patent, and that the patent has been acquiesced in by every one except the defendant, and even by him for a long time, a preliminary injunction may issue, though there has been no prior adjudication of the validity of the patent.⁶² To warrant a preliminary injunction against infringing a patent, it is sufficient proof of acquiescence to show that for about six years immediately following the issuance of the patent plaintiff had manufactured the articles in large quantities, had constantly and publicly proclaimed his exclusive right to make them, had sold many thousands of them to dealers interested in contesting his right, none of whom have questioned it, and that defendant himself acquiesced in such

judge below, who had personal knowledge of the causes for the delay in taking up the application."

60. *Wilson v. Consolidated Store S. Co.*, 88 Fed. 286, 31 C. C. A. 533, 50 U. S. App. 400; *Wyckoff v. Wagner Typewriter Co.*, 88 Fed. 515; *Cary Mfg. Co. v. DeHaven*, 58 Fed. 786, per Wheeler, J.: "The defendant insists, however, that a preliminary injunction should not be granted until the plaintiff's patent has been established by an adjudication. But this is not absolutely necessary; the right should be clear, but it may be made to appear so otherwise than by a judgment or decree. *Blount v. Societe, etc.*, 3 C. C. A. 455, 53 Fed. 98. This invention is not great, but the right to it, such as it is, and the infringement, seem to be clear. An injunction will not deprive the defendant of anything else."

61. *Antisdel v. Chicago Hotel Cabinet Co.*, 89 Fed. 308, 32 C. C. A. 216, 60 U. S. App. 572; *Wilson v. Con-*

solidated Store S. Co., 88 Fed. 286, 31 C. C. A. 533, 50 U. S. App. 400; *McDowell v. Kurtz*, 77 Fed. 206, 23 C. C. A. 119, 39 U. S. App. 353; *Elliot v. Harris*, 92 Fed. 374; *Peck S. & W. Co. v. Fray*, 88 Fed. 784.

62. *White v. Surdam*, 41 Fed. 790. And see *Schneider v. Missouri Glass Co.*, 36 Fed. 582; *Hat Sweat Mfg. Co. v. Davis Sewing Mach. Co.*, 32 Fed. 401. The validity of letters patent for a lamp wick raiser, issued to Leonard Henkle, not having been adjudicated or recognized by the public, a preliminary injunction to restrain their infringement will not be granted in a suit in which the patentable novelty of the invention is contested. And the subject of said patent being one of nine patented improvements embodied in the "Rochester Lamp," the use of such lamps by the public, with acquiescence in the exclusive right of the owner of the patent, is not a recognition of the validity of this particular pat-

right until a very recent period.⁶³ But a preliminary injunction against the infringement of a patent will be denied where plaintiff does not show a prior adjudication sustaining the validity of the patent, or public acquiescence, on which a presumption of validity may be based.⁶⁴

§ 855. **Old distinguished from new patents.**—The fact that a patent has been unquestioned for six years, during which time the machine has been in the market and over a million dollars has been invested in manufacturing it, is sufficient to fortify the presumption of the validity of the patent and to justify its protection by injunction, though there has been no previous adjudication.⁶⁵ But where an inventor and others have manufactured and sold articles prior to the grant of design letters patent therefor, and the only proof of infringement, since the grant of the patents, relates to a single sale, made shortly after the grant of the patents, but prior to the establishment of their validity, and prior to notice of the patents, the articles not being marked patented, a preliminary injunction should be denied.⁶⁶ And where it appears that the patent in controversy is only a year old at time of suit for infringement, and the complainant fails to show, either a prior adjudication sustaining the validity of the patent, or public acquiescence upon which a presumption of validity may be based,

ent. *Upton v. Wayland*, 36 Fed. 691. And see *Hurlburt v. Carter*, 39 Fed. 802, where the averment of public acquiescence was not supported by evidence.

63. *White v. Hunter*, 47 Fed. 819. On a motion for preliminary injunction the patentee made affidavit that he put the invention into practical use about the time of the application, and it had been in practical use ever since; that the rights of the owner of the patent had been acquiesced in by the public; that the invention had been applied to many hundred machines; that he had never given any licenses, or sold any manufacturing

rights; and that the validity of the patent had never been questioned. The assignee of the patent made affidavit that he had applied the patent since January, 1892. Held, that this was insufficient to show public acquiescence. *Stahl v. Williams*, 52 Fed. 648.

64. *Raymond v. Boston Woven Hose Co.*, 39 Fed. 365. But compare *Wyckoff v. Wagner Typewriter Co.*, 88 Fed. 515.

65. *Nat. Typo. Co. v. New York Typo. Co.*, 46 Fed. 114.

66. *Anderson v. Germain*, 48 Fed. 295.

and the defendant has signed a stipulation agreeing not to make or sell any instruments embodying the devices alleged to infringe the patent in suit until final hearing, an injunction will be denied.⁶⁷ Yet it has been held that in a clear case of infringement, an injunction may issue, although the validity of the patent, a recent one, has not been decided.⁶⁸

§ 856. **Presumed validity of patent, etc.**—Where, in a suit for the infringement of a patent, it appears that the improvement is novel and useful, that the patent has been generally acquiesced in, and that the person who took the device to defendant, and uses it for him, used it formerly in the employ of the plaintiff, there is a sufficient presumption of validity to warrant the granting of a preliminary injunction.⁶⁹ An injunction to prevent the infringement of a patent is never granted merely on filing a bill and producing a patent, though the grant of a patent by the Patent Office is itself *prima facie* evidence of the patent's validity.⁷⁰ In order to entitle complainant to a preliminary injunction, the *prima facie* right under the patent must be supported either by a decree or by the public acquiescence in the claim to a monopoly

67. *National Cash Register Co. v. Boston Cash Indicator Co.*, 41 Fed. 144. In *Brown v. Hinkley*, 6 Fish. Pat. Cas. 370, Longyear, J.: said: "In this case the patent has not been issued quite two months, and confessedly complainant has put his rights under it to no use whatever, even during that short time, and there has been no trial at law. I do not think a well considered case can be found in the books where a preliminary injunction has been granted under such circumstances. A preliminary injunction to restrain the manufacture of an alleged infringement of a patent will not be granted when the patent has never been adjudicated, and there is inadequate proof of public acquiescence, and the infringement is denied; and defend-

ants have been engaged in the manufacture for a long time without opposition, and have an extensive business, while the complainants have owned the patent for only three months, and defendants are not shown to be pecuniarily irresponsible; and the effect of an agreement not to manufacture the patented article, signed by one of defendants, is doubtful at least as to the other defendants. *Johnson v. Aldrich*, 40 Fed. 675."

68. *Foster v. Crossin*, 23 Fed. 400.

69. *Corser v. Brattleboro Overall Co.*, 59 Fed. 781.

70. *Palmer Pneumatic Tire Co. v. Newton Rubber Works*, 73 Fed. 218; *Tappan v. National Bank Note Co.*, 2 Fish. Pat. Cas. 195. Compare *Palmer v. Wilcox Mfg. Co.*, 141 Fed. 378.

which is set up under the patent.⁷¹ And in another case it is decided that to entitle a complainant to a preliminary injunction, restraining the infringement of letters patent, there must be a special presumption in favor of the patents arising from an adjudication in a Federal court, acquiescence by the public, or a successful interference in the Patent Office;⁷² and a presumption of validity arising from a successful interference in the Patent Office only applies against the parties to the interference and their privies. It does not extend to litigants who do not make the infringing article under a grant from the interferer.⁷³ And where a patent involving the subjection of steel springs to heat, having been before the courts, and been sustained to the extent of covering such process "when the springs are kept below red heat," it was held, on application for preliminary injunction, that the patent should be presumed valid only to the extent expressly covered by the decisions.⁷⁴ Again where, in a suit for the infringement of a patent the plaintiff set up an estoppel of defendant to dispute the validity of the patent by reason of the fact that he had disclosed his secret to defendant upon the latter's promise to take no advantage of it without plaintiff's consent, and it was shown that when he disclosed the alleged secret he neither had a patent nor intended to apply for one, and that he afterwards procured a patent to guard against any violation of defendant's promise, it was held that there was no estoppel upon defendant because plaintiff did not rely upon the promise to his injury.⁷⁵

holding that the issuance of a patent raises a sufficient presumption of its validity to warrant the granting of an injunction.

71. *Grover, etc., Machine Co. v. Williams*, 2 Fish. Pat. Cas. 133. In *Kirby Bung Mfg. Co. v. White*, 5 Ban. & A. 263, Treat, J., said: "*Prima facie* the patent is valid, but under the uniform rulings of the courts of the United States for more than half a century, if there has been no decision as to the patent on

the merits, the party is driven to show that his patent went into use undisputed for a sufficient time to raise a *prima facie* case in his favor."

See, also, preceding section.

72. *Edward Barr Co. v. New York, etc., Sprinkler Co.*, 32 Fed. 79.

73. *Edward Barr Co. v. New York, etc., Sprinkler Co.*, 32 Fed. 79.

74. *Carey v. Miller*, 34 Fed. 392.

75. *Leggett v. Standard Oil Co.*, 149 U. S. 287, 13 Sup. Ct. 902, 37 L. Ed. 737.

§ 857. **No preliminary injunction where validity doubtful.**—A preliminary injunction to restrain the infringement of a patent will not ordinarily be granted where the validity of the patent is open to any considerable doubt;⁷⁶ and particularly where the validity is dependent upon the result of an appeal in a former suit for infringement of the patent, and it appears that defendant has been acting in good faith and in ignorance of the alleged infringement, and that a stoppage of his business would cause him very serious injury.⁷⁷ To entitle complainant to a preliminary injunction, he should show either an adjudication sustaining the validity of the patent or such a public acquiescence as affords a reasonable presumption of its validity.⁷⁸

§ 858. **Or where infringement doubtful.**—And a preliminary injunction should not be granted where the court has any serious doubt on the very material question whether an infringement has

76. *Williams v. Breitling Metal Ware Co.*, 77 Fed. 285, 23 C. C. A. 171, 46 U. S. App. 254; *George Ertel Co. v. Stahl*, 65 Fed. 519, 13 C. C. A. 31, 24 U. S. App. 567; *Bristol Oil & G. Co. v. Beacom*, 143 Fed. 550; *Fenton Metallic M. Co. v. Chase*, 73 Fed. 831; *Standard Paint Co. v. Reynolds*, 43 Fed. 304; *Glaenger v. Wiederer*, 33 Fed. 583; *Thompson Mfg. Co. v. Hathaway*, 41 Fed. 519.

Where a patent has not been adjudicated, and its patentability is questionable, a preliminary injunction should not issue. *Baldwin v. Conway*, 32 Fed. 795. And see *Arnheim v. Finster*, 24 Fed. 276; *Fraim v. Sharon Valley Iron Co.*, 27 Fed. 457.

77. *Consolidated Roller Co. v. Richmond etc., Works*, 40 Fed. 474.

78. *Raymond v. Boston Hose Co.*, 39 Fed. 365. In an application for a preliminary injunction to restrain the manufacture of machines alleged

to infringe letters patent, when defendants admit the validity of the patent, if construed as they construe it, but deny the infringement and say that, if the patent be construed as plaintiffs construe it, they admit the infringement, but deny the validity of the patent, for want of novelty—the plaintiff is not entitled to an injunction until he shows a former adjudication in favor of his patent, or an equivalent. *Dickerson v. De la Vergne Refrigerating Co.*, 35 Fed. 143.

A restraining order, pending a suit for the infringement of a patent, will be granted where the patent has been fortified by one final decision in its favor, and by numerous interlocutory orders of injunction granted by other courts, and there has been public acquiescence for several years in the validity of the patent. *Schneider v. Missouri Glass Co.*, 36 Fed. 582.

See § 854 herein.

occurred.⁷⁹ But where infringing articles have been manufactured for purposes of sale and use, and have been advertised for sale, an injunction should be granted though none of the articles have been actually used or sold.⁸⁰ In a suit to restrain the infringement of letters patent issued for naphthaline paper, where the only question at issue was as to infringement, and the uncontradicted testimony of an expert showed that defendant's paper was manufactured in the manner described in said patent, an injunction and an accounting will be decreed.⁸¹ Where the evidence is so conflicting as to require full proofs to determine the question of infringement, a preliminary injunction will not be granted.⁸²

79. *New York Air Brake Co. v. Westinghouse Air Brake Co.*, 69 Fed. 715, 16 C. C. A. 371, 35 U. S. App. 373; *Societe Anonyme Du Filtre Chamberland Systeme Pasteur v. Allen*, 84 Fed. 812; *Thompson v. Rand, etc., Supply Co.*, 38 Fed. 112. In this case it also appeared that similar applications for injunctions had been elsewhere denied. And see *Dickerson v. Matheson*, 47 Fed. 319; *Raymond v. Boston Hose Co.*, 39 Fed. 365; *Hammerschlag Mfg. Co. v. Judd*, 28 Fed. 621; *Ironclad Mfg. Co. v. Vollrath Mfg. Co.* (1892), 52 Fed. 143; *Steam Gauge Co. v. St. Louis Mfg. Co.*, 25 Fed. 491; *Stahl v. Williams*, 52 Fed. 648.

Reissued letters patent, issued for improvements in ship's pumps, claimed as the principal improvement a barrel whose length was less than its diameter, making it easily lined. Defendant's pump had a barrel whose length was considerably in excess of its diameter. Held, that absence of this marked feature throws so much doubt on the question of infringement that a preliminary injunction will not be granted. *Russell v. Hyde*, 39 Fed. 614. Letters patent, No. 233, 240, were issued for

an adjustable dress form. The form was expanded by means of two opposing braces vertically sliding on a standard, and forming two sides of a triangle, which held the ribs in position. Defendants attached to two rotary collars the links of the lazy tongs, and divided the waistband into four sections, and made the ribs expand in four divisions. The braces in the patent are not merely extension braces, but converge to or towards the same point, and secure each other against rotation. Held, that there is such a substantial doubt in regard to any infringement by defendants that a preliminary injunction will not be granted. *Morss v. Knapp*, 39 Fed. 608. And when there are grave doubts as to whether there is an infringement, and a prompt final hearing is assured, a preliminary injunction will be denied. *Hammond Buckle Co. v. Goodyear Rubber Co.*, 49 Fed. 274.

80. *Butz Thermo. Electric R. Co. v. Jacobs Electric Co.*, 36 Fed. 191.

81. *Tsheppe v. Bernheim*, 42 Fed. 59.

82. *American Fire Hose Mfg. Co. v. Callahan Co.*, 41 Fed. 50. Letters patent to Jacob P. Tirrell, for im-

§ 859. **Or where novelty doubtful.**—Ordinarily a preliminary injunction will not be issued if the novelty of the patent is doubtful. Defendant in such case may be ordered to give a bond to secure plaintiff on the accounting.⁸³ Where the answer denies the charge of infringement, and shows that the novelty of plaintiff's invention is doubtful, a preliminary injunction should not be granted.⁸⁴ A preliminary injunction should not issue in a suit

provements in electric gas-lighting apparatus, consisting of mechanism whereby the gas-cock is turned by one electric impulse, is not so manifestly infringed by a device by which the cock is turned by a series of impulses as to warrant the issue of a preliminary injunction. *Boston Electric Co. v. Holtzer*, 41 Fed. 390. Letters patent to Charles H. Crockett, for improvements in electric gas-lighting apparatus, consisting, in combination with the rocking valve of a gas burner, of two independently acting armatures pivoted to strike projections on the end of the valve, is not so manifestly infringed by a device by which the gas-cock is turned by means of a ratchet and frame, as to warrant the issue of a preliminary injunction. *Boston Electric Co. v. Holtzer*, 41 Fed. 390. Letters patent No. 326,357, issued to Jacob J. Umbehend, September 15, 1885, for an improvement in an arctic buckle, having a tongue hinged between the leaves of a double flexible plate, by a cam-shaped hinge-pin entering between the plates, and having its front, which consists in the addition of guards across the side edges of the flexible portion of these plates to retain the hinge-pin in its proper bearings and also to prevent the lateral displacement of the plates, are not so clearly infringed by a buckle having the top and bottom plate

formed in one piece, folded back upon itself, with a pintle between the folds, and a depressed socket in one plate for receiving the pintle, the top plate being pinched downward, so as to make the socket smaller, and prevent the pin from sliding about, as to require the granting of a preliminary injunction. *Thomson Mfg. Co. v. Hathaway*, 41 Fed. 519. And see *Celluloid Mfg. Co. v. Eastman Dry Plate & Film Co.*, 42 Fed. 159. The Edison incandescent electric lamp patent is infringed by the Waring lamp, which only differs from it in that the Edison vacuum was to a large extent employed, but rendered somewhat less perfect by the introduction of a small quantity of bromine gas. *Edison Electric Light Co. v. Waring Co.*, 59 Fed. 358.

83. *New York Belting & Packing Co. v. Magowan*, 23 Fed. 596; *Gunn v. Savage*, 25 Fed. 101.

84. *Standard Paint Co. v. Reynolds*, 43 Fed. 304. Letters patent, issued to John C. Goebel July 20, 1886, for an improvement in hats or caps, claimed "in a hat or cap having a flexible tip, the body or skeleton of the side crown, formed of wire cloth, the ends of which are connected by an angular seam." In a suit for infringing this patent defendants produced affidavits that this mode of making hats and caps had been known and used during several years

for infringement, where upon the issue of priority of invention the evidence is merely oath against oath.⁸⁵ But in an action for infringement of patent, the *prima facie* presumption that plaintiff was the first inventor, and that the invention was a novelty, raised by introduction of the patent, must be rebutted beyond a reasonable doubt.⁸⁶

§ 860. Patentable novelty essential.—Letters patent are void for want of patentable novelty in the invention covered by them, and an injunction does not lie to protect them from infringement.⁸⁷ A manufacturer will not be enjoined from manufacturing as he did before a patent was issued.⁸⁸ This defense of want of patentable invention in a patent operates not merely to exonerate an infringing defendant, but also to relieve the public from an asserted monopoly, and the court cannot be prevented from so adjudging by the fact that the defendant had attempted without success to secure the monopoly for himself.⁸⁹ The fact that the patented article has gone into general use is evidence of its utility, but not conclusive of that, and still less of its patentable novelty.⁹⁰ And the mere fact that a patented article is popular and meets with large and increasing sales, is unimportant when the alleged

before the date of the patent; and a British patent, granted in 1864, showed metal threads or wires cut obliquely into strips similar to those claimed in the patent. Held, that a preliminary injunction would not be granted. *Goebel v. American Railway Supply Co.*, 55 Fed. 828; *Same v. Goldmann*, Id.

85. *Mack v. Spencer*, 44 Fed. 346.

86. *Ross v. Montana Union R. Co.*, 45 Fed. 424.

87. *Haughey v. Lee*, 151 U. S. 282, 14 Sup. Ct. 331, 38 L. Ed. 162; *Magin v. Karle*, 150 U. S. 387, 14 Sup. Ct. 153, 37 L. Ed. 1118. The tongue of the buckle described in letters patent No. 305,410, issued to Jacob J. Umbehend, September 16,

1884, being pivoted in sockets extending across the plates, the improvement in letters patent No. 336,769, issued to the same patentee, February 23, 1886, which consists in having the recesses receiving the tongue extend only part of the way across the plates, is of such doubtful patentability that a preliminary injunction will not be granted. *Thomson Mfg. Co. v. Hatheway*, 41 Fed. 519.

88. *Dorlon v. Guie*, 25 Fed. 816.

89. *Haughey v. Lee*, 151 U. S. 282, 14 Sup. Ct. 331, 38 L. Ed. 162.

90. *Grant v. Walter*, 148 U. S. 547, 13 Sup. Ct. 699, 37 L. Ed. 552; *McClain v. Ortmyer*, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 300.

invention is clearly without patentable novelty.⁹¹ But the fact that a device has gone into general use and has displaced other devices which had previously been employed for analogous uses, may be sufficient to turn the scale in favor of its patentable novelty, where the other facts in the case leave the question of invention in doubt.⁹²

§ 861. **Necessary averments as to novelty, etc.**—The omission, from a bill for infringing a patent, of the averment that the invention had not been patented or described in any printed publication before the date of said invention, is a defect in form which is demurrable; as is also the omission from the prayer for process of subpoena of the names of defendants named in the introductory part of the bill.⁹³

§ 862. **Mere mechanical skill not patentable; invention essential.**—Letters patent for a shade or globe holder for candles which should descend as the candle burned down, were applied for by Daniel Leary. A part of his claims were rejected as already covered by British patents, whereupon he obtained a patent on an amended claim, in which the modification consisted of two upper rings, which he claimed rendered the hold of the shade upon the candle more secure. It was held that the improvement did not exhibit sufficient mechanical skill or ingenuity to warrant the

91. *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, 13 Sup. Ct. 850, 37 L. Ed. 707.

92. *Krementz v. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Brake Shoe Co. v. Detroit Co.*, 47 Fed. 894. And see *Topliff v. Topliff*, 145 U. S. 156, 163, 12 Sup. Ct. 825, 36 L. Ed. 658.

93. *Goebel v. American Railway Supply Co.*, 55 Fed. 825, per Townsend, J.: "The fifth ground of demurrer assigned is that the complaint does not aver that the invention had not been patented or described in any

printed publication before the date of said invention. The omission of this averment is a defect in form which is demurrable. *Coop v. Institute*, 47 Fed. 899; *Overman Wheel Co. v. Elliott Hickory Cycle Co.*, 49 Fed. 859. The seventh ground of demurrer assigned is that the prayer for process of subpoena does not contain the names of all the defendants named in the introductory part of the bill. This omission is in violation of rule 23, U. S. Eq. Prac., and is a fatal defect. *City of Carlsbad v. Tibbetts*, 51 Fed. 852."

issuance of a preliminary injunction.⁹⁴ But though a device or process be not susceptible of a great exercise of invention, if it at once supersedes all other contrivances for the same purpose, it is presumably an invention which is patentable.⁹⁵

§ 863. **Old processes for new uses not protected.**—It is not a patentable invention to apply old and well known devices and processes to new uses in other and analogous arts.⁹⁶ And there-

94. *Leary v. Hohenstein*, 32 Fed. 832, per Lacombe, J.: "Without the English patents it is impossible to say what particular exhibition of inventive genius it was which entitled plaintiff to receive any letters patent at all. . . . The preliminary injunction must be denied. The plaintiff may, if he can, demonstrate the patentability of his invention upon the trial." In *Lapham Dodge Co. v. Severin*, 40 Fed. 762, Gresham, J., said: "The Krebs patent of 1873 describes a corrugated metallic plate formed of a single piece of sheet metal, supported by a backing board with a tubular enlargement at the upper end of the sheet to receive a rod for the purpose of holding the plate in position. The slight difference between the Krebs board and the George board is merely mechanical. In *Pfanschmidt v. Mercantile Co.*, 32 Fed. 667, Judge Nelson held that the George patent was void for want of patentable invention, and I concur in that ruling."

Complainant was the owner of letters patent for an improved dress shield for the under part of the armhole of a dress. The shield was made of "stockinet," and coated on one side with a thin layer of India rubber. After being stretched upon a proper form, it was vulcanized by heat, to hold it in shape. The shield was of

a crescent form and without seam. Defendant's shield was similar, except that it had stockinet on both sides of the rubber. It appeared that the idea of a seamless shield was not new with complainant, nor was there any patentable novelty in vulcanizing or heating the shield so that it should permanently hold its shape. Held, that the validity of complainant's patent was not sufficiently apparent to sustain a motion for a preliminary injunction against defendant for infringement. *Canfield Rubber Co. v. Gross*, 32 Fed. 226.

95. *White v. Surdam*, 41 Fed. 790, per Wheeler, J.: "There was no room for any great exercise of invention; but no one had done this before, and when done, the lens-holder appears to have immediately superseded all others. The accomplishment of this result was not so clearly within the domain of mechanical skill, and without that of invention as to warrant the conclusion that the patent-office was wrong in deciding that what the inventor had produced now amounted to a patentable invention. *Smith v. Goodyear Dental Vulcanite Co.*, 93 U. S. 486, 23 L. Ed. 952; *Sim. Pat.* 41."

96. *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 626, 13 Sup. Ct. 472, 37 L. Ed. 307; *Vinton v. Hamilton*, 104 U. S. 485, 26 L. Ed. 807; *Stow v.*

fore it has been finally decided by the Federal Supreme Court, after a different result had been reached in several of the Circuit Courts, that the application of heat to restore elasticity and strength to spiral steel springs was not patentable, and not to be protected by injunction because the invention was anticipated by the prior use of New England wire clock-bells and of blued hair springs used in marine clocks.⁹⁷ And a claim for the connection of a hollow journaled reel with the generator of a chemical fire engine, so that the contents of the generator may be discharged through a hose wholly or partially wound on the reel, is anticipated by well known prior devices for forcing water and other liquids through a hose, while wound upon a reel, by the use of a hollow journal; and as a hollow journaled reel is not wholly impracticable in machines for throwing water, where pressure is applied in the usual way, its mere application to the generator of a chemical fire engine does not involve invention, and will not be protected by injunction, for the result attained in either case is merely one

Chicago, 104 U. S. 547, 26 L. Ed. 816; *Locomotive Truck Case*, 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222; *Blake v. San Francisco*, 113 U. S. 679, 5 Sup. Ct. 692, 28 L. Ed. 1070; *Thompson v. Boisselier*, 114 U. S. 1, 5 Sup. Ct. 1042, 29 L. Ed. 76; *Miller v. Foree*, 116 U. S. 22, 6 Sup. Ct. 204, 29 L. Ed. 552; *Dreyfus v. Searle*, 124 U. S. 60, 8 Sup. Ct. 390, 31 L. Ed. 352; *Aron v. Manhattan R. Co.*, 132 U. S. 84; *Marchand v. Emken*, 132 U. S. 195, 10 Sup. Ct. 24. 33 L. Ed. 332; *Royer v. Roth*, 132 U. S. 201, 10 Sup. Ct. 58, 33 L. Ed. 322; *Burt v. Ivory*, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; *Florsheim v. Schilling*, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574; *Ryan v. Hard*, 145 U. S. 241, 12 Sup. Ct. 919, 36 L. Ed. 691; *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327. In *Perfection Window*

Cleaner v. Bosley, 5 Ban. & A. 449, *Dyer, J.*, said: "The law requires more than a mere juxtaposition of parts or of the external arrangement of things to give patentability. *Hailes v. Van Wormer*, 20 Wall. 353, 22 L. Ed. 241. Mechanical skill is one thing; invention is a different thing. Perfection of workmanship, however much it may increase the convenience, extend the use or diminish expense, is not patentable. *Reckendorfer v. Faber*, 2 Otto 347. In my judgment the device in question involved only mechanical skill. It is the case of a new use of an old and well-known article, so adjusted to an ordinary handle or holder as to make it capable of such new use, the adjustment of parts being purely mechanical and only requiring the exercise of mechanical ingenuity."

97. *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 13 Sup. Ct. 472, 37 L.

of degree.⁹⁸ And the principle is established that mere change of form or an alteration in unessential parts, or the use of known equivalent powers, not varying essentially the machine or its mode of operation or organization, will not avail to avoid infringement.⁹⁹

§ 864. Same subject; where material defects remedied.—One who takes old devices, having material defects, and, with a definite idea of remedying the same, retains the desirable features, and adapts them by novel modifications to new and varying conditions, so as to produce an article confessedly superior to all others, is not anticipated by such prior devices, and is entitled to an injunction to restrain infringement of his letters patent and to an accounting.¹

Ed. 307, reversing 31 Fed. 344; and overruling *Cary v. Spring Bed Co.*, 26 Fed. 38, and *Cary v. Lovell Mfg. Co.*, 24 Fed. 141, which followed *Cary v. Wolff*, 24 Fed. 139.

98. *Steiner Extinguisher Co. v. Adrian City*, 59 Fed. 132, per Taft, J.: "The hollow journaled reel may have been better adapted to the use in the chemical engine than in the ordinary steam pressure pump engine; but this, it seems to us, is a mere difference in degree of the result, and did not involve, in bringing it about anything but what would naturally occur to one skilled in the art. Similar cases may be found in *Consolidated Roller-Mill Co. v. Walker*, 138 U. S. 124, 11 Sup. Ct. 292, 34 L. Ed. 920; *Western Electric Co. v. La Rue*, 139 U. S. 606, 11 Sup. Ct. 670, 35 L. Ed. 294; *Blake v. City and County of San Francisco*, 113 U. S. 679, 5 Sup. Ct. 692, 28 L. Ed. 1070; *Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co.*, 110 U. S. 490, 4 Sup. Ct. 220, 28 L. Ed. 222; *Preston v. Manard*, 116 U. S. 661, 6 Sup. Ct. 695, 29 L. Ed. 763."

And see *Stahl v. Williams*, 52 Fed. 648.

99. *Butz Thermo. Elec., etc., Co. v. Jacobs Elec. Co.*, 36 Fed. 191; *O'Reilly v. Morse*, 15 How. 63, 14 L. 601.

1. *Wales v. Waterbury Mfg. Co.*, 59 Fed. 285, per Townsend, J.: "When Wales set out to devise a lever buckle, the field for invention was very limited. But there was some inherent defect of construction, or difficulty in the way of practical operation, in all of the buckles previously manufactured. None of them was adapted for all the various purposes for which such a buckle is to be employed. Under these circumstances he invented something new in construction and operation, accomplishing the new and useful results of adaptability to all lengths, widths and thicknesses of fabrics, of a firm grip, by the new means of a combination of elastic base plate and rigid upturned side lugs, slitted so as to receive the edge of the fabrics beyond the grip of said lever, and of a bearing of the lever upon the fab-

Where several patents cover a series of progressive inventions, all tending to the accomplishment of a given result, and it appears that the last of the series contains the first successful embodiment of these inventions, and that the improvement thereby added was only devised after a series of practical experiments for the pur-

ric at the point where its leverage was greatest, said elastic base plate forming a spring tongue, whose action was independent of the proportion and construction of said lever bearing. By this mode of construction he also secured a protection for the rear end of the lever, so that when the buckle was closed, it would be housed, and kept in position by the upright side lugs. The only question is whether such an invention discloses patentable novelty, or whether it would naturally have occurred to any person skilled in the art. That it did not so occur, either as to means or result, is evident from the patents heretofore discussed, and from others in evidence in the case. The following considerations seem to me to be pertinent to this inquiry: The old, simple side-lug buckle was impracticable. House, Wardwell and Wales had it before them. Each tried to invent an improvement. Each secured, in a different way, a result, and each obtained a patent therefor. That the improvement of House and Wardwell presumably involved invention, and that the improvement of Wales accomplished other and more useful results, suggest that the prior inventors must have striven to accomplish these results, and failed, and that such improvements involved the exercise of invention, and would not have occurred to any person skilled in the art. *Thomson v. Bank*, 3 C. C. A. 518, 53 Fed. 250. That Wales

had these buckles before him seems to support the claim that his buckle involved creative skill, for, instead of following out their ideas, he recognized the defects necessarily inherent in their plans of construction, and abandoned them. It was not, therefore, the 'carrying forward of the original thought,' but the introduction of new features, producing better results, not analogous to the old results, and of such a character as to require the exercise of the inventive faculty to conceive and produce them. *Lovell Manufacturing Co. v. Cary*, 147 U. S. 623, 13 Sup. Ct. 472, 37 L. Ed. 307; *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327; *The Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154. The defendant practically admits infringement. From one of the exhibits it appears that it has used a bearing plate interposed between the grip lever and the base plate. This is not essential, does not affect the relation or operation of the infringing device, and is either a colorable modification or one which has been adopted for convenience. In view of all these circumstances, I think the evidence of practicability, adaptability, and general utility should resolve any possible doubt in favor of complainant. He has confessedly presented the most useful, and apparently the only practical, solution of the problem presented.

pose of obviating previous defects, this shows that the conception of such improvement involved invention.²

§ 865. **Same subject.**—One who, by overcoming difficulties which for years have baffled all others, perfects a device which satisfactorily supplies a long-existing and imperative need, and supersedes all other appliances, both at home and abroad, proves the exercise of inventive faculty, notwithstanding that the change

and is entitled to the benefit of his patent for the invention as described by him, and claimed in claims 1, 2, and 3 of said patent. Let there be a decree for an injunction and an accounting as to said claims, 1, 2, and 3."

2. *Westinghouse v. N. Y. Air Brake Co.*, 59 Fed. 581, per Townsend, J.: "It may be added, as is forcibly urged by counsel for complainants, if this was merely a thing that 'any competent mechanic could do,' why was George Westinghouse the only person to whom it occurred to do it, and how to do it? The claim of defendants that all this was done in patent No. 360,070 will be considered in connection with that patent. Even if Mr. Westinghouse, in patent No. 376,837, did, as claimed by defendants, throw his mind back to patent No. 162,465, and use it as a basis for a part of the contrivance of patent No. 376,837, he did not reinvent patent No. 162,465, but he invented and created a new device, adapted to new conditions, and developed in new combinations, which produced new and different results. These facts would seem to bring this branch of the case within the rule as stated in *Ansonia Brass & Copper Co. v. Electrical Supply Co.*, 144 U. S. 11, 12 Sup. Ct. 601, 36 L. Ed. 327: 'If an old device or process be put to a new use which is

not analogous to the old one, and the adaptation of such process to the new use is of such a character as to require the exercise of inventive skill to produce it, such new use will not be denied the merit of patentability.' The consideration of the general questions of pioneership involves the inquiry as to whether the patented device contained an invention which, for the first time, enabled 'a law of science, or force of nature, to be used so as to accomplish a practical and beneficial result.' Judge Shipman, in *Dederick v. Seigmund*, 1 U. S. App. 227, 2 C. C. A. 169, 51 Fed. 233; *Morley Sewing Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715. In this inquiry is necessarily involved the determination, in this case, of the question as to whether this great invention was so disclosed to the world in patent No. 360,070 as to make it available without a further exercise of the inventive faculty. The argument of counsel for complainants and defendants on this question seems to assume that whether the defendants are infringers or not largely depends upon whether patent No. 376,837 is or is not a pioneer patent. It is questionable whether a court may safely depart from the ordinary rules in the construction of a patent because it may seem to bear the brand of pio-

from existing devices seems comparatively slight, and such a device will be protected by injunction.³

§ 866. Where defendant before estopped to question novelty, etc.—Although complainant's patent has been upheld in a suit against other parties in which defendants' patent was pleaded, a

neership. In the present case, too, the application of the principle is not without difficulty, because the inventor is confessedly a pioneer, the question being whether he had not already blazed a pathway through the forest before he laid out or opened the practicable public highway. I have therefore attempted to dispose of the question herein by a consideration of the prior art, and a comparison of defendants' devices with the patent in suit, independently of the doctrine of pioneership. If this doctrine is applicable, the case seems to fall within the principle stated and followed by Judge Coxe in *Mergenthaler Linotype Co. v. Press Pub. Co.*, 57 Fed. 502. In either case, 'a strict construction should not be resorted to if it becomes a limitation upon the actual invention, unless such construction is required by the claim, it being understood that the construction should not go beyond and enlarge the limitations of the claim.' *Smead Warming & Ventilating Co. v. Fuller & Warren Co.*, 6 C. C. A. 481, 57 Fed. 626."

3. *Consol. Brake Shoe Co. v. Detroit Spring Co.*, 59 Fed. 902, per Swan, J.: "While there is a marked similarity, which to a casual observer amounts almost to identity, in form and use, in the Ross and Steel devices, there is a substantial difference between them, which not only determined, in the patent office, the patentability of Ross' device, but has

caused the former to supersede Steel's both in Great Britain and this country. The Stilmant and Brill patents which are pleaded in defense may be laid out of consideration altogether. There is nothing anticipatory of Ross' invention in either. The issue is solely between Ross and Steel. The aim of each was to produce a brake shoe which would so operate upon the wheels of railway cars as to obviate, as much as possible, the effect of the rail wear upon the tread of the wheel, and insure its constant profile. Both accepted, as a necessity for reducing the velocity or bringing to rest the moving car, the application of the restraining power or frictional energy directly upon the face or periphery of the wheel, and relied upon the grinding down, by the application of the shoe, of those parts of the tire upon which its pressure was exerted, to equalize the frictional wear of the tread proper by the track. To accomplish this result, Steel gave his device two bearings on the wheel—one on the outside of the tread, spanning it from its outer edge with a groove or channel which extended to the upper part of the inside of the flange, at which point he formed another groove or channel in the brake block or shoe, which engaged the rim or periphery of the flange, thereby constituting the second bearing of the shoe. Ross' shoe claims three bearings, viz: one on the outside of the tread, one on the inside, between the tread and the

preliminary injunction against alleged infringement by manufacturing devices under the latter will not be granted when it appears that the former suit was so decided on the ground that there was an estoppel to question the novelty of complainant's patent, so that

flange, and the third upon the periphery of the flange. The second of these bearings affords the distinctive feature of difference between the two appliances. Long before Bell patented the telephone it was the general belief of scientists that speech could be transmitted by electricity if the requisite electrical effect could be produced. Bell discovered and perfected the apparatus and the process by which this could be done, and although the previous labors of Reis in the same field had brought him almost to the point of success he failed to reach his goal. Over twenty years before Bell's invention an eminent scientist had said, in reference to the mode of transmitting speech by electricity: 'Reproduce precisely these vibrations,' to-wit, the vibrations made by the human voice in uttering syllables, 'and you will produce precisely the syllables;' yet Bourseul neither claimed nor invented the telephone. Like Bourseul, Steel told what to do, but not how to do it. His conception of counteracting the rail wear by the shoe friction was meritorious, but not inventive. Its crude expression in his brake block not only failed to meet its purpose, but added to the defects caused by the rail wear equally prolific sources of danger in the 'sharp flange,' and the failure to equalize the friction area of the shoe upon the flange with that on the tread. These defects not only caused its supersedure by the Ross shoe, but condemned its usefulness and safety. Ross' device, though but slightly

varied in form from that of Steel's, has not only demonstrated its utility in years of use by prolonging the life of the tire, and obviated the great expense of frequent re-turning and the loss of use of the locomotive during such repairs, but has promoted the safety of railway travel by conserving the efficiency and contour of the wheel. Now that ten years of successful use have established its merits, and since it has practically supplanted all others, and has been accepted in Great Britain, the home of the Steel patent, and after the skill of the mechanics and railway employes of both countries had been challenged in vain for eight years by the defects of the Steel shoe to the need of an effective device, it is too late either to refer the merits of this appliance to the suggestions of its imperfect predecessor, or to declare it merely the work of a mechanic of ordinary skill. Without essaying to define the line between the skill of the mechanic and the ingenuity of the inventor, it may be safely affirmed that one who perfects a device of confessed utility, which satisfactorily supplies a long-existing and imperative need of any branch of industry, and which excels in operation and results other existing appliances, superseding them at home and abroad, and by its structure overcoming difficulties and objections which have for years baffled the ingenuity of his fellow craftsmen the world over, including Steel himself, for whose conception so much breadth is claimed,

the validity of defendants' patent was not considered.⁴ On a motion for preliminary injunction, complainant introduced the record of another Circuit Court, showing that in a suit by him against a third person the court found infringement, and granted a restraining order; that subsequently this injunction was made perpetual, but there was nothing to show that any question as to patentable novelty, the prior state of the art, or public acquiescence, were raised therein. It was held that such an adjudication was not of controlling weight.⁵

has proved beyond cavil that average mechanical skill was not equal to what he has accomplished. His success is his individual achievement, the product of his inventive faculty, not merely that of his training or vocation. The merit and originality of his device is not to be determined by the application of a measure to its parts, or the extent of the difference of form between it and a contrivance which fails to answer the same purpose, when that difference, as in this case, not only produces a desired local effect, but insures the proper operation of the entire device. The lug or projection in Ross' shoe bearing upon the wheel upon the flange and the inner side of the tread performs a double function. It preserves the normal shape of that part of the wheel and flange, and aids to equalize the friction surface of the shoe on each side of the tread. It also prevents the lateral vibration of the shoe. It is essential to the success of the device, and is lacking in the Steel brake block, which has no compensating feature. The difference between these contrasted devices is therefore not merely in form, but in their mechanical and economic results. This test, and the considera-

tions above adverted to, establish the originality of Ross' shoe, and sustain its patentability. Examples of patented inventions which have been upheld by the courts, although they differed very little in form, mechanism, or operation from other appliances, are numerous. *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719, 37 L. Ed. 558; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939; *Magowan v. Packing Co.*, 141 U. S. 332, 12 Sup. Ct. 71, 35 L. Ed. 800; *The Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154; *Gandy v. Belting Co.*, 143 U. S. 587-594, 12 Sup. Ct. 598, 36 L. Ed. 272; *Topliff v. Topliff*, 145 U. S. 156-163, 12 Sup. Ct. 825, 36 L. Ed. 658. For the reasons given, and those mentioned by Mr. Justice Brown in awarding the injunction in this cause, there must be a decree for complainants, with a reference to a master to ascertain damages; and the injunction is made perpetual."

4. *Ney M'fg Co. v. Superior Drill Co.*, 56 Fed. 152, following *Goodyear v. Dunbar*, 1 Fish. Pat. Cas. 474.

5. *Stahl v. Williams*, 52 Fed. 648.

§ 867. **Anticipation; proof as to.**—On a motion for a preliminary injunction, where a patent is set up as an anticipation which, on its face, antedates the patent in suit, complainant may show that his invention was actually made prior to the date of the anticipating patent.⁶ Complainant's patent was for a composite pavement, formed with depressions in which the pressure of the foot produced a partial vacuum, and prevented slipping. It was especially intended for sidewalks. It was held that a patent for a concrete street pavement, formed by passing a corrugated roller over it before it became cold so as to make indentations to catch the shod feet of horses, was not an anticipation of complainant's patent, and, it having been adjudicated in complainant's favor in a former case, a preliminary injunction should be granted, where the affidavits and specimens exhibited show that defendant's patent is an infringement.⁷ On a motion for a preliminary injunction against the infringement of letters patent, the court will not disregard prior decisions sustaining the patent, upon new evidence, consisting of the affidavits of five persons, resting entirely in personal recollection, after the expiration of eight or ten years, as to the date of certain alleged prior uses, when there are other affidavits fixing a later date, and the latter are strongly corroborated by circumstances.⁸ Where, on motion for a preliminary injunction to restrain infringement, it is necessary for the patentee to show that he made the invention some years before he applied for a patent, in order to meet the charge of anticipation, the finding of the examiner of interferences to the effect that the patentee did make the invention at the earlier date is not sufficient proof of the fact to warrant issuing the injunction when the evidence on which the examiner based his finding is not preserved.⁹ Where a prior adjudication sustaining a patent is decided on the ground that the defendant's own testimony that "he did not think there was any invention in the patent" is not sufficient to overcome the

6. Norton v. Eagle Automatic Can Co., 57 Fed. 929.

7 Stuart v. Thorman, 37 Fed. 90

8. Macbeth v. Braddock Glass Co., 54 Fed. 173.

9. Siemens-Lungren Co. v. Hatch, 47 Fed. 64.

prima facie effect of the patent, such decision is not sufficient to justify the issuance of a preliminary injunction, restraining an alleged infringement of the patent, where the existence of an anticipating device is shown on the application for injunction by evidence which is undisputed, except by the opinion of an expert.¹⁰

§ 868. **Proof of another's prior use or knowledge.**—The affidavit of a third person, stating merely that he showed the plaintiff how to make the improvement upon which his patent is based, does not show such prior knowledge or use as will defeat the patent, and hence it does not raise such a doubt as to defeat the motion for a preliminary injunction.¹¹

§ 869. **Notice of prior use; waiver of oath.**—Under the act which requires that, where the defense to a suit in equity for the infringement of a patent is prior knowledge or use of the patent by others, notice shall be given with defendant's answer of the names and residences of the persons having such knowledge or making such use, and of the place of the use, it is not necessary

10. *Jacobson v. Alpi*, 46 Fed. 767. And see *Lambert v. Hofheimer*, 18 Fed. 654. On a motion based on prior adjudications for an injunction against the infringement of letters patent issued November 26, 1883, to J. H. Frink, for duplicate memorandum or sale slips, there was produced as entirely new evidence a sales slip called "Taft Book," which was shown to have been in use in Detroit prior to the time of Frink's invention, and that Frink had knowledge thereof. From this evidence it appeared highly probable that the Frink combination contained no patentable invention. Held, that the preliminary injunction should be denied. *Carter & Co. v. Fry*, 54 Fed. 882.

11. *Corser v. Brattleboro Overall Co.*, 59 Fed. 781, per Wheeler, J.: "The answer sets up prior knowledge

and use of one Churchill, whose affidavit is produced, stating that he showed the orator 'how to make an offset in the loop by bending the wires composing the loop,' and that the offset of the patented articles 'is the identical change suggested' by him. An answering affidavit of the orator states that Churchill's suggestion was of an inward bend of the wires, and not of this offset. This contradiction might raise sufficient doubt to defeat this motion if what Churchill says he did would defeat the patent. The conception of an invention is not making it; the embodiment of it is. The orator produced this invention; Churchill did not. According to his statement, as understood, he merely made a suggestion which, perhaps, forwarded it. This idea would not be such prior knowledge or use as, within the statutes, would defeat a

that such notice should be under oath; and where complainant's counsel in such suit consent to an order that the answer shall be considered as amended by the insertion of such defense and the required notice, such consent is a waiver of any further oath.¹²

§ 869a. **Appeal; scope of review on.**—On an appeal from an interlocutory order granting an injunction against the infringement of a patent the court may examine the whole case and dispose of it upon its merits.¹³ Such a course will, however, only be followed by the appellate court when the determination of the question whether the injunction was erroneously granted requires it to look into the whole case upon its merits.¹⁴ And it is decided in a recent case in the Circuit Court of Appeals that where a patent has been held valid by that court and a preliminary injunction is subsequently issued by the Circuit Court from which decree an appeal is taken, it is well settled that such appeal brings up only the propriety of the action of the Circuit Court, that the whole cause is not to be reopened and that the only question for consideration is whether a preliminary injunction should have been granted or denied.¹⁵

patent. *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 466; *Coffin v. Ogden*, 18 Wall. 120, 21 L. Ed. 822. Upon the undisputed facts of this case as it now stands, the orator seems to be entitled to the preliminary injunction."

12. *Campbell v. City of New York*, 45 Fed. 243.

13. *Richmond v. Atwood*, 52 Fed. 10, 2 C. C. A. 596.

14. *Gamewell Fire-Alarm T. Co. v. Municipal Signal Co.*, 61 Fed. 208, 9 C. C. A. 450.

15. *Consolidated Rubber Tire Co. v. Diamond Rubber Tire Co.*, 157 Fed. 677 (C. C. A. 1907).

CHAPTER XXVIII.

AGAINST INFRINGEMENT OF COPYRIGHT.

- SECTION 870.** Copyright distinguished from patents.
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Section 870. Copyright distinguished from patents.—A copyright cannot effect the purposes of a patent. The copyright of a treatise on a new medicine by the discoverer of it secures to him the exclusive right of printing and publishing the book, but not the exclusive right of making and selling the medicine; and the copyright of a book on perspective gives him no exclusive right to the modes of drawing described, though they were never known before. The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains. The description of a useful art in a book, though entitled to the benefit of the copyright, lays no foundation for an exclusive claim to the art itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can be secured, if at all, only by letters patent.¹ Thus a claim to the exclusive property in a peculiar system of bookkeeping cannot, under the law of copyright, be maintained by the author of a treatise in which that system is exhibited and explained.² And the copyright of a book describing a new system of stenography does not protect the system, when considered simply as a system apart from the language by which it is explained, so as to make the illustration by another of the same system in a different book, employing totally different language, an infringement.³

§ 871. Copyright protection is wholly statutory.—The right of action to prevent the infringement of a copyright, as well as the

1. *Baker v. Selden*, 101 U. S. 99, 101, 105, 25 L. Ed. 841.

2. *Baker v. Selden*, 101 U. S. 99, 25 L. Ed. 841. See, also, *Cobbett v. Woodward*, L. R. 14 Eq. 407, where a catalogue of furniture; and *Page v. Wisden*, 20 L. T. (N. S.) 435, where a cricket scoring sheet were held not

to be fit subjects for copyright. But see *Drury v. Ewing*, 1 Bond, 540, where a copyright in a chart of patterns for cutting dresses for ladies, and coats for boys, was protected from infringement.

3. *Griggs v. Perrin*, 49 Fed. 15.

copyright itself, is wholly statutory.⁴ And in recent cases in the United States Supreme Court it has been declared that copyright property under the Federal law is wholly statutory, and depends upon the right created under the acts of Congress in pursuance of the authority conferred under article 1, § 8 of the Federal Constitution: "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."⁵

§ 871a. **Construction of copyright statutes.**—The copyright statutes should be reasonably construed with a view to effecting the purposes intended by Congress. They should not be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.⁶

§ 871b. **Compliance with statutory requirements.**—The statutory requirement as to printing the prescribed notice of copyright in the book, and the deposit of copies of the book and of the printed

4. *Banks v. Manchester*, 128 U. S. 244, 252, 9 Sup. Ct. 36, 32 L. Ed. 425; *Wheaton v. Peters*, 8 Pet. 591, 662, 8 L. Ed. 1055.

In England, registration of the publication in which there is copyright, is not required by the Act in order that others may know what they may and may not legitimately copy; such registration is necessary only as a condition precedent to suing to protect copyright. *Cate v. Devon, etc., Newspaper Co.*, L. R. 40 Ch. D. 500, 506.

The International Copyright Act of 1886 (49 and 50 Vict., chap. 33), cannot be construed so as to revive or recreate a right which had expired before the passing of that act, or so as to confer a new right on the former owner of an expired right without any fresh act done by him.

Lauri v. Renad (1892), 3 Ch. D. (C. A.) 402. And see *Paige v. Banks*, 13 Wall. 608, 20 L. Ed. 709, as to the effect of a subsequent copyright act on a contract between a reporter of decisions and a publisher. In order to entitle the owner of the English copyright in a foreign painting to sue in England to enjoin an infringement of such copyright, it is not necessary for him to have registered his ownership under the International Copyright Acts, but he must have previously registered himself as owner of the copyright under the English Copyright Act of 1862. *Fishburn v. Hollingshead* (1891), 2 Ch. D. 371.

5. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339; *American Tobacco Co. v. Werckmeister*, 207 U. S. 284.

6. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 346. Per Mr. Justice Day.

copy of the title, are conditions precedent to the perfection of copyright;⁷ and these conditions precedent extend to editions published by the grantee of a copyright, so that his failure to print the required notice is essential to his right of action to prevent infringement, even as against his grantor who originally secured the copyright.⁸ The copyright law requiring a deposit of two copies of the best edition of the work, to complete the copyright, is sufficiently complied with in the case of the separate article of an American author published in a foreign encyclopaedia by the deposit of the sheets or pages containing the article, taken out of the bound volume.⁹ If the published title of a book is sufficient to identify it with substantial certainty with the registered copyright, the copyright will not be forfeited on account of slight variations between them.¹⁰ And where the publishers of a copyright book fixed upon

7. *Belford v. Scribner*, 144 U. S. 488, 12 Sup. Ct. 734, 36 L. Ed. 514; *Callaghan v. Myers*, 128 U. S. 617, 652, 9 Sup. Ct. 177, 32 L. Ed. 547; *Merrell v. Tice*, 104 U. S. 557, 26 L. Ed. 854; *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055; *Jollie v. Jaques*, 1 Blatchf. 618. As to alternative form of notice, see *Hefel v. Whitely Land Co.*, 54 Fed. 179. A bill to enjoin infringement, alleging disjunctively, in the language of U. S. Rev. Stat., § 4956, which prescribes the prerequisites to the obtaining of a copyright, that orator "before publication delivered at the office of the librarian of Congress, or mailed to said librarian, a copy of the title of said photograph," is ambiguous, and tenders no issue. *Falk v. Howell*, 34 Fed. 739.

GENERAL NOTE.—There have been three principal Acts of Parliament on the subject of copyright. By the earliest (8 Anne, chap. 19, § 1), there was conferred on authors the sole right and liberty of printing and reprinting. In the second (54 Geo. III,

chap. 156, § 4), copyright is styled "the sole liberty of printing." The Act now in force (5 and 6 Vict., chap. 45), defines (§ 2), copyright to be "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." And by § 3 it is enacted that the copyright in every book which shall, after the passing of this Act, be published in the lifetime of its author, shall . . . be the property of such author and his assigns. By § 2, the word "book" is to be construed to mean and include every volume, part or division of a volume.

8. *Thompson v. Hubbard*, 131 U. S. 123, 9 Sup. Ct. 710, 33 L. Ed. 76.

9. *Black v. Allen Co.*, 56 Fed. 764.

10. *Carte v. Evans*, 27 Fed. 861. In this case, after citing U. S. Rev. Stat., §§ 4956-4957, which provide "that no person shall be entitled to a copyright of a book unless he shall, before publication, deliver at the office of the librarian of Congress, or deposit in the mail addressed to him, a

and advertised a day of publication, and, three days in advance thereof, sent out copies to subscribers by carrier, it was held, in the absence of proof that any of the books reached the subscribers before the day fixed, that the court would not find that there was a publication in advance of such day.¹¹

§ 871c. **Same subject; publication of book in serial form.**—The serial publication of a book in a monthly magazine, prior to the taking of any steps to secure a copyright is such a publication within the meaning of the copyright statutes as will vitiate a copyright of the whole book obtained subsequently though prior to the publication of the book as an entirety, and the author of a work so published will not be entitled to an injunction restraining the publication of the book by another publisher.¹²

§ 871d. **Remedies provided by copyright statutes exclusive.**—The special remedies provided by the copyright statutes for an infringement of copyright are exclusive of any right to maintain an action at common law and Congress alone, and not the courts, has the power to enlarge the remedies so conferred. So it is said that an inspection of the copyright statutes indicates that the purpose of Congress was not only to create the rights granted in the statute, but also to create the specific remedies by which alone such rights

printed copy of its title, nor unless he shall also within ten days from the publication deliver at the office of the librarian or deposit in the mail addressed to him, two complete printed copies of the book, of the best edition issued; Nelson, J., said: 'The Act does not say that the published book shall bear on its title page the same title as that registered. But as the object of the registration is to give notice to the world that the author or proprietor has acquired the exclusive right of publication is that by two complete printed copies' is meant two printed copies with a title corresponding with the registered title, and that for the purpose of identification the registered title shall be substantially reproduced on the title page of the published book."

11. Black v. Allen Co., 56 Fed. 764.

12. Holmes v. Hurst, 174 U. S. 82, 19 Sup. Ct. 606, 43 L. Ed. 904. Mr. Justice Brown said: "If, as contended by the plaintiff, the publication of a book be a wholly different affair from the publication of the several chapters serially, then such publication of the parts might be permitted to go on indefinitely before a copyright for the book is applied for,

may be enforced.¹³ And in a recent case in the Circuit Court it is decided that one who has taken the benefit of the copyright law cannot rely upon his common law rights.¹⁴

§ 872. **Extracts as infringements.**—An author who takes existing materials from sources common to all writers, and arranges and combines them in a new form and gives them a new application, may be protected in the exclusive enjoyment of what he thus produces, because he has exercised selection, arrangement and combination, and has thus produced something new and valuable.¹⁵ Considerable difficulty often attends the inquiry whether an alleged act of copying from an original author amounts to piracy, or whether it may or may not be justified on the ground of fair quotation, or whether the use made of the book exceeds what the law permits to another engaged in composing a new work on the same subject. The authorities, however, agree that it is not necessary that the whole or even the larger part of a work should be taken in order to constitute an infringement of a copyright; and they hold to the doctrine that if so much is taken that the value of the original is materially diminished, or the labor of the original author is substantially appropriated by another, that an action to restrain the infringement may be maintained.¹⁶

and such copyright used to enjoin a sale of books which was perfectly lawful when the books were published. There is no fixed time within which an author must apply for a copyright, so that it be 'before publication,' and if the publication of the parts serially be not a publication of the books a copyright might be obtained after the several parts, whether published separately or collectively, had been in general circulation for years. Surely this cannot be the spirit of the Act."

13. *Globe Newspaper Co. v. Walker*, 210 U. S. 356. Per Mr. Justice Day.

14. *Savage v. Hoffman*, 159 Fed. 584.

15. *Gray v. Russell*, 1 Story, 17; *Emerson v. Davies*, 3 Story, 768; *Lewis v. Fullarton*, 2 Beav. 6; *Story v. Holcombe*, 4 McLean, 309.

16. *Folsom v. Marsh*, 2 Story, 100; *Webb v. Powers*, 2 Wood. & M. 514; *Wilkins v. Aikin*, 17 Ves. 424; *Mawman v. Tegg*, 2 Russ. 385; *Roworth v. Wilkes*, 1 Camp. 94; *Saunders v. Smith*, 3 Myl. & Cr. 711; *Lewis v. Chapman*, 3 Beav. 133. In *Folsom v. Marsh*, 2 Story, 100, Story, J., says: "We must often, in deciding questions of this sort, look to the nature and objects of the selections made,

§ 873. **Compilations and abridgements, etc.**—The distinctions between the lawful and unlawful use of a prior publication are often so fine that they have been called the metaphysics of the law.¹⁷ A compilation from voluminous public documents, so arranged as readily to show the date and order of battles fought during the civil war, together with a list of casualties, may be copyrighted and the copyright protected by injunction, because it requires labor, care, and some skill in selection and arrangement, and is a valuable source of information.¹⁸ And where the editor of a second or subsequent edition of an annotated work makes notes which may be separated and distinguished from those contained in the original edition, he is entitled to a copyright for them; but if they are so connected with the original that they cannot be separated, they infringe it.¹⁹ It is also a settled rule that an abridgement, in which there is a substantial condensation of the materials of the original work, and which involves intellectual labor and judgment, as, for example, the abridgement of a history, does not constitute an in-

the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work. Many mixed ingredients enter into the discussion of such questions. In some cases a considerable portion of the materials of the original work may be fused, if I may use such an expression, into another work, so as to be undistinguishable in the mass of the latter, which has other professed and obvious objects, and can not be fairly treated as a piracy; or they may be inserted as a sort of distinct and mosaic work into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy. If a person should, under color of publishing 'elegant extracts' of poetry, include all the best pieces at large of a favor-

ite poet, whose volume was secured by a copyright, it would be difficult to say why it was not an invasion of that right, since it might constitute the entire value of the volume." In *Story v. Holcombe*, 4 McLean, 315, it was held that a book may in one part infringe the copyright of another book and in other parts be no infringement, and that extracts made for the purpose of review or compilation are governed by the same rule, and that such extracts cannot be so extended as to convey the same knowledge as the original. And see *Bramwell v. Halcomb*, 3 Myl. & Cr. 738.

17. *Folsom v. Marsh*, 2 Story, 105.

18. *Hanson v. Jaccard Jewelry Co.*, 32 Fed. 202; *Lawrence v. Dana*, 4 Cliff. 1, 85, 2 Am. L. T. Rep. (N. S.) 423.

19. *Lawrence v. Dana*, 4 Cliff. 1.

fringement of the original copyright.²⁰ Where the piracy is not of the entire book, nor of entire chapters or pages, but consists of extracts from different parts of the publication scattered through the defendant's book, the courts have sometimes applied the familiar doctrine of confusion of goods, and have enjoined the defendant from publishing any part of his book.²¹ But if the pirated matter can be separated, the injunction should extend only to that and allow the defendant to publish the rest of his book; and especially should this be done where the injunction would be likely to lead to injurious consequences to defendant out of all proportion to those done to plaintiff by the infringement.²²

§ 873a. **Compilations; credit ratings.**—Compilations in the nature of credit ratings are subject to protection under the copyright law and an injunction may be had against their infringement. So where it was claimed that such ratings were obtained partly by interviews with gentlemen in the trade but more largely by correspondence, the court declared that it was well settled that compilations of this character were protected by the copyright statutes, even when they involve only industry and no such degree of originality as is expected from authors of repute.²³ But the

20. *Folsom v. Marsh*, 2 Story, 105; *Story v. Holcombe*, 4 McLean, 309; *Tinsley v. Lacy*, 1 Hem. & M. 753; *Campbell v. Scott*, 11 Sim. 38; *Gyles v. Wilcox*, 2 Atk. 141; *Whittingham v. Wooler*, 2 Swanst. 428; *Dodsley v. Kinnersley*, Ambler, 403.

21. *Mawman v. Tegg*, 2 Russ. 385.

22. *West Pub. Co. v. Lawyers Co-op. Pub. Co.*, 79 Fed. 756, 25 C. C. A. 648, *rev'g* 64 Fed. 360, 25 L. R. A. 441; *Greene v. Bishop*, 1 Cliff. 186; *Webb v. Powers*, 2 Wood. & M. 497; *Mawman v. Tegg*, 2 Russ. 385; *Cobbett v. Woodward*, L. R. 14 Eq. 407. Complainant was the author and proprietor of an elaborate book of 1,024 pages, entitled "A History of Detroit and Michigan, or the Metropolis Illus-

trated." Defendant's publication was a pamphlet of 274 pages, entitled "The Industries of Detroit;" the first 70 pages of which were mainly historical, and contained about 100 short extracts from complainant's book. The remaining pages consisted of advertisements only. Held, that as three-fourths of the extracts from complainant's book, and practically all to which he could lay claim as original matter, were contained in first 11 pages of the pamphlet, and that to enjoin the whole would cast a disproportionate pecuniary loss on the defendant, the injunction should extend only to this portion. *Farmer v. Elstner*, 33 Fed. 494.

23. *Ladd v. Oxnard*, 75 Fed. 703.

acceptance of publications of credit ratings is said to depend largely upon the reputation of the compilers and publishers and it has been decided that in the absence of positive evidence of any pending irreparable injury a conditional order will be granted ordering that there be a decree for an interlocutory injunction as prayed for unless a suitable bond be filed conditioned for the payment of such sum, exclusive of costs, as may be finally decreed.²⁴ And where complainant sought to enjoin the publication by defendant of a book of credit ratings on the ground of infringement in the improper use by defendant of a similar publication of the plaintiff and the evidence showed that there had been such a use in only a few cases, the court refused to grant an injunction on the ground that the extent to which use of complainant's publication had been made was so insignificant in comparison with the magnitude of the defendant's publication and the amount of original work thereon, that an injunction would be unconscionable and the court remitted the complainant to his remedy at law.²⁵

§ 874. **Copyright of maps and plans.**—A cardboard pattern sleeve, containing a scale for adapting it to sleeves of any dimensions, is capable of copyright under the English act as a chart or plan, though having no literary character in the ordinary sense and though it is not topographical.²⁶ As absolute originality is hardly possible in the case of a topographical map. A person may

24. *Ladd v. Oxnard*, 75 Fed. 703.

25. *Dun v. Lumbermen's Credit Ass'n*, 144 Fed. 83 (C. C. A. 1906).

26. *Hollinrake v. Truswell* (1893), 2 Ch. D. 377, per Wright, J.: "I think you may have a chart showing various things which would not be topographical at all, which might yet be within the act. I think a chart showing the relations of the stars, or the harmonies of colors, or the lines of electrical action, or types of physiognomy, or the artistic principles of proportion, or molecular proportion, or atomic proportion, might be so

construed as to be capable of protection under the statute as a 'map, chart, or plan.' And this, I think, may be regarded as a chart or plan of the female arm in relation to dress-making, or as a plan of a pattern or model sleeve. . . . In my opinion literature is not properly confined to notation by words or numbers, but may extend to all notations by figures in a form suitable for dissemination in the way in which notations by words are ordinarily disseminated."

take material from prior publications, provided he bestows on it such skill and labor as to produce an original result;²⁷ but where the subsequent map appears to have been substantially copied from the prior one without alteration or revision except in scale or color, there is an infringement which should be enjoined, and the publisher should be required to account for the profits arising from its sale.²⁸ Each map contained in a statistical atlas need not be copyrighted, for they are all protected by a copyright of the entire work.²⁹

§ 875. **Albums; cyclopaedias; no copyright in name.**—Injunction will not lie in this country to restrain the publication and sale of a cyclopaedia of the same name as one published by complainants, the foreign owners, and of the same contents, except as to certain copyrighted articles, when defendants have not infringed any copyright, and use no means to persuade the public that their publication is that of complainants.³⁰ And a copyrighted book

27. Copinger, Copyright, 181, 183.

28. Chapman v. Ferry, 18 Fed. 539.

29. Black v. Allen Co., 42 Fed. 618.

30. Black v. Ehrich, 44 Fed. 793, per Wallace, J.: "With the exception of the copyrighted articles, the entire literary matter of 'The Encyclopaedia Britannica, Ninth Edition' is public property in this country at least, and a rival publisher has the legal right to make any use of it he sees fit. He may use any part of it or all of it, and call it by what name he prefers. Neither the author or proprietor of a literary work has any property in its name. It is a term of description which serves to identify the work; but any other person can with impunity adopt it and apply it to any other book or to any trade commodity, provided he does not use it as a false token to induce the public to believe that the thing to which

it is applied is the identical thing which it originally designated. If literary property could be protected upon the theory that the name by which it is christened is equivalent to a trade-mark, there would be no necessity for copyright laws." In Schove v. Schmincke, L. R. 33 Ch. D. 546, a photographic album illustrated with views of castles was entitled by the plaintiff, who claimed to have been the first inventor of the "Castle Album," and after being for several years under that name, was registered by him under the Copyright Act of 5 and 6 Vict., chap. 45, and the illustrations under the Fine Arts Copyright Act of 25 and 26 Vict., chap. 68. It was held that as the plaintiff could not by registration obtain copyright for the mere name "Castle Album," he had not, in the absence of distinct evidence that such name had become generally accepted

published by the consent and license of the author, as a part of a foreign cyclopaedia, the remainder of which is the production of aliens not protected by the copyright laws of the United States, does not thereby become public property and cannot be used without the consent of the author in a reprint of the cyclopaedia.³¹ But an album for holding photographs with pictorial borders containing views of castles with short descriptions attached, was held to be an ornamental article of commerce in the form of a book, but not a "book" within the meaning of the copyright acts, so as to be the subject of a copyright which could be protected by injunction.³² A copyright is given for the contents of a work, not for its mere title. The title is a mere appendage in which there need be no originality, and cannot be protected by copyright if the work to which it belongs is not so protected.³³

§ 876. **Same subject.**—The failure of the publishers of a foreign cyclopaedia to press to completion suits for infringement of certain volumes, does not estop them from prosecuting suits for infringement of parts of later volumes.³⁴ Where an American publisher, acting for a foreign publishing firm, made an oral agreement with an American author to write an article for a foreign cyclopaedia, and to obtain a copyright for it, and there was no written assignment by the author, it was held that the agreement amounted only to a license to the foreign publisher to use the article for the cyclopaedia, and that the copyright was properly taken in the author's name.³⁵ In another case an injunction was granted to three proprietors of three several weekly trade publications, registered under the copyright act, to enjoin the infringement of their joint copyright in matter printed in all three

in the market, as exclusively denoting the plaintiff's album, acquired any exclusive right to the name as a trade-name, so as to be able to restrain the use of it by others to describe their albums, similarly illustrated, but not shown to be pirated from that of the plaintiff.

31. *Black v. Allen Co.*, 42 Fed. 618.

32. *Schove v. Schmincke*, L. R. 33 Ch. D. 546.

33. *Jollie v. Jaques*, 1 Blatchf. 618.

34. *Black v. Allen Co.*, 56 Fed. 764.

35. *Black v. Allen Co.*, 56 Fed. 764.

publications, though the pirated matter was not copied from either of the three publications but from a reproduction of the same matter issued in another form by the authority of one of the proprietors, without further registration under the act.³⁶

§ 877. **Labels; prices current; blanks.**—The provision of the Constitution that Congress “shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,” has reference only to such writings and discoveries as are the result of intellectual labor, and while the word “writings” may be construed to include original designs for engravings and prints, etc., it has no reference to labels which simply designate or describe the articles to which they are affixed, and have no value separated from those articles.³⁷ Thus a label placed upon a bottle to designate its contents, and not designated to be used distinct from the bottle, is not a composition and not a subject for copyright.³⁸ And a daily price current published in a newspaper has been held not to be such a publication as falls under the copyright law.³⁹ And the arrangement of the matter

36. *Cate v. Devon, etc., Newspaper Co.*, L. R. 40 Ch. D. 500.

37. *Higgins v. Keuffel*, 140 U. S. 428, 11 Sup. Ct. 731, 35 L. Ed. 470; *Trade-mark Cases*, 100 U. S. 82, 25 L. Ed. 550; *Scoville v. Toland*, 6 Western L. J. 84.

38. *Higgins v. Keuffel*, 140 U. S. 428, 11 Sup. Ct. 731, 35 L. Ed. 470.

39. *Clayton v. Stone*, 2 Paine, 382, 392, per Thompson, J.: “In determining the true construction to be given to the act of Congress, it is proper to look at the Constitution of the United States to aid us in ascertaining the nature of the property intended to be protected. ‘Congress shall have power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive

right to their writings and discoveries.’ The act in question was passed in execution of the power here given, and the object, therefore, was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent and durable character. The term ‘science’ cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price-current, the subject matter of which is daily changing, and is of mere temporary use. Although great praise may be due to the plaintiffs for their industry and enterprise in publishing this paper,

which the California Code requires the supervisors to deliver to each person as a blank form of property statement, is not a subject of a copyright, as it requires no more skill or legal knowledge than are necessary to read the Code, and the supervisors who are required by law to furnish the blank forms, would be embarrassed in the performance of their duty by distinctions of convenience of forms prepared by private persons.⁴⁰

§ 878. **Enjoining the piracy of news.**—The form of expression in which news is conveyed is subject of copyright, and a practice by newspapers to copy from other newspapers is no defense to an action to prevent an infringement of such copyright.⁴¹ While a person may make reasonable quotations from a copyrighted newspaper, magazine, or book, for the purposes of comment and

yet the law does not contemplate their being rewarded in this way; it must seek patronage and protection from its utility to the public, and not as a work of science. The title of the act of Congress is, 'for the encouragement of more learning,' and 'was not intended for the encouragement of mere industry, unconnected with learning and the sciences. . . . We are, accordingly, of opinion that the paper in question is not a book, the copyright to which can be secured under the act of Congress."

40. *Carlisle v. Colusa County*, 57 Fed. 979, per McKenna, J.: "The law requires the board of supervisors to furnish the blank form, and if one convenient form can be copyrighted and monopolized by the complainant, other convenient forms can be copyrighted and monopolized by others, and the supervisors of the counties of the State will be in the anomalous position of being unable to perform their legal duties legally."

41. *Walter v. Steinkopff*, 3 Ch. D. 489, 499, per North, J.: "The plea

of the existence of such custom, or habit, or practice of copying as is set up, can no more be supported when challenged than the highwayman's plea of the custom of Hounslow Heath. It has often been relied upon as a defense in such cases, but always has been repudiated by the courts. In one of the early cases, *Wyatt v. Barnard*, 3 Ves. & B. 77, the defendant relied 'on the usual practice' among publishers of magazines to take articles from each other; but Lord Eldon pointed out that such a custom could not control the law. In the most recent case I recollect, *Maxwell v. Somerton*, 22 W. R. 313, where the general custom of provincial papers to make such extracts from other papers was relied on, Vice-Chancellor Bacon said that the injunction must go against the defendants, as they had done acts of which the plaintiff could legally complain. Lawful use for reviewing was right, but unauthorized copying of whole articles was illegal; and the custom of trade which had been

criticism, he cannot, under the pretense of quotation, publish considerable parts of another's work.⁴²

§ 879. **Protecting newspaper's name.**—The plaintiffs on the third day of the month published the first number of a newspaper and registered it on the next day at Stationers' Hall, without any previous advertisement that a newspaper under that name was about to be published. On the sixth day of the same month the defendant published the first number of a newspaper with the same name. It was claimed that the name of plaintiff's newspaper was an integral part of it and included in the copyright; but an injunction was refused on the ground that the registration gave plaintiffs no exclusive right to the name, and that a title to it by user and reputation could not be acquired by a publication of three days with a very small sale.⁴³

alleged was no justification for breach of law. The result is that the defendants are entirely wrong. With regard to Mr. Rudyard Kipling's article, the interlocutory order must be continued. With regard to the other paragraphs I do not think any order necessary. Their interest has passed away, and they will not be repeated. It has not been shown that any damages resulted to the Times from the illegal appropriation of these articles, and I do not think it necessary to observe the form of giving nominal damages."

42. *Walter v. Steinkopff*, 3 Ch. D. 489, per North, J.: "With respect to the quantity of the matter copied, the passages pirated are taken in their entirety for the very purpose for which they were used by the Times—namely, to convey intelligence or information to the readers of the paper. It is not a case of the selection of a part, or quotation of an extract. The defendant cannot justify what has been called the literary larceny of a book or chapter of

an author by showing that there are many other books or chapters by the same author from which they have not taken anything. In *Cary v. Longman*, 1 East, 358, an old itinerary by Patterson had been republished by the plaintiff with some corrections and additions of his own, and it was held that there the plaintiff was entitled to sue in respect of such corrections and additions, though there was not any copyright in the bulk of the work. In *Sweet v. Benning*, 16 C. B. 459, the head-notes only of certain law reports were taken. And in the *Trade Auxiliary Co. v. Middlesborough, etc., Assn.*, 40 Ch. D. 425, it was held that the appropriation by one paper of a very small part of the contents of another ought to be restrained by injunction, and that was affirmed by the Court of Appeal. So, too, in the later case before me in the same volume. *Cate v. Devon and Exeter Constitutional Newspaper Co.*, 40 Ch. D. 500."

43. *Licensed Victuallers Newspaper Co. v. Bingham*, L. R. 38 Ch. D.

§ 880. **Directory headings.**—A man may have copyright in certain parts of a book, although the whole of it is not protected.⁴⁴ Thus the headings in a trades' directory are the subject of copyright which will be protected from infringement by injunction, though the letter-press consist only of advertisements, which cannot be copyrighted.⁴⁵

§ 881. **Protecting law reports; courts' opinions.**—It is regarded as against public policy that a copyright under acts of Congress should be secured in the products of the labor done by judicial officers in the performance of their judicial duties;⁴⁶ for judicial work constitutes the authentic exposition and interpretation of the law which binds every citizen and is free for publication to all, whether it is a declaration unwritten, or of statute or constitutional law.⁴⁷ Thus where a judge of the Supreme Court of a State prepares the opinion or decision of the court, the statement of the case and a syllabus or head note, and the court reporter takes out a copyright for such matter in his name, but for the State, the copyright is invalid and will not be protected from infringement by an injunction.⁴⁸ In such a case the judge is not

139, per Lindley, L. J.: "The plaintiffs must make out an exclusive right to the name. How have they acquired it? The copyright acts do not help them, for *Weldon v. Dicks*, L. R. 10 Ch. D. 247, on which they might have relied, is on this point overruled by *Dicks v. Yates*, L. R. 18 Ch. D. 76. They must then fall back upon the old principles and establish their right by a user which has given them a reputation. Now it is impossible to say that a reputation had been acquired by the mere publication for three days of a paper which during that time had only a very small circulation. The case is of importance, for it seems to me to be a flaw in the copyright or trade-

mark acts that they do not enable a person to acquire an exclusive right to the name of a newspaper, though commercially it may be of great value."

44. *Maple v. Junior Army Stores*, L. R. 21 Ch. D. 369, where the illustrations of a catalogue were held to be the subject of copyright, though the letterpress was not.

45. *Lamb v. Evans* (1892), 3 Ch. D. 462.

46. *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055.

47. *Nash v. Lathrop*, 142 Mass. 29, 35. 6 N. E. 559.

48. *Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425.

the author or proprietor of the matter so prepared in the sense of the statute,⁴⁹ so that the State can become his assignee and take out a copyright for such matter.⁵⁰ There is, however no ground of public policy on which a reporter who prepares a volume of law reports should be debarred from obtaining a copyright which will cover the result of his intellectual labor, and such copyright may cover title page, table of cases, head notes, statement of facts, arguments of counsel, index, and order of arrangement of cases, the division into columns, the numbering and paging, and the cross references.⁵¹ But the reporter of the Supreme Federal Court cannot have a copyright in the courts' written opinions.⁵² And where a reporter of decisions contracted to furnish certain publishers with reports in manuscript, and they to have the copyright for themselves and assigns, it was held that he had conveyed to them his whole interest, and that his executor could not enjoin them twenty-eight years afterward from continuing to publish the reports.⁵³

§ 882. Law reports and digests; balancing convenience in cases of doubt.—On motion for a preliminary injunction in a suit for infringement of complainant's copyrights in law reports and in a digest thereof, by the publication by defendant of a similar digest, the instances of alleged piracy pointed out amounted to less than one per cent. of defendant's book, and while, as to some of them, identity of language raised a presumption, well-nigh conclusive, of copying from complainant's books, defendant contended, as to others, that both parties had copied from the opinions digested, and denied any piracy. It appeared that the parts of defendant's digest, issued semi-monthly during the year,

49. U. S. R. S., § 4952.

50. *Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425.

51. *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. 177, 32 L. Ed. 547; *Butterworth v. Robinson*, 5 Ves. 709; *Cary v. Longman*, 1 East, 358; *Hodges v. Welsh*, 2 Ir. Eq. 266, 287; *Lewis v. Fullarton*, 2 Beav. 6; *Saunders v. Smith*, 3 Myl. & Cr. 711;

Sweet v. Benning, 16 C. B. 491; *Jarrolld v. Houlston*, 3 Kay & J. 708, 719.

52. *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055.

53. *Paige v. Banks*, 13 Wall. 608, 20 L. Ed. 709. The decision in this case turned partly on the long ac-

had been sent to complainant, who was a subscriber thereto; that the volume for the year, compiled from said parts was printed and ready for delivery; and that complainant had supplied its customers with its own digest for the year. It was held that, as the determination of the question of infringement would involve a long and complicated comparison, and an injunction meantime would work irreparable injury to defendant, out of proportion to the injury to complainant from a refusal thereof, the temporary stay previously granted should be vacated, and defendant be restrained only from future infringement, and from selling its digest to any persons other than its regular subscribers and those with whom it had previously contracted to deliver the same; and that defendant should bond to keep account of all digests sold, and to pay such damages as might be awarded to complainant.⁵⁴ Subsequently in the Circuit Court a final decree was rendered in this case awarding six cents damages as profits which accrued to defendant from the sale of books containing such paragraphs with costs.⁵⁵ On an appeal from these decrees the Circuit Court of Appeals reversed the decree of the Circuit Court with costs and remitted the case to such court with instructions to decree in favor of the complainant for an injunction against the digest of defendant complained of except so much thereof as contained paragraphs digested from the advance sheets of the United States Supreme Court and from the English, Canadian and other reports referred

quiescence of the reporter in the exercise of the right of the publishers to publish and sell.

54. *West Publishing Co. v. Lawyers' Co-Operative Publishing Co.*, 53 Fed. 265, per Coxe, J.: "It is the duty of the court in all these cases to take into consideration the situation of both parties, and not to issue the writ except in the plainest cases where the result will be irreparable injury to the defendant without corresponding advantage to the plaintiff. It is always easier in such cases to wait for the final proof. *Sargent v. Seagrave*, 2 Curt. 553, 557; *McNeill*

v. Williams, 11 Jur. 344. In *Bramwell v. Halcomb*, 3 Myl. & Cr. 739, the chancellor said: 'It is obvious that it is the interest of both parties that the injunction should be dissolved; for if in consequence of piracy the defendant is in fact selling the plaintiff's work, the plaintiff will have the profits of the publication; but if, on the contrary, no piracy has been committed, a very grave hardship is inflicted on the defendants.' See, also, *Spottiswoode v. Clarke*, 2 Phil. Ch. 157."

55. *West Pub. Co. v. Lawyers Co-op. Pub. Co.*, 64 Fed. 360.

to by the court in the first part of its opinion, and paragraphs from syllabi prepared by the court,—with the privilege, however, to defendant, if it be so advised, to show by competent proof to the court or master which paragraphs in said digest were prepared by its editors, with the further privilege of moving on such proof to except such paragraphs from the operation of the injunction, providing, also, that if defendant should avail of this privilege, the case should then be re-opened sufficiently to allow complainant, if it be so advised, to adduce additional proofs tending to show any unfair use of complainants' copyrighted work by said editors, or either of them.⁵⁶

§ 882a. Infringement by State; publication of statutes.—A State cannot authorize its agents to infringe rights acquired by an individual under the copyright laws of the United States and then when a suit against the State is commenced for such infringement shield itself behind the United States Constitution on the ground that the suit is one against the State. So it has been decided that a person may copyright a volume of annotated statutes and that such copyright covers all in his books that may fairly be deemed the result of his labors. including marginal references, notes, memoranda, table of contents, indexes, and digests of judicial decisions prepared by him from original sources of information, and also such head notes as are clearly the result of his labors. But in such a case where an action is brought by such compiler for an infringement of copyright by the State in the publication of another set of the statutes authorized by the Legislature, it has been decided that the Legislature having determined that the public interests require a new compilation of the laws of the State, and the work having been completed, the court should not interfere by injunction unless the right to the relief asked is clearly manifest from the evidence.⁵⁷

56. West Pub. Co. v. Lawyers' Co-op. Pub. Co., 79 Fed. 756, 25 C. C. A. 648.

57. Howell v. Miller, 91 Fed. 129, 33 C. C. A. 407, 62 U. S. App. 17.

§ 883. **Dramatizing novels.**—The defendant dramatized the novel “Little Lord Fauntleroy,” and caused his play to be performed on the stage. The infringement of copyright complained of was that, for the purpose of producing the play, the defendant made four copies of it, one for the Lord Chamberlain and three for the use of the performers, either in manuscript or by the aid of a typewriter. Very considerable passages in the play were extracted almost *verbatim* from the novel. The defendant claimed the right to make more copies if it should be necessary to enable him to give further representations of the play. It was held that what had been done by the defendant constituted an infringement of the plaintiff’s copyright, and that they were entitled to an injunction to restrain the defendant from printing or otherwise multiplying copies of his play containing any passages from the plaintiff’s book.⁵⁸ But though a novelist makes a dramatization of

58. *Warne v. Seeböhm*, L. R. 39 Ch. D. 73, per Stirling, J.: “Not every *verbatim* reprint of part of a book is an infringement of copyright. In the words of Lord Hatherley in *Chatterton v. Cave*, 3 App. Cas. 492: ‘Books are published with an expectation, if not a desire, that they will be criticized in reviews, and if deemed valuable that parts of them will be used as affording illustrations by way of quotation, or the like, and if the quantity taken be neither substantial nor material, if, as it has been expressed by some judges, “a fair use” only be made of the publication, no wrong is done and no action can be brought.’ In *Tinsley v. Lacy*, 1 H. & M. 747, 751, the question arose whether it was a fair use of a novel to print and publish a drama founded on it. In that case it was proved that a portion of the drama, including the most striking incidents and much of the actual language, had been bodily taken from the novel. And it was in

evidence that the profit on the publication of the play had been almost inappreciable. Nevertheless, a perpetual injunction was granted against the printing and publishing of the play, without any preliminary inquiry as to damages. In giving judgment Lord Hatherley, V. C., said: ‘Although it is open to any actor or declaimor to recite a poem or other work written by another as publicly as he pleases, it would scarcely be said that he would be at liberty, on the occasion of his recitation or performance, to distribute copies of the work for sale among the audience; nor could it be any excuse to say that the copies were intended merely to assist the audience, who desired, while listening to the recitation, to have a copy of the words in their hands.’ In *Novello v. Sudlow*, 12 C. B. 177, it was decided that the printing or multiplying copies of a piece of music, not for sale but for gratuitous distribution among the members of a musical soci-

his novel and copyrights both, he cannot restrain another from merely dramatizing the same novel in a proper manner and putting such dramatization on the stage.⁵⁹

§ 884. Musical compositions; piano-forte arrangements, etc.

—A musical composition, to be the subject of a copyright, must be substantially a new and original work, not a copy of a piece already produced with additions or variations which a writer of music with experience and skill might readily make. And where, on application for an injunction to restrain the infringement of such a copyright, the defendant alleged that the basis of the com-

ety, was a violation of the right of property vested in the owner of the copyright in the piece. It must therefore follow that the gratuitous distribution among the audience of copies of a poem or other work which an actor or declaimer thought fit to recite in public, would be an infringement of the copyright therein. This being so, I am unable to see that the multiplication of an indefinite number of copies of a play which, if printed and published, would be an infringement of copyright, for the purpose of enabling that play to be publicly represented, can be otherwise than an infringement. It was said, however, that anyone has a right to dramatize a novel—that is, not merely to conceive but to write dramas, and to do everything necessary for that purpose, including the making of a copy for the Lord Chamberlain. In my opinion that is a fallacious mode of stating the right. The statute confers on the author of a book and his assigns “the sole and exclusive liberty of printing or otherwise multiplying copies” of the book. By implication every person other than the author and his assigns is prohibited from

printing or otherwise multiplying copies of the book. But this is the only restriction imposed on the public, and, subject to it, every person is free to make such use of the book as he pleases. So long, therefore, as he does not print or otherwise multiply copies of the novel, any person may dramatize it, and may cause his drama to be publicly represented. But if for the purpose of dramatization, he prints or otherwise multiplies copies of the book, he violates the rights of the author, no less than if the copies were made for gratuitous distribution. The authorities appear to me to be consistent with this view. *Coleman v. Wathen*, 5 T. R. 245; *Murray v. Elliston*, 5 B. & Ald. 657.’ And see *Reade v. Conquest*, 9 C. B. (N. S.) 755, 11 C. B. (N. S.) 479.” As to similitude of names of plays, see *Frohman v. Miller*, N. Y. Law Jour. of May 26, 1894.

59. *Schlesinger v. Bedford* (C. A. 1893), W. N. 57, per Lindley, L. J.: “*Wilkie Collins* had written a novel and also a play called ‘*The Woman in White*,’ and the plaintiffs, his executors, had the copyright in both. The copyright law of this country is in a peculiar state, and the defend-

position was taken from one before published in another country, and that the plaintiff had only by ordinary skill adapted to the piano-forte a melody that had been arranged for the clarinet, and the evidence on that point was conflicting, so that the court could not determine the question of fact, the decision on the motion for an injunction was suspended and an issue at law directed, the defendant to keep an account of sales and report them monthly under oath to the clerk of the court.⁶⁰ An arrangement for the piano-forte of the orchestral score of an opera, is a piracy of the opera if made by one who has not acquired the right to make such use of it; but if he has acquired such right, the piano-forte arrangement is substantially a new and distinct composition, requiring musical taste and skill of a high order, for in making such an arrangement for the piano, the ideas of the composer of the opera cannot be wholly reproduced, but other ideas resembling them, or wholly new, must be added and substituted.⁶¹ And where a piano-forte arrangement of the orchestral score of an opera was made by a United States citizen, with the consent of the non-resident foreign composers of the opera, and then transferred by him to a fellow citizen, who procured a copyright, which he assigned to a non-resident foreigner, acting as agent of the original composers of the opera, it was held that there was nothing of evasion or violation of law, and that the assignee was entitled to the protection of the court against infringers.⁶² A piracy is also

ant has done what by law he was entitled to do. He has not infringed the copyright in the drama or in the novel, but he has dramatized the novel in his own way and made an effective play of it."

60. *Jollie v. Jaques*, 1 Blatchf. 618.

61. *Wood v. Boosey*, L. R. 2 Q. B. 340, *aff'd* L. R. 3 Q. B. 223; *Boosey v. Fairlie*, L. R. 7 Ch. D. 301, *aff'd* L. R. 4 App. Cas. 711; *Thomas v. Lennon*, 14 Fed. 849.

62. *Carte v. Evans*, 27 Fed. 861. C., an alien, purchased from the au-

thors, British subjects, the right of public representation in the United States of their opera. They employed T., a citizen of the United States, to come to London and prepare a pianoforte arrangement from the original orchestral score, with a view to copyright in the United States, where T. copyrighted it and conferred on C. the right to use it. The author published and sold in England the libretto and vocal score, and C.'s pianoforte arrangement. Held, they thus dedicated their entire dramatic property in the opera

committed upon a musical composition by incorporating any substantial part of its air or melody into another musical composition, though the original be an opera and the infringing work be a waltz or quadrille, and such an infringement will be enjoined, whatever mechanical variations be added to the original air.⁶³ And a dramatic representation, in which a substantial and material part of an opera has been performed, is an infringement of the exclusive right to perform the opera, even though the operatic

to the public, notwithstanding their retention of the orchestral score in manuscript, and that the public representation in the United States by a third person, who had procured in England an independent orchestration from the vocal score, and piano score, would not be enjoined. *Carte v. Duff*, 23 Blatchf. C. Ct. 347, 25 Fed. 183.

63. *D'Almaine v. Boosey*, 1 Younge & C. 288, per Lord Lyndhurst: "It is said that the present publication is adapted for dancing only, and that some degree of art is needed for the purpose of so adapting it; and that but a small part of the melody belongs to the original composition. That is a nice question. It is a nice question what shall be deemed such a modification of an original work as shall absorb the merit of the original in the new composition. No doubt such a modification may be allowed in some cases, as in that of an abridgment or digest. Such publications are in their nature original. Every compiler intends to make of them a new use; not that which the author proposed to make. . . . Now it will be said that one author may treat the subject very differently from another who wrote before him. That observation is true in many cases. A man may write

upon morals in a manner quite distinct from that of others who preceded him; but the subject of music is to be regarded upon very different principles. It is the air or melody which is the invention of the author, and which may, in such case, be the subject of piracy; and you commit a piracy if, by taking not a single bar but several, you incorporate in the new work that in which the whole melodious part of the invention consists. . . . It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and a mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is where the appropriate music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding variations makes no difference in the principle."

score may have been obtained by independent labor bestowed on an uncopyrighted piano-forte arrangement by another.⁶⁴

§ 884a. **Musical composition; what is a copy of within copyright law.**—A copy of a musical composition which will entitle a complainant to an injunction against it under the copyright laws is defined as “a written or printed record of it in intelligible notation,” and musical sounds which reach a person through the sense of hearing cannot be considered as copies. Such a composition is not copied until it is put in a form which others can see and read and therefore a record or perforated roll which even those skilled in the making of them can not read, cannot be said to be a copy which will entitle a person to the benefit of the remedies provided by the copyright statutes.⁶⁵

§ 885. **Pantomime; merely mechanical movements.**—The merely mechanical movements, by which effects are produced on the stage, are not subjects of copyright where they convey no ideas

64. *Boosey v. Fairlie*, L. R. 7 Ch. D. 301. As to the copyright of a humorous topical song, see *Henderson v. Tompkins*, 60 Fed. 758.

65. *White Smith Music P. Co. v. Apollo Co.*, 209 U. S. 1, *aff'd* 147 Fed. 226. Mr. Justice Day said: “After all, what is the perforated roll? The fact is clearly established in the testimony in this case that even those skilled in the making of these rolls are unable to read them as musical compositions, as those in staff notation are read by the performer. It is true that there is some testimony to the effect that great skill and patience might enable the operator to read his record as he could a piece of music written in staff notation. But the weight of testimony is emphatically the other way, and they are not intended to be read as an ordinary piece of sheet music, which to those skilled in the

art conveys, by reading, in playing or singing, definite impressions of the melody. These perforated rolls are a part of a machine which, when duly applied and properly operated, in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the Copyright Act. It may be true that the use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislative and not to the judicial branch of the government. As the act of Congress now stands we believe it does not include these records as copies or publications of the copyrighted music involved in the cases.”

which are expressed, or are capable of expression, in a dramatic composition. Thus, a stage dance illustrating the poetry of motion, by a series of graceful movements of a comely woman, combined with an attractive arrangement of drapery, lights and shadows, but telling no story, portraying no character and depicting no emotion, is not a "dramatic composition," within the meaning of the copyright act.⁶⁶ And the manner and method of every actor is held to be individual, and one who, as a theatrical manager, claims the exclusive right of producing an opera has no literary property in the manner in which an actor may dance or posture, as the actor alone, if any one, has the right to complain, and a manager is not entitled to an injunction restraining another actor from imitating the postures of an actor appearing for him in such play.⁶⁷ But a written play, consisting of directions for its representation by pantomime, without the use of spoken language, is a dramatic composition and is entitled to be protected against piracy in whole or in part, by pantomime.⁶⁸ A scene in a play represented a person put in peril of his life by being placed by another on a track over which a railroad train was momentarily expected to arrive, and so fastened that he could not move from his dangerous position, and his rescue by a third person who, surmounting various obstacles, succeeded at the last moment in releasing him. It was displayed before the audience by a series of incidents grouped in a certain sequence, and realistically presented, but with very little dialogue. It was held that such combination of dramatic events, although its success was largely dependent on what was seen, irrespective of the dialogue, was a

66. *Fuller v. Bemis*, 50 Fed. 926. In *Martinetti v. Maguire*, 1 Abb. (U. S.) 356, it was held that the Copyright Act did not extend so far as to protect the "Black Crook" spectacle and scenic effects which had no literary character, and the principal part of which, as the court

said, was "of women lying about loose, a sort of Mohammedian paradise with imitation grottoes and earthly houris."

67. *Savage v. Hoffman*, 159 Fed. 584.

68. *Daly v. Palmer*, 6 Blatchf. 256.

dramatic composition, entitled to protection by injunction under the copyright laws.⁶⁹

§ 886. **Protecting translations of plays, etc.; international copyright.**—Where the translator of a play, by consent of the author, has obtained a copyright upon it, he can maintain a bill to enjoin any other person from representing such translation or any part of it on the stage.⁷⁰ The rule in England is that a translation of a foreign play, in order to be protected under the law of international copyright, does not necessarily require to be absolutely literal; it is sufficient if it be substantially a transla-

69. *Daly v. Webster*, 56 Fed. 483, 4 C. C. A. 10, per *Curiam*: "Upon the main point of the case, namely whether the combination or series of dramatic events (apart from the dialogue), which makes up the particular scene or portion of the play claimed to be infringed, is a dramatic composition, and as such entitled to protection under the copyright laws, it is necessary to add but little to the exhaustive opinion of Judge Blatchford, reported in *Daly v. Palmer*, 6 Blatchf. 256. The same scene in the same play is elaborately discussed by him, and in his conclusion, that it is a dramatic composition, we concur. In plays of this class the series of events is the only composition of any importance. The dialogue is unimportant, and, as a work of art, trivial. The effort of the composer is directed to arranging for the stage a series of events so realistically presented, and so worked out by the display of feeling or earnestness on the part of the actors, as to produce a corresponding emotion in the audience. Such a composition, though its success is largely dependent upon what is seen irrespective of the dialogue, is dramatic. It tells a

story which is quite as intelligible to the spectator as if it had been presented to him in a written narrative. the mere exhibition of mechanical appliances to represent incidents is not to be included within this classification. There must be a series of events, dramatically represented, in a certain sequence or order. In other words, there must be a "composition," *i. e.*, a work invented and set in order—a work of various parts and characters, which, when put upon the stage, is developed by a series of circumstances. The decree of the Circuit Court is therefore reversed, and the cause remanded, with instructions to enter the usual decree for account and perpetual injunction."

70. In *Shook v. Rankin*, 6 Biss. 477, 479, *Drummond, J.*, said: "D. Enney and Cormon were the authors of a drama in the French language, called 'Les Deux Orphelines;' Jackson translated it into English, and adapted it to representation on the stage. This was with the consent of the authors. After this was done he applied under the law for a copyright; and the question is whether there was any valid objection to his obtaining a copyright for the play

tion.⁷¹ A prose translation of a copyrighted prose romance which the author had herself caused to be translated in a way she liked and copyrighted, is not an infringement of the author's copyright of the original.⁷²

thus translated into English. I do not see that there was. He was the translator of the play. He adapted it to representation on the stage, and was in the sense of the law the author of that for which he obtained a copyright. No one could complain of this, except the authors of the play in French, and it affirmatively appears that they assented to this action on the part of Mr. Jackson. Then I do not see why he was not protected under the law for his translation and adaptation of the work to the stage, and of which he was in one sense the author."

71. *Lauri v. Renad* (1892), 3 Ch. (C. A.) 402; *Wood v. Chart*, L. R. 10 Eq. 193.

72. *Stowe v. Thomas*, 2 Wall. Jr. 547. This decision has been severely criticised.

GENERAL NOTE.—An international copyright association, organized in Paris in 1879, under the presidency of Victor Hugo, held its 14th annual conference in Barcelona, Spain, Sept. 23-30, 1893. Annual conferences have been held since 1878 in London, Lisbon, Vienna, Rome, Amsterdam, Brussels, Antwerp, Geneva, Madrid, Venice, Paris (for the 2d time), London (for the 2d time), Neuchatel, and Milan. Its membership is largely French, but at Barcelona there were many Germans and Italians, as well as Spaniards. The object of the association, as declared in its constitution, is to defend and propagate the principle of international literary and artistic property, and to work for

the unification of the legislation of the world regarding copyright. The conference was entertained by the press association of Barcelona, and there were public receptions and other festivities. The subjects for discussion, arranged on the programme were: (1) Translations; (2) Contracts between authors and publishers; (3) Registration of copyrights at Stationers' Hall, London; (4) Literary property in South America; (5) Term of copyright; (6) Property in architectural designs; (7) Desirability of general registration at Berne of copyrights claimed in any country. The conference resolved that authors should have control of the translation of their works for a minimum period of 20 years. A draft of a law on contracts was carefully considered, in 27 articles, and it was resolved: (1) That the duration of protection should be the same in all countries; (2) That this term, if limited, should be 100 years; (3) That in the near future this should be extended to perpetuity. The plan of a general registration of titles and authors, which should be recognized as proof in law, was discussed, with general agreement on its desirableness. The records of copyright in the U. S. Congressional Library show that the year 1893 has been the most prolific in the history of the country. The increase in 1893, over the issue in 1892 was more than 3,000. The annual issue of copyrights is between 50,000 and 60 000. Under the international copyright law approved by

§ 887. **Protecting sculpture; statuary.**—Where a piece of statuary is copyrighted a photograph thereof constitutes a “copy” within the meaning of the copyright laws, and where it is made without the authority of the owner of the copyright constitutes an infringement which may be enjoined.⁷³ And where a London firm of modelers and sculptors had made new and original casts of natural fruits and leaves, it was held entitled, under an act passed in the reign of George the Third, to an injunction to restrain another sculptor from making and selling casts copied from and only colorably differing from theirs, as their casts were found to display artistic taste in the selection of the object to be molded, judgment in arrangement, and skill in grouping.⁷⁴

§ 888. **Paintings, photographs, etc.**—A photograph may be copyrighted so far as it is a representation of original intellectual conceptions, but whether it is an original work of art, or is a mere mechanical production is to be determined by proof of the facts of originality and of thought and conception on the part of the author.⁷⁵ And one who photographs an actress in her public

the president March 3, 1891, many foreign works of the highest class have been published in the United States. Foreign writers not of the highest ranks are more slow to use the law. American authors use the privilege of copyright more widely every year. Copyrighting newspaper articles has become almost universal, and some daily papers copyright their whole issue. There is also great increase of copyrighted photographs, and musical compositions. Alden's “Living Topics Cyclopaedia.”

73. *Bracken v. Rosenthal*, 151 Fed. 136, wherein it was said by Kohlsaas, J.: “To hold that a piece of statuary may be infringed by a picture of the statuary seems in every way in accord with the reason and spirit of the law.”

74. *Caproni v. Alberti*, W. N.

(1891) 200. In this case it was held that 54 Geo. 3, ch. 56, § 1. which provides that every person who makes or causes to be made any new and original sculpture model, copy or cast of the human figure, or of any animal of “any subject being matter of invention in sculpture,” is to have the sole property in such sculpture for a term of fourteen years, includes new and original casts of fruits and leaves.

75. *Burrow-Giles Lith. Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349, per Miller, J.: “The question here presented is one of first impression under our Constitution, but an instructive case of the same class is that of *Nottage v. Jackson*, 11 Q. B. D. 627, decided in that court on appeal August, 1883. The first section of the act of 25 & 26

character free of charge, with the understanding that she is to have as many photographs as she desires to use, is the owner of the negative and photograph, and has the right to copyright it for his exclusive benefit, and her right does not extend to making copies or permitting others to do so for their own benefit.⁷⁶ And a painting of the dimensions of seven inches by four and a half inches, owned by a corporation, painted by an artist employed by the corporation from a design made by its president from a wood-cut, may be copyrighted by the corporation, and at the suit of the corporation protected by injunction from infringement; and the fact that such a painting could be readily lithographed and used as an advertising label will not affect the copyright.⁷⁷ So in a recent case it is decided that a photograph,

Vict., ch. 68, authorizes the author of a photograph, upon making registry of it under the copyright act of 1882, to have a monopoly of its reproduction and multiplication during the life of the author."

76. *Press Publishing Co. v. Falk*, 59 Fed. 324, per Wheeler, J.: "That she was the subject of the picture would not alone make it hers. The right to it would depend upon for whom the work was done, and the evidence shows that what Mr. Falk did was done for himself. That she was to have as many of the photographs as she wanted to do with as she pleased, did not affect his exclusive right to make other copies.

77. *Schumacher v. Schwencke*, 25 Fed. 466, per Coxe, J.: "The complainant is certainly the 'proprietor' of the painting, even in the restricted and technical sense in which, according to some of the authorities, the word proprietor is used in the statute. The complainant's money paid for the painting; its artist colored it; its president designed it, his was the originating, inventive, and master mind. The complainant owns the

painting. Its title is derived directly from the author and designer. The head was no doubt suggested by the wood-cut print, but the same is true, to a great extent, of all figure painting. No artist would for a moment think of placing the face of Washington, for instance, upon his canvas without studying the best portraits of Washington within his reach. But there is enough of artistic merit in the other parts of the painting to support a copyright. It certainly needed a much higher order of merit to produce the pleasing and suggestive combination presented in this painting—requiring, as it must, imagination and artistic genius than that required in placing a human being in a graceful attitude before a camera; and yet there is no longer a doubt that a photograph may be protected by a copyright. *Burrows-Giles Lith. Co. v. Sarony*, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349. U. S. R. S., §4952, provides that any citizen of the United States or resident therein, who shall be the author, inventor, designer or proprietor of a painting, drawing, chromo-

where it is also an artistic production, the result of original intellectual conception on the part of the author, may be copyrighted with the same effect as if it were a book, but that without the protection of the Federal statutes it cannot continue to be the author's exclusive property after it has been printed and offered to the public for sale and therefore to copy it is not to compete unfairly in a legal sense but to compete with the full sanction of the law and such an act can not be restrained by injunction.⁷⁸ But the proprietor of a copyrighted photograph may, without losing his copyright, use a card containing one hundred miniature samples of different copyrighted photographs, for the sole purpose of enabling dealers to give orders, though it does not have the word "copyright" impressed on it. Such a use is not a publication within the meaning of the copyright laws.⁷⁹

§ 888a. **Right to "vend" under copyright statutes construed; fixing of retail price by owner of copyright.**—In a recent case in the United States Supreme Court the question was presented whether the sole right given by the copyright law to vend the subject of the copyright secured to the owner of the copyright of a book, after the sale of the book to a purchaser, the right to restrict future sales of the book at retail to a certain price per copy because of a notice in the book that a sale at a different price would be treated as an infringement, which notice was brought home to the

statue, statuary, and of models or designs intended to be perfected as works of the fine arts, shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing' and vending the same." "That in the construction of this act the words 'engraving, cut, and print,' shall be applied only to pictorial illustrations or words connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture should be entered under the

copyright law, but may be registered in the patent office." Act of June 18, 1874.

78. *Bamforth v. Douglass Post Card & M. Co.*, 158 Fed. 355. In this case the complainant made and sold post cards illustrated by pictures from life models. The complainant did not copyright them and sought to obtain damages and other equitable relief against the defendants, who had reproduced the pictures,

79. *Falk v. Gast Lithograph Co.*, 54 Fed. 890.

one offering to sell for a less sum than that named. The court held that, there being no claim of contract limitation, nor license agreement controlling the subsequent sales of the book, the copyright statutes, while protecting the owner of the copyright in his right to vend copies of the book, gave him no right to impose, by such a notice, a limitation at which the book might be sold at retail by future purchasers, with whom there was no privity of contract.⁸⁰

§ 888b. **Sale of plates by owner of copyright; agreement as to price of book.**—Where an author or a publisher owning the copyright of a book enters into an agreement with another in respect to the use of the property, that is, the copyright and plates, such agreement is held to be binding upon all who may acquire the property with notice thereof. So where a publisher who owned the copyright of a book and the plates sold one set of plates to another under an agreement which contained a provision fixing the retail price of the book at a certain sum, and a receiver was subsequently appointed for such publisher, who sold the remaining plates to a third party, who, with notice of the agreement, proceeded to publish a better book from the same plates than that published by the first publisher, it was decided that though the

80. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, followed in *Scribner v. Straus*, 210 U. S. 352. Mr. Justice Day said: "This conclusion is reached in view of the language of the statute, read in the light of its main purpose to secure the right of multiplying copies of the work, a right which is the special creation of the statute. True, the statute also secures, to make this right of multiplication effectual, the sole right to vend copies of the book, the production of the author's thought and conception. The owner of the copyright in this case did sell copies of the book in quantities and at a price satisfactory to it. It has exercised the right to vend. What the complainant con-

tends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the right to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in the enactment."

agreement between the publisher and first purchaser was technically a personal one, yet the latter was entitled to an injunction against the purchaser from the receiver restraining him from selling the books published by it from the plates so purchased at a price less than that stipulated in the agreement.⁸¹

§ 889. **When injunction should issue; jurisdiction.**—On proof of infringement of copyright, injunction should issue without proof of actual damage.⁸² And where the infringement is otherwise established the infringer's intention is immaterial.⁸³ And where the act of infringement is committed in this country the subsequent acts abroad are immaterial, except upon the question of damages.⁸⁴ One who reproduces a copyrighted photograph cannot escape liability as an infringer by merely showing that the copy which he reproduced did not bear the notice of copyright when he purchased it, but he must also show that it bore no notice when it left the custody of the owner of the copyright.⁸⁵ As in the case of patents the Federal courts have exclusive jurisdiction to protect copyright by injunction.⁸⁶ The instances in which a court of equity will interfere because the threatened injury by a wrongful act is irreparable covers cases "where the loss of health,

81. *Murphy v. Christian Press Assn. Pub. Co.*, 38 App. Div. (N. Y.) 426, 56 N. Y. Supp. 597.

82. *Fishel v. Lueckel*, 53 Fed. 499; *Black v. Allen Co.*, 56 Fed. 764, 772; *Reed v. Holliday*, 19 Fed. 325. Plaintiffs, who owned the copyright of E. P. Roe's novels, published them in two editions, one printed on thin paper with paper covers, and retailing at fifty cents a copy, and the other handsomely finished, and bound in cloth, retailing at \$1.50 a copy. Defendants purchased over 60,000 copies of the paper edition, and, binding them in cloth so that they resembled somewhat plaintiff's cloth edition, offered them for sale at forty cents each in thousand lots the pur-

chasers afterwards retailing them at about sixty cents. Defendants' circular stated that they were "the paper E. P. Roe book bound in cloth, which is an exact copy of the genuine \$1.50 edition." Held, that an injunction prohibiting such sales was properly denied. *Dodd v. Smith*, 144 Pa. St. 340, 22 Atl. 710.

83. *Reed v. Holliday*, 19 Fed. 325.

84. *Ketchum Harvester Co. v. Johnson Co.*, 8 Fed. 586; *Goucher v. Clayton*, 11 Jur. (N. S.) 462.

85. *Falk v. Gast Lithograph & Eng. Co.*, 54 Fed. 890, 4 C. C. A. 648, *aff'd* 48 Fed. 262.

86. See § 56, *ante*. U. S. Rev. Stat., § 4970: "The Circuit Courts and District Courts having the juris-

the loss of trade, the destruction of the means of subsistence, or the ruin of the property must ensue" and the reason for equitable interference in copyright cases comes within the meaning of the words "the loss of trade."⁸⁷

§ 890. Rule as to preliminary injunctions.—Where an application was made by the plaintiff for an order *pendente lite*, restraining the defendant from circulating a guide-book containing matter infringing on the copyright of the plaintiff, it was held, that the question of damage that might be sustained by the defendant upon granting the order, as compared with that to the plaintiff by denying it, and the financial ability of the defendant to respond to any damages assessed against him, and the fact that there was no intent on the part of the defendant to appropriate the property of the plaintiff, and that it was done without the knowledge of the defendant by one employed to compile the work, are all considerations which it is proper for the court to weigh in determining the question of granting or denying the application.⁸⁸ The ability of the

diction of Circuit Courts, shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, on such terms as the court may deem reasonable."

87. Ladd v. Oxnard, 75 Fed. 703.

88. Hanson v. Jaccard Jewelry Co., 32 Fed. 202.

On a motion for a preliminary injunction to restrain an infringement of a copyright, when plaintiff has shown a copyright of a book, and a copy of a book having the same title, and has shown that defendant is publishing a book containing extracts from it, but has failed to show that the copy shown is a copy of the book copyrighted, and defendant denies that it is. Held, that

there is no ground for a preliminary injunction. *Humphrey's Homoeopathic Medicine Co. v. Armstrong*, 30 Fed. 66.

Plaintiff contracted with an authoress to copyright and publish her book, to use his best efforts to secure a speedy sale, and to pay her twelve cents per copy sold. She agreed to furnish the manuscript, and agreed not to cause to be published anything which might injure the sale of the book. Plaintiff sought to restrain the publication of the same work, emanating from her since, in a newspaper. She was not made a party to the suit, and it appeared that the sale of the book had quite or nearly ceased, and that plaintiff had not continued his efforts to sell. Held, that a preliminary injunction would be refused. *Worthington v. Batty*, 40 Fed. 479.

defendant to respond to any damages that may be assessed on final hearing, is an element of consideration on an application for a preliminary injunction to prevent infringement, and in this respect the rule governing cases arising under the patent and copyright laws, is the same as in other equitable proceedings.⁸⁹

§ 891. **In case of agency.**—Where the owner of the copyright of a book makes it known to defendant and generally, that the book will be sold only by subscription, and the owner sends to his agent copies to be delivered to subscribers; the agent not, however, becoming the owner of those copies, and the agent, without authority, sells copies to a bookseller, who sells them to defendant, it has been decided that defendant should not be enjoined from selling these copies, but that the injunction should not be extended so as to prevent other unlawful dealings in the future.⁹⁰ If, however, in such a case, the agent had bought the books, and had bound himself not to sell except by subscription, and the defendant had bought from the agent, not knowing of the agreement, he could not be enjoined from selling the books as he pleased.⁹¹

§ 892. **Coincidence of errors as proof of infringement.**—The coincidence of errors, that is, the reproduction of the clerical and typographical errors of the original, in the copy, is often the strongest evidence of an infringement.⁹²

89. *Scribner v. Stoddart*, 19 Am. Law Reg. 433; *Forbush v. Bradford*, 21 Month. Law. Rep. 471; *Chase v. Sanborn*, 4 Cliff. 306; *Lodge v. Stoddart*, 9 Reporter, 137; *Drone, Copyright*, 524.

90. *Henry Bill Publishing Co. v. Smythe*, 27 Fed. 914.

91. *Clemens v. Estes*, 22 Fed. 899. And see *Baldwin v. Baird*, 25 Fed. 293.

92. *Lawrence v. Dana*, 4 Cliff. 1, per Clifford, J.: "Where the question is whether the defendant, in preparing his book, had before him

and imitated or copied the book of the plaintiff, it is manifest, says Mr. Curtis, that this kind of evidence is the strongest proof short of direct evidence, of which the fact is capable. *Curtis on Copyright*, 255; *Murray v. Bogue*, 1 Drewry, 367; *Spiers v. Brown*, 6 Weekly Rep. 353. Other authorities arising from the presumptions arising from the identity of inaccuracies may be carried much further, and where it is held that when it is proved are proved to have been copied by the copying of the blunders in them,

§ 892a. **Doubtful cases.**—Where it is sought to obtain a preliminary injunction against an alleged infringement of a copyright the same general rule applies as in other cases, that is, that the injunction will be refused where the right of the complainant thereto is doubtful.⁹³ In order to warrant a preliminary injunction for the infringement of a copyright the facts must be clear and the equities growing out of them in no doubt. So where the complainant sought an injunction against a rival publisher of information as to real estate transfers on the ground of piracy and the defendant not only denied the right of the complainant to copyright such matter but also alleged that the complainant was guilty of piracy, the court refused to grant a preliminary injunction.⁹⁴ And where the right of a complainant to exclusively produce a certain opera as claimed by him is doubtful an injunction will not be granted restraining an actor from using an orchestration of the opera and the words, but he will be left to prove his rights on the final hearing.⁹⁵ And in another case it is decided that where the infringement of a copyright has not been so clearly established as to exclude substantial doubt a preliminary injunction will not be granted but nevertheless the competition must be fair and the work not so named, advertised or offered for sale as to indicate that it is that of the plaintiffs and a defendant may be restrained from using a title, which, though not identical with that of the plaintiff's publication, is such as would lead ordinary purchasers to suppose that they were buying the latter.⁹⁶

§ 893. **Clean hands.**—In England, where christianity is recognized as being "part and parcel of the law of the land,"⁹⁷ a copyrighted book which denied the immortality of the soul was refused the protection of an injunction,⁹⁸ and an injunction which

other passages which are the same with other passages in the original book must be presumed *prima facie* to be likewise copied, though no blunders occur in them. *Mawman v. Tegg*, 2 Russ. 385; *Longman v. Winchester*, 16 Ves. 269."

93. *Blunt v. Patten*, Fed. Cas. No. 1580.

94. *Sweet v. Bromley Co.*, 154 Fed. 754.

95. *Savage v. Hoffman*, 159 Fed. 584.

96. *Harper v. Holman*, 84 Fed. 224.

97. *Cowan v. Milbourn*, L. R. 2 Exch. 230.

98. *Murray v. Benbow*, cited 6

had been obtained to restrain the publication of a pirated edition of a portion of the poem of "Don Juan" was dissolved on similar grounds.⁹⁹ The Federal Constitution asserts that the object of the power conferred upon Congress to pass copyright and patent laws is "to promote the progress of science and the useful arts," and on this ground it has been held that a dramatic composition, so immoral and indecent as to be calculated to corrupt the morals of the people, would not be entitled to copyright, and on this ground an injunction was refused to protect the proprietor of the spectacle of "Black Crook," in his claim of the exclusive right to represent it on the stage.¹ And where an injunction was sought to restrain the production by defendant of a copyrighted opera the court refused to grant it where the evidence tended to show an oral

Peters, Abr. 558. Story thus draws attention to a practical difficulty of applying a rule, the principal of which he finds no fault with: "A judge who should happen to believe that the immateriality of the soul, as well as its immortality, was a doctrine clearly revealed in the Scriptures (a point upon which very learned and pious minds have been divided), would deem any work anti-Christian which should profess to deny that point, and would refuse an injunction to protect it. So a judge who should be a Trinitarian might most conscientiously decide against granting an injunction in favor of an author enforcing Unitarian views; when another judge of opposite views might not hesitate to grant it." Story, Eq. Jur. 70, 938.

99. Copinger's Copyright (3d ed.), 93. And see Wright v. Tallis, 1 C. B. 893, as to the pirating of works which are of a nature to deceive purchasers.

1. Martinetti v. Maguire, 1 Abb. (U. S.) 356, 363, per Deady, J.: "It cannot be denied that this spectacle of the 'Black Crook' merely

panders to a prurient curiosity by very questionable exhibitions of the female person. The lawfulness of such an exhibition depends on the laws of the place where it is exhibited. But when the author or proprietor of the spectacle asks the power of this court to protect him in the exclusive right to make such an exhibition, under the copyright law of Congress, the matter assumes a very different aspect. I am strongly impressed that an injunction should not be allowed in this case, on the ground that the spectacle is not 'suited for public representation—not fit to be exhibited—within the meaning of that word as used in the Act of Congress, and on the further ground that it is not within the scope of the power of Congress to encourage the production of such exhibitions, as they neither promote the progress of science or the useful arts." In the case of Shook v. Daly, 49 How. Pr. 366, the court was of opinion, after an examination of the original manuscripts, that the defendant's objection that the play of "Rose Michel" was an immoral pro-

license to the defendant from the complainant to use such opera and there was evidence of negotiations for such a license and the defendant had made preparations to produce the opera at a large expense by engaging singers and otherwise which facts were known to the complainant who failed to notify the defendant of any objection to his production of the opera.²

§ 893a. **Pleading.**—On an application for a preliminary injunction to restrain the infringement of a copyright the court will not grant the injunction where it is apparent from the face of the bill that it cannot be sustained on demurrer.³ The complaint in an action for infringement of a copyright of a book should allege affirmatively that the title of the book has been filed in the office of the Librarian of Congress at Washington, that two copies of the book have been filed in such office before its publication, and that notice of the copyright, as required by the act, has been printed upon each copy issued.⁴ But where a bill was demurred to on the ground that notice of the United States copyright had been printed in all editions of the book issued in countries other than the United States and did not therefore show a compliance with the copyright statutes the court overruled the demurrer.⁵

§ 894. **Parties.**—One who seeks to protect a copyright must show that he is the author of the work, or that he derives his title from the author.⁶ A translator of a play who takes out a copyright with the author's consent, is an author in respect to the translation, and as such may protect his copyright from infringement.⁷ And a grantor of a copyright may be sued for infringement by his grantee, if the latter has complied with the statutory requirements as to printing the notice of copyright.⁸ A vendor of a book is

duction could not be sustained, and that the plaintiff's rights should be protected by injunction.

2. Ricordi & Co. v. Hammerstein, 150 Fed. 450.

3. Ladd v. Oxnard, 75 Fed. 703.

4. Ford v. Blaney Amusement Co., 148 Fed. 642.

5. Haggard v. Waverly Pub. Co., 144 Fed. 490.

6. Greene v. Bishop, 1 Clifford, 186, 198; Curtis, Copyright, p. 169.

7. Shook v. Rankin, 6 Biss. 477.

8. Thompson v. Hubbard, 131 U. S. 123, 9 Sup. Ct. 710, 33 L. Ed. 76.

liable if its sale invades the copyright of another, on the same principle and for the same reasons as the inventor of a patented machine is liable for selling it without the license or consent of the patentee.⁹ And where a person bought certain copyrighted pictures and had copies of them made by a photogravure company, it was held that he and the company were liable as joint tort feorsors for the infringing act.¹⁰ In a suit for the infringement of a copyright, where it is shown that the copyright was taken in the name of the complaining publisher as "proprietor," defendant cannot object that the author was a married woman, and that her husband was entitled to the fruits of her literary labor; for it will be presumed that the legal title of the author was properly vested in complainant.¹¹ And where, in such a case, the married woman received her royalties from time to time, from the publisher to whom she had assigned, the court presumed that her legal title as author was duly vested in the publisher as the proprietor of it, and held that long acquiescence by all parties in such claim of ownership by the complaining publisher was enough to answer the suggestion of the husband's possible marital interest in the wife's earnings.¹² Complainant's title is sufficiently made out to enable him to maintain the suit where it is shown that he took the copyright in the name under which he did business,—the name of a firm, to all of whose rights he had succeeded on its dissolution.¹³

§ 895. **Parties; action by one of tenants in common.**—The English rule is that the registered owners of a copyright take as tenants in common and not as joint tenants;¹⁴ and yet any one or

9. *Greene v. Bishop*, 1 Clifford, 186, 203.

10. *Fishel v. Lueckel*, 53 Fed. 499; *Estes v. Worthington*, 30 Fed. 465. And see *Harper v. Shoppell*, 26 Fed. 519.

11. *Scribner v. Clark*, 50 Fed. 473.

12. *Belford v. Scribner*, 144 U. S.

488, 12 Sup. Ct. 734, 36 L. Ed. 514.

13. *Scribner v. Clark*, 50 Fed. 473.

As to the effect of parting with title, see *Harrison v. Maynard*, 61 Fed. 689.

14. *Powell v. Head*, L. R. 12 Ch. D. 686.

more of them may maintain an action against a stranger for an infringement of the entire copyright.¹⁵

§ 896. **Alien assignees; legal and equitable owners.**—A non-resident foreigner to whom a copyright has been assigned by an American owner may have an injunction to protect his rights from infringement.¹⁶ And an action for the infringement of a copyright may be maintained by the holder of the legal title, though the beneficial ownership be in another,¹⁷ and the defendant in such an action cannot take any advantage of the trust relation existing between the legal holder of the title and some third person.¹⁸ An inchoate right to a copyright may be transferred by parol prior to the taking of the copyright, and when the legal and equitable owners of a copyright join in a complaint to enjoin its infringement, it is immaterial whether the equitable owners acquired their interest by written instrument or by parol.¹⁹ And the fact that alien publishers of a foreign cyclopaedia procured copyrighted articles from American citizens for the express purpose of preventing the work from being reprinted in the United States, does not affect their standing in the courts of the United States in a suit to protect the copyright.²⁰

§ 897. **Accounting incident to injunction; rule as to profits.**—Under the copyright act,²¹ the right to an account of profits is incident to the right to an injunction,²² and together they form the appropriate relief in equity, where an infringement has been established.²³

15. *Lauri v. Renad* (1892), 3 Ch. (C. A.) 402.

16. *Carte v. Evans*, 27 Fed. 861; *Black v. Allen Co.*, 56 Fed. 764.

17. *Hanson v. Jaccard Jewelry Co.*, 32 Fed. 202.

18. *Little v. Gould*, 2 Blatchf. 366.

19. *Black v. Allen Co.*, 42 Fed. 618; *Morris v. Kelly*, 1 Jac. & W. 461. That the legal owner of the

title should be joined as plaintiff in a suit by the equitable owner, see *Colburn v. Duncombe*, 9 Sim. 151.

20. *Black v. Allen*, 42 Fed. 618.

21. U. S. Rev. Stat., § 4970.

22. *Falk v. Gast Lithograph, etc., Co.*, 54 Fed. 890; *Belford v. Scribner*, 144 U. S. 488, 12 Sup. Ct. 734, 36 L. Ed. 514; *Stevens v. Gladding*, 17 How. 447, 15 L. Ed. 155.

23. *Fishel v. Lueckel*, 53 Fed.

§ 898. **Rule of damages.**—It is a well-settled rule that though only portions of a copyrighted work are copied in an infringement, yet if such portions are so intermingled with the rest of the pirated work that it is impracticable to separate them from it, the entire profits realized by the infringer will be given to plaintiff.²⁴ If the defendant put his infringing book on the market at the same price at which complainant sold his, he must account for every copy he sold as if it had been a copy of complainant's book, and must pay the complainant the profit he would have received from the sale of so many additional copies.²⁵ But where the infringing publication uses only a part of the matter of the original, and is issued in a different and much cheaper form, the measure of damages is the amount of profits realized by the infringer, and not the amount of profits that would have been realized to the copyright owner by the sale of an equal number of copies of the copyright edition.²⁶ Under the copyright act the printer and publisher are equally liable to the owner of the copyright for an infringement;²⁷ and where two of the defendants print the infringing books by contract with the third defendant who publishes and sells them, the two who print are held to be sharers in the profits from the sales, and are properly chargeable with such profits.²⁸

§ 899. **Forfeiture of infringing books.**—Though the bill prays the forfeiture of all the infringing books, and the plates used in

499; *Gilmore v. Anderson*, 38 Fed. 848. Infringement furnishes ground for an injunction, and the right to an account is incident to the right to an injunction; but the cessation of the infringement removes the occasion, but not the right to an injunction, and such cessation does not deprive complainant of the right to equitable relief. *Gilmore v. Anderson*, 38 Fed. 846.

Complainant, having proved infringement, is entitled to an interlocutory decree enjoining further infringements, and to an accounting for damages. *Sanborn Map & Pub.*

Co. v. Dakin Pub. Co., 39 Fed. 266.

24. *Belford v. Scribner*, 144 U. S. 488, 12 Sup. Ct. 734, 36 L. Ed. 514; *Callaghan v. Myers*, 128 U. S. 617, 665, 9 Sup. Ct. 177, 32 L. Ed. 547; *Elizabeth v. Nicholson Pavement Co.*, 97 U. S. 126, 139, 24 L. Ed. 1000; *Mawman v. Tegg*, 2 Russ. 385, 391.

25. *Pike v. Nicholas*, L. R. 5 Ch. App. 261.

26. *Scribner v. Clark*, 50 Fed. 473.

27. U. S. Rev. Stat., § 4964.

28. *Belford v. Scribner*, 144 U. S. 488, 12 Sup. Ct. 734, 36 L. Ed. 514.

their production, it is unnecessary to grant any other relief than damages, where it is shown that the infringer's place of business, with all the books and plates in question, has been destroyed by fire.²⁹ In England a court of equity has power, under its general jurisdiction, to compel one who has infringed upon the copyright of a novel, by introducing extracts from it into a dramatization of it, to deliver it up for cancellation; but in such a case the defendant may be allowed to sever the offending passages from the dramatization, and as thus altered to put it upon the stage.³⁰

29. *Scribner v. Clark*, 50 Fed. 473, per Blodgett, J.: "The bill contains the usual prayer for the forfeiture of all the books on hand and of the plates, etc., used by the defendant in the pirated work." The learned judge then added that the forfeiture was unnecessary, because of a fire which had destroyed defendant's place of business, but gave a decree for perpetual injunction and damages and costs.

30. *Warne v. Seebohm*, L. R. 39 Ch. D, 73, 82, per Stirling, J.: "The plaintiffs further insisted on an order directing the delivery up for cancellation of the existing copies of the play, and they relied on the decision in *Hole v. Bradbury*, L. R. 12 Ch. D. 886. In that case, however, as I understand the facts, the whole of the work complained of was an infringement of the plaintiff's

rights. In the present case, upon an examination of the play I have come to the conclusion that it may not be impossible for the defendant to sever the passages which he has extracted from the novel from the rest of the work, and if he desires it I will give him an opportunity of doing so. He must, however, first state upon oath what copies of the work exist; secondly, extract from those copies which are in his possession or power and deliver up to plaintiff for cancellation all passages copied, taken or colorably imitated from the plaintiffs' book; thirdly, produce to the plaintiffs, if required by them, for examination, the copies after the pirated passages have been extracted, and there must be liberty for the plaintiffs to apply for a further order if they are dissatisfied with the result."

CHAPTER XXIX.

TO PROTECT LITERARY PROPERTY.

SECTION 900. Common law protection to inventors and authors.

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903b. Protecting photographs.

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Section 900. Common law protection to inventors and authors.

—Independent of letters patent or copyright, an inventor or author has, by the common law, an exclusive property in his invention or composition,¹ until by publication it becomes the property of the general public.² Thus where an inventor of a machine sells it

1. *Palmer v. DeWitt*, 47 N. Y. 532; *Potter v. McPherson*, 21 Hun (N. Y.), 559; *Hammer v. Barnes*, 26 How. Pr. (N. Y.) 174; *Kiernan v. Manhattan etc., Tel. Co.*, 50 How. Pr. (N. Y.) 194; *Woolsey v. Judd*, 4 Duer (N. Y.), 379; *Peabody v. Norfolk*, 98 Mass. 452; *Salomon v. Hertz*, 40 N. J. Eq. 400. And see *Merryweather v. Moore* (1892), 2 Ch. D. 518.

2. *Rees v. Peltzer*, 75 Ill. 475;

Clemens v. Belford, 14 Fed. 728. In *Tompkins v. Halleck*, 133 Mass. 32, *Devens, J.*, says: "That the right of property which an author has in his works continues until by publication a right to their use has been conferred upon or dedicated to the public, has never been disputed. If such publication be made in print of a work of which no copyright has been obtained, it is a complete dedication thereof for all purposes to the pub-

without a patent, but still retains an exclusive property in the patterns by which the machine is made, and one to whom such patterns are given to be repaired measures them, and reveals their dimensions to a third person, the latter may be enjoined by a State court from using patterns made from such measurements; but neither he nor the public in general can be enjoined from manufacturing, selling and using machines like the one which has been sold without the protection of a patent.³

§ 901. **Protecting property in manuscripts.**—The author of the manuscripts of literary, dramatic or musical composition has an absolute common law right to publish them or not, as he thinks fit, and, if he does not desire to publish them, to prevent their publication, either in whole or in part, by anyone else.⁴ At common law

lic. *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055; *Stevens v. Gladding*, 17 How. 447, 15 L. Ed. 155.”

3. *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12, per Vann, J.: “If a valuable medicine not protected by patent is put upon the market, anyone may, if he can, by chemical analysis and a series of experiments, or by any other use of the medicine itself, aided by his own resources only, discover the ingredients and their proportions. If he thus finds out the secret of the proprietor, he may use it to any extent without the interference of the courts. But because this discovery may be possible by fair means, it would not justify a discovery by unfair means, such as the bribery of a clerk who, in course of his employment, had aided in compounding the medicine, and had thus become familiar with the formula. The courts have frequently restrained persons who have learned a secret formula for compounding medicines, beverages and the like, while in the employment of the proprietor, from

using it themselves or imparting it to others to his injury; thus in effect holding, as was said by the learned general term: ‘That the sale of the compounded article to the world was not a publication of the formula or device used in its manufacture.’ *Hammer v. Barnes*, 26 How. Pr. (N. Y.) 174; *Morison v. Moat*, 21 L. J. (N. S.) 248, 20 L. J. (N. S.) 513; *Green v. Folgham*, 1 Sim. & Stu. 398; *Yovatt v. Winyard*, 1 Jac. & W. 394; *Peabody v. Norfolk*, 98 Mass. 452; *Kerr on Injunctions*, 181. And see *Cornwall v. Sachs*, 69 Hun (N. Y.), 283.

4. *Shortt on the Law of Literature*, 48; *Palmer v. DeWitt*, 47 N. Y. 532; *Hoyt v. Mackenzie*, 3 Barb. Ch. (N. Y.) 320; *Wheaton v. Peters*, 8 Pet. 591, 8 L. Ed. 1055; *Little v. Hall*, 18 How. 165, 15 L. Ed. 328; *Prince Albert v. Strange*, 1 MacN. & G. 25. It is provided by U. S. Rev. Stat., § 4967, that “any person who shall print or publish any manuscript whatever, without the consent of the author or proprietor

an author had a property in his manuscript and might have redress against any one who undertook to realize a profit from its publication without authority of the author.⁵ So the owner of an opera which has not been copyrighted may, on his common law right, obtain an injunction, on giving proper security, to prevent its presentation by an unauthorized person.⁶ But the publication of the libretto and vocal score of an opera, with the consent of the

first obtained, if such author or proprietor is a citizen of the United States or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury."

5. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339. Per Mr. Justice Day, citing *Wheaton v. Peters*, 8 Pet. 591, 659, 8 L. Ed. 1055.

In a recent case in the Circuit Court of Appeals the rule is laid down as to the right at common law as follows: "The property rights of the author in his production, intellectual or artistic, are two-fold—absolute ownership of the corporeal production, alike with other property ownership, and an independent right to make duplications, which is equally his own so long as he withholds from publication to the world. The first mentioned right is unaffected by either class of copyright, and one or both are subject to his disposition, absolute or qualified, in common with other property rights. While publication is withheld his right of first publication is exclusive. When he voluntarily releases to the public by general publication, this common-law right of exclusive publication is surrendered. Unless he obtains on or before publication the protection of the statutory copyright, the public is unrestrained in duplication. With the

copyright obtained, his right to publish and sell all copies becomes exclusive thereunder for the statutory term. Thus the benefits of the statute are substituted for the imperfect benefits of the common-law ownership by his surrender of the perpetual right to withhold from publication. These rights are separate and not co-existent. The common-law right ends when the statutory right begins." *Caliga v. Inter-Ocean Newspaper Co.*, 157 Fed. 186 (C. C. A., 1907).

6. *Goldmark v. Kreling*, 25 Fed. 349. In this case plaintiffs were the exclusive owners of the manuscript copy of the operetta "Nanon." Defendants were producing a play under the name of "Genée's Nanon, the Reigning Eastern and European Sensation," which they pretended to have translated and adapted from an old French story, "Nanon." Both plays contained eight characters in common, not in the French; one character had the same name in each, different from the French; the scenes and situations in each were alike; each had ideas expressed alike, not in the French; and defendants advertised their adaptation as "Genée's," and not as their own, from the French. It was held that defendants' play was substantially the same as complainants', with only colorable changes; that plaintiffs were en-

authors, is a dedication of their playright or entire dramatic property in the opera, though they retain the orchestral score in manuscript.⁷

§ 901a. **Same subject; unfair competition.**—Where plaintiff published a series of poems and hymns each in a separate volume with illustrations, particular designs for the covers, and a decorated border for each page, it was decided that though the plaintiff did not claim any protection under the copyright laws it was entitled to an injunction restraining the publication by the defendant of a series which was identically the same, save in artistic merit and workmanship, which were evidently reproduced from the books of the plaintiff by some photographic process.⁸ But where it is sought to enjoin the publication of a book on the ground of unfair competition in trade because it relates to the same subject and contains similar literary matter and illustrations, an injunction will not be granted where there is nothing deceptive in the cover, outside title or title page of defendant's book, and an ordinary customer possessing common intelligence should not in the absence of actual fraud practiced upon him, mistake one for the other, without gross carelessness on his part.⁹

§ 901b. **Right of author to have name appear; encyclopaedia articles.**—In a recent case in New York the question is considered of the right of an author to have his name appear as the author of an article for an encyclopaedia. It appeared in this case that

titled to an order to restrain defendants from performing it as a whole, or the piano score, the libretto containing the dialogue, stage business, situations, etc., or any part as performed by defendants, except the orchestration, which was their own work, or any work under the name of "Nanon," or "Genée's Nanon, the Reigning Eastern and European Sensation." *Goldmark v. Kreling*, 35 Fed. 661. An original operetta, consisting of libretto, score, and name,

so far as unpublished, will be protected by injunction. And it may be entitled to such protection as an original composition, although it is an adaptation of an old play. Nor does the publication of the songs and vocal score make the name public property. *Aronson v. Fleckenstein*, 28 Fed. 75.

7. *The Mikado Case*, 25 Fed. 183.

8. *Dutton & Co. v. Cupples* (N. Y. App. Div. 1908), 102 N. Y. Supp. 309.

9. *Lare v. Harper & Bros.*, 86 Fed.

the plaintiff had entered into a contract with the publisher of an encyclopaedia of law by which he agreed for one year at so much per page to write and prepare original articles and treatises, or parts of articles and treatises, on subjects assigned to him by the defendant. The contract also provided that whatever articles or parts of articles he might prepare should be subject to editorial changes, even to the extent of the rejection of any portion of the manuscript. The defendant by this contract was to become the sole owner of the copyright of said articles or parts of articles and the plaintiff reserved no right to republish any articles or parts of articles so prepared. The plaintiff brought an action to restrain the defendant from publishing a certain article alleged to be written by him, and published as edited by another, unless his name was substituted and the name of the one given as editor eliminated. The court declared that the plaintiff's contract was such that he was not entitled to the relief demanded, as the reasonable interpretation of his contract precluded him from such right.¹⁰ The plaintiff also contended in this case that he had proved a custom among

481, 30 C. C. A. 373, 57 U. S. App. 279.

10. *Jones v. American Law Book Co.* (N. Y. App. Div. 1908), 109 N. Y. Supp. 706. The court said: "Such a contract is very different from one with an author to write a book or a play, even though it is to be produced within a given time, and to be paid for at so much a page. Such a contract could be very well considered as contemplating that the author should have his name appear, and thus enjoy whatever reputation the learning or brilliancy of the work might give him, although he retained no right of future publication. Of course an author is entitled to his own productions. The manuscript is his own. He may retain or publish it or sell it. He may sell it in such a way that his name shall appear as author. He may also

agree to work in such a manner that the right to have his name appear as author will be lost. The fact that he is an author and does literary work does not prevent his hiring out to another to produce an article in which his name shall not appear. . . . The right to mutilate and change through editing of any article which the plaintiff might prepare negatives the idea that the plaintiff's name was to appear as author of each article which he wrote. . . . Whatever the plaintiff may have produced we think belonged to the defendant and that it was under no obligation to publish the article under the plaintiff's name as author. That right was not reserved in the contract, and the character of the work and the manner in which plaintiff was to perform it was such that it is not to be presumed that the par-

publishers of similar works of giving the name of the author of the article, but the court declared that such a custom could not be read into the contract in the absence of proof that the writers for such other publications were under a contract like that of the plaintiff's, or of such proof of a custom as would indicate that the parties contracted in relation to it.

§ 902. **Protecting private letters.**—The receiver of a letter which has been sent to him by the writer has the right to read and keep it, but the writer has the right to restrain its publication;¹¹ unless the publication of it is necessary in vindication of the receiver's character and interests.¹² So it has been decided that where a person has obtained copies of letters dictated to a stenographer by the firm by which he was employed in the course of his employment an injunction will be granted restraining him from publishing them.¹³ The unauthorized publication of letters is not restrained from considerations of honor and confidence or to spare the feelings of the writer, but only to prevent the violation of rights of property.¹⁴ It was insisted, however, by Judge Story, and Mr. Justice Duer declared that he agreed with him, that every letter, however trivial it might be, or defective in sense or orthography, was as truly a literary composition as the most finished poem, and therefore should not be published against the will of the writer.¹⁵

ties so contemplated when they entered into the contract." Per Houghton, J.

11. *Boosey v. Jefferys*, 6 Exch. 580, 583, per Campbell, C. J. And see *Oliver v. Oliver*, 11 C. B. (N. S.) 139.

12. *Labouchere v. Hess* (Ch.), 77 Law T. Rep. 559; *Lytton v. Devey*, 54 L. J. Ch. 293. A defendant in a suit cannot refuse to produce private letters from a third person on the ground that the writer forbids their production, but in such a case the plaintiff must give an undertaking not to use them for publication.

Hopkinson v. Burghley, L. R. 2, Ch. App. 447.

13. *Laidlaw v. Lear*, 30 Ont. Rep. 26.

14. *Wetmore v. Scovell*, 3 Edw. Ch. (N. Y.) 515; *Hoyt v. Mackenzie*, 3 Barb. Ch. (N. Y.) 320; *Brandreth v. Lance*, 8 Paige (N. Y.) 24; *Gee v. Pritchard*, 2 Swanst. 422.

15. *Folsom v. Marsh*, 2 Story, 100; *Woolsey v. Judd*, 4 Duer (N. Y.), 379, 396. And see *Pope v. Curl*, 2 Atk. 342; *Thompson v. Stanhope*, Ambler, 737; *Percival v. Phipps*, 2 Ves. & B. 19.

§ 903. **Protecting lectures, paintings.**—Where persons are admitted to public lectures, as pupils or otherwise, it is upon the implied confidence that they will not injure or infringe upon the exclusive right of the lecturer in his own lectures to publish them in print or by oral delivery, and an injunction may be granted to restrain them from this species of literary piracy.¹⁶ And where, at the meeting of a dental association an original essay was read, which was afterwards handed, with other essays, to a representative of a magazine of dental literature, but was not published, and a third person procured a copy from one connected with the magazine and used extracts as an advertisement, without the authority or permission of the society, it was decided that the manuscript was the exclusive property of the society and that a use without its consent would be enjoined.¹⁷ So, too, an author does not dedicate his manuscript to the public by using it to instruct others; and even if he permits them, for purposes of instruction, to take complete copies, they may be restrained from publishing them.¹⁸ And a professor of a university who delivers orally in his class-room lectures which are his own literary composition, does not thereby dedicate them to the public, and may by injunction restrain their publication.¹⁹ A painter also has the right, before publication of his painting, to restrain any person

16. *Abernethy v. Hutchinson*, 3 L. J. Ch. 209. This was a bill by the celebrated surgeon Abernethy to prevent the publication of his lectures. Lord Eldon held that while the pupils might take down the lectures for their own information, they could not publish them for profit or sell them to others to publish.

17. *New Jersey State Dental Soc. v. Dentacura Co.*, 57 N. J. Eq. 593, 41 Atl. 672.

18. *Bartlette v. Crittenden*, 4 McLean, 300. In *Tompkins v. Halleck*, 133 Mass. 32, 44, Devens, J., said: "The lectures of an accomplished medical professor are of high pecuniary value. They are repeated from

year to year, before different classes, with only such changes as advancing science may require, or such new illustrations as experience may dictate. The student is not only permitted but invited to take written notes; he is entitled to all the instruction he can obtain from the lectures, using both notes and memory to retain it; he may employ the information in his practice; he may reproduce it in his own discourses should he desire to discuss a similar subject; but he cannot therefore orally deliver or publish in print the lecture of which he has been an auditor."

19. *Caird v. Sime*, L. R. 12 App. Cas. 326.

from copying it, and a sale of it is not the publication of it, but the purchaser has the same right. Nor is the exhibition of the painting in a public art gallery, or for the purpose of obtaining subscribers to an engraving of it, a publication of it.²⁰

§ 903a. **Protecting statues.**—In a case in New York the question is considered of the right of relatives of a deceased person to enjoin the erection of a statue in honor of such person, and it is decided that persons attempting to erect a statue or bust of a woman who is no longer living, if their motive is to do honor to her, and if the work is to be done in an appropriate manner, cannot be restrained by the surviving relatives from carrying out such purpose merely because they had not the honor of her personal acquaintance or friendship while she was living, or at most had merely been associated with her in philanthropic enterprises. The court declared that the individual right of privacy which a person has during his life dies with the person, and that any right of privacy which survives is a right pertaining to the living only to protect their feelings and a violation of their own rights in the character and memory of the deceased, and that the mere fact that a person's feelings may be injured by the erection of a statue to a deceased relative is not ground for an injunction against its erection unless there is reasonable and plausible ground for the existence of this mental distress and worry, a ground not the creation of mere caprice or of pure fancy.²¹

20. *Turner v. Robinson*, 10 Irish Ch. 121.

21. *Schuyler v. Curtis*, 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671. Peckham, J., said: "If the motive were to do honor to a good woman, and if the work were to be done in an appropriate way, the relations toward the deceased of those who proposed to render this mark of honor to her memory as one of the benefactors of her sex, would be a matter of very small moment, entitled to no consideration whatever.

No surviving relative, male or female, would have, in our judgment the least ground of complaint that an action, confessedly meant to do honor to the memory of a noble woman, was proposed by those who in her lifetime had not the honor of her personal acquaintance or friendship, but whose proposed action was nevertheless the outgrowth of admiration of her character as a friend and benefactor of her sex of which she was herself so great an ornament. . . . It is not a question of what right of

§ 903b. **Protecting photographs.**—The question as to the right of a person to enjoin the publication of a photograph of himself is one which is considered at length in a somewhat recent case in New York in which the complainant relied to a considerable extent upon the statements made by the court in its opinion in *Schuyler v. Curtis*,²² which is referred to at length in the preceding section. In the later case involving the right to enjoin the publication of a photograph the principle is enunciated that the right of privacy founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise, is not a legal right enforceable in equity by injunction. In the application of this principle, the court decided that an injunction cannot be granted to restrain the unauthorized publication and distribution of lithographic prints or copies of a photograph of a young woman as part

privacy Mrs. Schuyler had in her lifetime. The plaintiff does not represent that right. Whatever right of privacy Mrs. Schuyler had died with her. . . . The right which survived (however extensive or limited), was a right pertaining to the living only. It is the right of privacy of the living which it is sought to enforce here. . . . A privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased. . . . We cannot assent to the proposition that one situated as the plaintiff in this case can properly enjoin such action as the defendants

propose on the ground that as mere matter of fact his feelings would be thereby injured. We hold that in this class of cases there must in addition be some reasonable and plausible ground for the existence of this mental distress and worry. It must not be the creation of mere caprice nor of pure fancy, nor the result of a supersensitive and morbid mental organization, dwelling with undue emphasis upon the exclusive and sacred character of this right of privacy. . . . Feelings that are thus easily and unnaturally injured and distressed under such circumstances are much too sensitive to be recognized by any purely earthly tribunal."

22. 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671.

of an advertisement of a legitimate manufactured article, where there is no allegation that the picture is libelous in any respect, but, on the contrary, the gravamen of the complaint is that the likeness is so good that it is easily recognized and that it has been and is used to attract attention to the advertisement upon which it is placed, although the publication has caused her great mental and physical distress, necessitating the employment and attendance of a physician.²³ In this case there were three judges who dissented from the prevailing opinion and the conclusion reached by them seems supported by better logic, reasoning and law than that reached by the majority of the court. Judge Gray, in the dissenting opinion, said: "If it is to be permitted that the portraiture may be put to commercial, or other, uses for gain, by the publication of prints therefrom, then an act of invasion of the individual's privacy results, possibly more formidable and more painful in its consequences than an actual bodily assault might be. Security of person is as necessary as the security of property; and for that complete personal security, which will result in the peaceful and wholesome enjoyment of one's privileges as a member of society, there should be afforded protection, not only against the scandalous portraiture and display of one's features and person, but against the display and use thereof for another's commercial purpose or gain. The proposition is, to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety without right to invoke the exercise of preventive power of a court of equity."

§ 903c. Publication of opera; reservation of acting right.—

One who publishes an opera in its complete form dedicates it to the public and where it is complete the fact that it contains a notice of a reservation of the acting right does not secure to the publisher

23. *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 828, *rev'g* 64 App. Div. 30, 71 N. Y. Supp. 876.
442, 59 L. R. A. 478, 89 Am. St. Rep.

the exclusive acting right, as in such a case the notice is ineffective to reserve the very right which such publication dedicates to the public. Thus it was so held where a composer of an opera entered into a contract with a publisher ceding to him the exclusive right of publication for all countries, but reserving to himself the acting right in regard to theatres. The opera as published contained upon the title page the following notice: "This copy must not be used for production upon the stage," but it was decided that in view of the publication, which was complete, neither the composer nor his heirs could insist that the performance be enjoined.²⁴

§ 903d. **Publication of play; agreement to keep work in manuscript form.**—The fact that an author has entered into a contract with another to whom he sells a play, to keep the work in manuscript form and not to allow the same to appear in the book trade in order that it may be protected, under the laws of the United States confers no right on the vendee to enjoin the production of such play by a stranger in the United States where the play has been published in Germany in book form in pursuance of a contract between the author and a German publisher, as in such a case all exclusive literary property therein has ceased so far as the United States is concerned and any one here has the legal right to produce it either in its literary form or on the stage, in German or English.²⁵

§ 904. **Where play obtained by memorizing it.**—The representation of a dramatic work which the proprietor has never caused to be printed and has not copyrighted, if made without license of the proprietor, is a violation of his common law right and may be restrained by injunction, though such representation is from a copy obtained by a spectator attending a public representation by the proprietor, for money, and afterwards writing it from memory.²⁶ In New York also it has been decided that the owner's

24. *Wagner v. Conried*, 125 Fed. (N. Y.) 220, 57 N. Y. Supp. 1125. 798.

26. *Tompkins v. Halleck*, 133

25. *Daly v. Walrath*, 40 App. Div. Mass. 32, per Devens, J.: "The

rights in a manuscript play are not lost or prejudiced by its public performance, and no matter by what means a copy is improperly obtained, whether by carrying in the memory or by the steno-

facts bring the case clearly within the principles decided in *Keene v. Kimball*, 16 Gray, 545; and it is frankly admitted by the counsel for the plaintiffs that, unless that shall be reconsidered and reversed, no injunction can issue according to the prayer of the bill. The question decided in *Keene v. Kimball* had never until then been directly determined in any reported case. It had been discussed with great ability by Judge Cadwalader in the Circuit Court of the United States for the eastern district of Pennsylvania, where a decision of it was not necessary in order to dispose of the case before him. *Keene v. Wheatley*, 9 Am. Law. Reg. 33. Adopting the views there expressed, it was held in *Keene v. Kimball* 'that the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others, as they may be enabled, either directly or secondarily, to make from its being retained in the memory of any of the audience.' The case of *Keene v. Kimball* has not since been reaffirmed here, nor, so far as we are aware, elsewhere, nor has it been distinctly denied by the decision of any adjudicated case except that of *French v. Conelly*, decided by the Superior Court of New York, which is not the final tribunal in that State. 1 N. Y. Weekly Dig. 196. The defendants were there charged with representing an unprinted play, 'Around the World in

Eighty Days,' in violation of the rights of plaintiff. They sought to maintain a defense upon the ground that they had themselves dramatized the story from Jules Verne's work of the same name. They were unsuccessful in this, and, it having been proved that the copy used by them was obtained by the memory of individuals after witnessing its public representation, an injunction was issued restraining the defendants from further representing it. . . . The case of *Macklin v. Richardson*, Ambl. 694, decided in 1770, is of much importance in this connection. The plaintiff was the author of a farce called 'Sans a la Mode,' which had never been printed or copyrighted. It had been performed under his direction, and also by his authority, for which he received compensation. Great care was taken by him of the manuscript, which was always kept in his own possession. The defendants, who were proprietors of a journal, employed a stenographer, who took down the words of the play, and his copy, as written out, was afterwards corrected by one of the proprietors of the journal, who published one act in their journal, and advertised the publication of the remainder in their next number. Upon application to the lord chancellor, an injunction forbidding such publication was issued, which was afterwards continued until the final hearing. When the case came on for final hearing, the Great Seal was in commission, and the injunction was made perpetual by the Lords Commissioners. 'It

graphic notes of a spectator, its use without permission is piratical and will be enjoined.²⁷

§ 905. **Translator and dramatizer protected.**—The work by the same person of translation and dramatization requires not only the learning of the scholar but also the skill and versatility of the playwright, and is as much entitled to injunctive protection as a purely original composition.²⁸ And such protection is extended to the assignee of the author, and to an alien as well as a citizen.²⁹ And plaintiff, who translated a novel and dramatized it, was held to be entitled to an injunction restraining an actor, who had been employed by him and had memorized the lines of one of the characters, from speaking the lines and doing the business peculiar to plaintiff's dramatization in a rival theater where another dramatization of the same novel was being performed; and plaintiff was held not to be disentitled to the injunction by the fact that he had licensed a third person to produce the play for a limited time.³⁰

can scarcely be necessary,' to use the words of Judge Cadwalader in *Keene v. Wheatley*, 'to refer to *Morris v. Kelly*, 1 Jac. & W. 481, or any other case, to show that, on the principle of this decree, the performance of "Sans a la Mode," at another theatre, from the shorthand writer's report, would also have been prevented by an injunction.' The learned judge also cited *Morris v. Kelly*, 1 Jac. & W. 461; *Coleman v. Wathen*, 5 T. R. 245; *Murray v. Elliston*, 5 B. & Ald. 657, which he distinguished as copyright cases."

27. *Fieron v. Lackaye*, 14 N. Y. Supp. 292; *Palmer v. DeWitt*, 47 N. Y. 532; *French v. Conelly*, 1 Wkly. Dig. 197.

28. *Daly v. Byrne*, 77 N. Y. 182. It is immaterial whether the work is done by one only or of several acting in co-operation. *French v. Maguire*,

55 How. Pr. (N. Y.) 471.

29. *Shook v. Daly*, 49 How. Pr. (N. Y.) 366; *Widmer v. Greene*, 56 How. Pr. (N. Y.) 91.

30. *Fleron v. Lackaye*, 14 N. Y. Supp. 292, per McAdam, J.: "If the defendant had memorized the plaintiff's lines while attending a performance given by the plaintiff, it would not accord with any notion of propriety to take them to a rival establishment and there repeat them as somebody else's literary production. The law would call this piracy—enjoin it. The fact that the defendant memorized the lines while in the plaintiff's employ does not better his case. What came to him during his employment was imparted under a relationship that required him to be faithful to his employer's interests; and taking his employer's property and using it for the profit and gain of another is

§ 905a. **Play based on facts of a murder; right to produce; accused on trial.**—A constitutional provision that “Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press,” is held to give to every citizen an unlimited right to freely speak, write and publish his sentiments subject to a responsibility at the hands of the law for an abuse of that right. In construing such a provision it has been decided that one on trial for murder is not entitled to an injunction, and that a court of equity has no right to grant one, restraining the production of a play, based upon the facts of the case, though it may tend to deprive him of a fair and impartial trial at the time.³¹

§ 906. **Preventing breach of confidence and of implied contract.**—Where defendant was entrusted with a picture in order to make copies of it for the owner, he was enjoined from selling other copies which in the meantime he had made for himself.³² And a photographer who had taken a negative of a lady in order to supply her with photographs, was restrained from selling or exhibiting copies, both on the ground that there was an implied contract not to use the negative for such a purpose, and also on the

at least a breach of confidence. The act is without justification in law or morals and must be enjoined. The defendant cannot avail himself of plaintiff's literary efforts, nor can he dovetail the plaintiff's lines into the play of another and have all pass as the literary product of that person.”

31. *Dailey v. Superior Court*, 112 Cal. 94, 44 Pac. 458, 32 L. R. A. 273.

32. *Tuck v. Priester*, L. R. 19 Q. B. D. 629, per Lord Esher: “The plaintiffs entered into a written contract with the defendant, by which the defendant undertook to make a specified number of copies of the picture, in order that plaintiffs might

be able to sell them for their own profit. The defendant made other copies with the intention of selling them for his own profit, and he sent a number of them to England with the intention of selling them there, and what was worse, of selling them at a lower price than the plaintiffs were selling theirs. . . . I cannot doubt that quite irrespective of the Act of 1862, a court of equity would grant an injunction and damages against the defendant.” See, also, on the same point, *Murray v. Heath*, 1 B. & Ad. 804, 811; *Queensberry v. Shebbeare*, 2 Eden, 329; *Prince Albert v. Strange*, 1 MacN. & G. 25; *Cox v. Cox*, 11 Hare, 118.

ground that such sale or exhibition was a breach of confidence.³³ The Minnesota rule also is that there is an implied contract between a photographer and his customer that the negative for which the customer sits shall be used only for the printing of such photographs as the customer may order or authorize.³⁴ But it has been decided by a court of first instance in the city of New York that a parent cannot maintain a suit to enjoin the publication of a portrait of his infant child, or for damages caused thereby, and also that he cannot recover upon the theory that he is the proprietor of the portrait, where it is shown that before suit he presented the portrait to his wife. But judging from the opinion the court was not asked to consider the force of an implied contract on the part of the artist not to engage in the publication of the portrait.³⁵

33. Pollard v. Photographic Co., L. R. 40 Ch. D. 345.

34. Moore v. Rugg, 44 Minn. 28.

35. Murray v. Gast Lithographic Co., 8 Misc. R. (N. Y.) 36, 28 N. Y. Supp. 271. "On the trial plaintiff's counsel contended that this action is one brought to recover damages for the alleged unauthorized publication of a portrait of plaintiff's infant daughter, and for an injunction restraining such further publication. Consistently with that contention I have been asked to find as the only proposition of fact deemed established by the evidence that defendant has committed the act of which the claim to relief is predicated. Assuming this theory of the complaint and action to be correct, two insuperable objections arise to preclude any recovery. First, as *conjuncta persona* merely, plaintiff has no right of action for a wrong committed against the person of another, assuming the unauthorized publication of a portrait of the latter to be an unlawful invasion of his right to the enjoy-

ment of personal privacy. Secondly, as parent, his only right of action, growing out of wrongs committed against the person of his child, is for the recovery of damages for loss of services of the child and the expenses to which he has been subjected in effecting a cure from the injury, elements of damages which are obviously wanting in this action; and even in an action for loss of services, and expenses attending the cure, no recovery can be had for the outraged mental sensibility of the parent. Sutherland on Damages, vol. 3, sec. 952; Cowden v. Wright, 24 Wend. 429; Cuming v. Brooklyn R. Co., 109 N. Y. 95. If, still pursuing the same theory of the action, it be insisted that the parent has suffered a personal injury—one to his mental sensibility by the invasion of his child's right to the enjoyment of personal privacy and the indiscriminate distribution of her portraits—the answer is, that the law does not take cognizance of and will not afford compensation for sentimental injury in-

§ 906a. **Same subject; use of another's statements in advertisement.**—In a case in England in which it appeared that a physician had made certain statements to the owner of a medicinal preparation as to its use and value, without any view to their being used as an aid in the sale of the liquid, it was decided that the

dependent of redress for a wrong involving physical injury to person or property. 'The law protects the person and the purse. The person includes the reputation. The body, reputation and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But, outside these protected spheres, the law does not yet attempt to guard the peace of mind, the feelings or the happiness of every one by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain without disturbance any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries.' Lumpkin, J., in *Chapman v. West. U. T. Co.*, 88 Ga. 763, 46 Albany Law J. 409. If plaintiff is not entitled in this action to recover damages for the infraction

of a legal right, still less is he entitled to injunctive relief. A court of equity is powerless to enforce a right or to prevent a wrong in the abstract, and, apart from an injury or damage to the person seeking relief (*High on Injunctions*, sec. 1), it cannot enforce a purely moral obligation or the performance of a purely moral duty; and in the absence of actual or threatened injury to property rights, injunctive relief must be denied (*id.*, sec. 23). It is fundamental to the jurisdiction of the court, in any case where it is applied to for an injunction, that some property right belonging to the party seeking the relief is in jeopardy (*Re Sawyer*, 124 U. S. 200, 210; *Kerr on Injunction*, 1); and an injunction was upon that ground refused where it was sought to restrain a libelous publication (*Brandreth v. Lance*, 8 Paige, 24), and in another case, where the surviving relatives of another applied to restrain the publication of his unauthorized biography, though the latter was admitted to be wholly laudatory. *Corliss v. Walker Co.* (1893), 48 Alb. L. J. 431. Should it now be urged that this action was in fact brought, and that its true theory is to recover damages for the unauthorized publication of the portrait which plaintiff caused to be painted of his infant daughter, and to restrain such further publication, and that the unauthorized publication of the portrait was and is an invasion of plaintiff's proprietary

physician was not entitled to an injunction against the publication of such statements in an advertisement of the preparation, where it did not appear that the publication was injurious either to the reputation or property of the complainant.³⁶

§ 907. Colorable imitations.—The use of a colorable imitation of a publication and of the pseudonym under which it is published, by which the public may easily be misled into supposing that another publication is the one which they wish to obtain, is an act of deception and a species of literary piracy which may be prevented by injunction.³⁷ But if the difference of appearance be-

rights therein, it seems a conclusive answer that he is not the owner of the portrait, for, from his own admission, it is his wife's property. I refrain from discussing the rights of plaintiff's wife or infant daughter, upon the facts in evidence, for two reasons, namely, that it is unnecessary for the purposes of this action, and that the urgency of the parties for a speedy decision precludes the possibility of doing so satisfactorily to me. Defendant is entitled to judgment, with costs." An engineer made a report upon a mining property and handed it to a member of a syndicate for buying out a company. It was agreed that the report should be printed and shown to the syndicate, and if the company was formed and the report published in the prospectus, the engineer should receive £1,000, but if the company was not formed the report should be returned to him. The proposed company was abandoned, but defendant company took up the property and having obtained a printed copy of the report, stating it to be a reprint of the made use of it in the prospectus issued by them. It was held that the property in the report belonged to the engineer, and that he could enjoin

the defendants from publishing it. *Kenrick v. Danube Collieries Co.*, 39 Wkly. Rep. 473.

36. *Dockrell v. Dougall*, 78 Law. T. Rep. 840.

37. *Munro v. Tousey*, 129 N. Y. 38, 29 N. E. 9, per Gray, J.: "That the plaintiff would be entitled to the protection of the law against the use by others of the words 'Old Sleuth Library,' as used to describe a series of publications, or against the use of the name 'Old Sleuth, the Detective,' for a work of fiction, may be conceded. This protection is afforded upon the same principle upon which the court acts in trade-mark cases, in restraining the unauthorized use of the label or sign constituting the trade-mark. The theory upon which a court of equity has long acted is that a resemblance in or an imitation of the names, signs or marks under which another conducts a business, is a deception practiced upon the public, and an injury to the proprietor in the loss of custom and patronage; to redress which an action for damages is not a sufficient remedy. That is the principle we may extract from *Hogg v. Kirby*, 8 Ves. 215; *Knott v. Morgan*, 2 Keen, 213; *Snowden v. Noah*, Hopk. Ch. (N. Y.) 347; *Bell*

tween plaintiff's and defendant's publications is so obvious as to be readily detected by the buyer's senses, there is no colorable imitation to be enjoined.³⁸

§ 908. **Jurisdiction.**—The State courts have jurisdiction to protect by injunction the common law rights of authors to their

v. Locke, 8 Paige (N. Y.), 75."

Defendant advertised a reprint of the 1847 edition of Webster's Dictionary, the copyright having expired, as "latest edition, 10,000 new words," etc., old price \$8, and that the new low price of \$1 was made possible by improvements in machinery, etc. Held, on application of the owner of the copyright of subsequent editions, that defendant be enjoined against the further circulation of such misleading advertisements, and that, because of their already extensive circulation, a printed slip must thereafter be attached to each book, stating edition of 1847. *Merriam v. Texas Siftings Pub. Co.*, 49 Fed. 944.

A complaint to restrain the infringement of a copyright alleged that the cigarmakers' union was an unincorporated association, organized for the purpose of improving the condition of its members, who were practical cigarmakers and to maintain a high standard of workmanship and fair wages; that it adopted a trade-mark, known as the "Union Label," for the purpose of designating cigars made by members of the union, and to guarantee that fair wages, etc., had been secured; that cigars bearing the "Union Label" commanded a higher price than similar cigars without the label; that the label is a source of great profit to the members of the union; that the cigarmakers and the public have always acquiesced in the exclusive right of the members of the

union to the label; and that the defendant is imitating the label for the purpose of deceiving the public, to plaintiff's irreparable injury. Held, that a good cause of action was stated. *Bloete v. Simon*, 19 Abb. N. C. 88.

38. *Munro v. Tousey*, 129 N. Y. 38, 29 N. E. 9, per Gray, J.: "If the character and prowess of Old Sleuth have captivated the literary fancy of a portion of the public, and a magic in the name secures the public patronage to the 'Old Sleuth Library,' how can it be imposed upon by the caption of stories of 'Young Sleuth?' The illustrations of Young Sleuth and of his rescued subjects convey no idea of Old Sleuth. Both to the eye and the ear the differences are marked." In 1891 plaintiff was publisher of a newspaper styled "The Electrical World." In 1890 defendant published a newspaper devoted to the same subject called the "Electric Age." Plaintiff's title-page consisted of the name of the paper, combined with designs of electrical appliances and structures printed in colors. In 1891 defendant changed the name of its paper to that of "The Electrical Age," and adopted a title-page similar in general to that of plaintiff, but having points of striking diversity, and printed in and upon other and different colors. Held, that the facts shown were not sufficient to justify an injunction upon the ground that purchasers would be induced to pur-

literary productions. And an alien friend and a citizen are accorded equal protection and are regarded with equal favor.³⁹ The Federal Circuit Courts have similar jurisdiction by reason of the diverse citizenship of the parties.⁴⁰

chase defendant's paper instead of plaintiff's by reason of their similarity of appearance. *W. J. Johnston Co. v. Electric Age Pub. Co.*, 14 N. Y. Supp. 803.

39. *Palmer v. DeWitt*, 47 N. Y. 532.

40. *Keene v. Wheatley*, 4 Phila. 157, 9 Am. L. Reg. 45.

CHAPTER XXX.

RELATING TO TRUSTS AND CONFIDENTIAL COMMUNICATIONS.

SECTION 909. Jurisdiction—Limited by terms of trust.

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- 927. Attorney and client.
- 928. Partner's outside use of information.
- 929. Dissolution of injunction.

Section 909. Jurisdiction; limited by terms of trust.—As before seen, equity will, when necessary, assume control of trusts and trustees and direct the disposition of the trust fund for the purposes of the trust.¹ Thus though, in default of payment, a deed of trust authorizes a sale by the trustee, yet where he attempts to sell property which is subject to conflicting liens, and it is

1. § 57, *ante*.

doubtful whether a part of it is covered by the deed, a court of equity has jurisdiction to restrain the sale, determine the parties' rights and administer the fund.² And the beneficiary of a trust may enjoin the trustees from completing a sale which is being so conducted by them as to amount to a breach of a trust, and the fact that plaintiff's interest is small and that he is an infant, is not a sufficient reason for not granting an injunction.³ And in a recent case in Nebraska it is declared that a court of equity has jurisdiction of an application by a *cestui que trust* for an order restraining the trustee from misappropriation of the trust funds and that this jurisdiction is grounded on the fundamental principles of equity jurisprudence.⁴ The ground of jurisdiction is breach of trust, and not irreparable injury.⁵ And where church trustees have power to sell property of the church for the purpose of paying debts incurred by them on its behalf, a court of equity may enforce the sale.⁶ It has, however, been held in New York that a court of equity has no power to compel a trustee to consent to an extinction of a trust. Thus in an action for partition between heirs and devisees, the Supreme Court of that State has no power to order a testamentary trustee of certain express trusts affecting the realty in the partition suit to enter into a stipulation providing that a judgment shall be entered adjudging the will to be void as a will of real property, even though all the parties interested consent to and desire such a disposition of the matter.⁷ And where the terms

2. *Draper v. Davis*, 104 U. S. 347, 26 L. Ed. 783, per Bradley, J.: "It cannot be doubted that the court had full power to take the trustee under its control and to direct him to dispose of the trust fund embraced in the deed executed to him, including the personal property in dispute."

3. *Dance v. Goldingham*, L. R. 8 Ch. App. 902. And see *Rede v. Oakes*, 4 DeG. J & S. 513.

4. *Coleman v. McGrew*, 71 Neb. 801, 99 N. W. 663.

5. *Anon.*, Madd. & G. 10; *Attorney-General v. Liverpool*, 1 Myl. &

Cr. 171, 210; *Attorney-General v. Aspinall*, 2 Myl. & Cr. 613.

6. *Bushong v. Taylor*, 82 Mo. 660. See, also following cases:

Illinois.—*Trustees v. Garvey*, 53 Ill. 401.

Indiana.—*Trustees v. Shultze*, 61 Ind. 511.

New Jersey.—*Van Houten v. Dutch Church*, 17 N. J. Eq. 126, 132.

Ohio.—*Price v. Methodist Church*, 4 Ohio, 515.

Virginia.—*Linn v. Carson*, 32 Gratt. 170.

7. *Cuthbert v. Chauvet*, 136 N. Y.

of an instrument creating a charitable trust are unequivocal and imperative, there is no room for a *cy pres* construction, and if the fund is administered by the trustees as authorized by the terms of the trust, a court of equity cannot direct a different application of the fund.⁸ In the State of New York the Supreme Court has inherent power to execute a trust, and in the absence of a trustee it may and will take upon itself its execution.⁹

§ 909a. Possession of trustee that of court; interference with.

—In a suit instituted in the chancery court by a trustee for the purpose of administering the trust his possession is the possession of the court in which the suit is pending and an attempt to interfere therewith where permission has not been first obtained from the court so to do will be enjoined.¹⁰ So where trustees of property acting under the orders of the court therein sold the trust property, retaining title thereto as security for the purchase money subject to confirmation of the court, it was decided that they were entitled to an injunction restraining the sale of the property under executions.¹¹

§ 910. Danger to trust fund.—Peril to the trust fund alone will justify a court of equity to interfere by injunction with a trustee in the exercise of his powers over the fund, but unless such danger is shown by specific allegations and clear proof, the injunction will not be granted.¹² So where the trustees for the benefit of a married woman and children born and to be born unintentionally committed a devastavit by purchasing unimproved land, a court of equity, prior to the Maryland Act of 1862, authorizing such courts to sell the interests of unborn children, had

326, 32 N. E. 1088. And see Douglas v. Cruger, 80 N. Y. 19; Lent v. Howard, 89 N. Y. 169; Cruger v. Jones, 18 Barb. (N. Y.) 467; Wood v. Wood, 5 Paige (N. Y.), 596.

8. Adams Female Academy v. Adams, 65 N. H. 225, 18 Atl. 777, 23 Atl. 430.

9. Kirk v. Kirk, 137 N. Y. 510, 33 N. E. 552; Rogers v. Rogers, 111 N.

Y. 228, 18 N. E. 636; Greenland v. Waddell, 116 N. Y. 242, 22 N. E. 367.

10. Ford v. Watts, 95 Va. 182, 28 S. E. 179.

11. Ford v. Watts, 95 Va. 182, 28 S. E. 179.

12. Satterfield v. John, 53 Ala. 127.

jurisdiction to order a sale of the land in order to relieve the trustees and preserve the trust; and the fact that children were not born in time to be made parties to the suit does not affect the title of the purchaser.¹³ And a trustee may bring suit to prevent a co-trustee from committing a breach of trust and generally it is his duty to do so.¹⁴ But where a testator gave personal property to a trustee to manage and pay the income to his widow, and after her death to deliver it to his children, and the trustee gave a probate bond for the discharge of his trust, it was held that a remainderman had sufficient security and that the mismanagement of the trust fund was not sufficient ground for a court of equity to interfere.¹⁵ And on filing a bill against directors of a bank, charging them with a fraudulent abuse of their trust in the election of new directors which was colorable in law, the new directors will not, before the coming in of the answer, be enjoined from the exercise of their powers, nor will a receiver be appointed to take charge of the bank, except where there is imminent danger of irreparable loss.¹⁶ And when the existence of a trust is reasonably doubtful, an interlocutory injunction will not be granted to restrain the disposition of the alleged trust fund.¹⁷

§ 911. **Resulting trusts, etc.**—When real property is bought with partnership funds and title improperly taken in name of one partner, a resulting trust arises in favor of the other partner which he may enforce in a court of equity.¹⁸ So a parol contract by which the purchaser of land agrees to buy and hold it for the joint benefit of himself and another, the latter paying no part of the purchase money, but the purchaser advancing half of it for him-

13. *Seeger v. Hunting*, 78 Md. 54, 26 Atl. 960.

14. *Re Chertsey Market*, 6 Price, 261, 279. And see *Scott v. Becher*, 4 Price, 346.

15. *Terry v. Allen*, 60 Conn. 530, 23 Atl. 150.

That the appropriate protection of trust property is by adequate security from the trustee, see *Clarke v.*

Terry, 34 Conn. 176; *Sanford v. Gilman*, 44 Conn. 461; *Security Company v. Hardenburgh*, 53 Conn. 169.

16. *Ogden v. Kip*, 6 Johns. Ch. (N. Y.) 160. And see *Boyd v. Murray*, 3 Johns. Ch. (N. Y.) 48.

17. *Bank of Turkey v. Ottoman Co.*, L. R. 2 Eq. 366.

18. *Traphagen v. Burt*, 67 N. Y. 30; *Davis v. Davis*, 60 Miss. 615.

self, and half of it as a loan to the other party, creates a resulting trust in favor of the latter which is not within the statute of frauds, and which entitles him to an accounting and partition and to an injunction to restrain the other from prosecuting actions of ejectment and forcible detainer brought to deprive the *cestui que trust* of possession.¹⁹ As a resulting trust in lands is valid against all subsequent purchasers and incumbrancers with actual or constructive notice of the trust, and possession of land is constructive notice that it is under a claim of title, legal or equitable, the enforcement of a writ of possession against a person in whose favor there is a resulting trust in the land described in the writ, and who is in possession of the land, will be restrained by injunction.²⁰ And where, on the strength of a promise by a father to his

19. *Towle v. Wadsworth*, 147 Ill. 80, 35 N. E. 73, per *Curiam*: "The bill sets up and seeks to enforce a resulting trust. As such trusts are expressly excepted from the operation of the statute of fraud, the defense set up by pleading that statute need not be noticed. The complainant's theory is that the defendant, in pursuance of his agreement in that behalf, advanced the money required to make the first payment for the property, and that he made such advance for himself and the complainant jointly, and thus, in effect, loaned one-half of the money thus advanced to the complainant, and paid it to the seminary in purchase of the property as the complainant's money, taking the title in his own name as security for its repayment. That these facts, if true, raised a resulting trust in favor of the complainant, is too well settled to require discussion. The following cases illustrative of the rule may be consulted: *Wallace v. Carpenter*, 85 Ill. 590; *Reeve v. Strawn*, 14 Ill. 94; *Davis v. Hopkins*, 15 Ill. 519; *Reigard v. McNeil*, 38 Ill.

400; *Ferguson v. Sutphen*, 3 Gilman (Ill.), 547. We are of the opinion that, assuming the truth of the complainant's testimony, it is sufficient to establish a resulting trust of the character of the one alleged in the bill. We fully recognize the rule that proof, to establish such trust, must be full, clear, and satisfactory, and that it should be received with due caution; but, in considering evidence for such purposes, two things are to be kept in mind: First, the question of its truthfulness; and, secondly, of its effect. The court below has found that the version of the transactions given by the complainant is the true one, and we see no ground for impeaching that finding. Taking it, then, as true, the resulting trust alleged is fully, clearly, and satisfactorily established. Entertaining these views of the case, our conclusion is that the decree of the Circuit Court must be affirmed."

20. *Ferrin v. Errol*, 59 N. H. 234, per Stanley, J.: "The defendants do not stand in the position of parties without notice; for the possession by

daughter to give her a farm if she would reside on it, she and her husband went into possession of it and improved and managed it, it was held that they were entitled to a specific performance of the oral promise and also to restrain a levy of execution by attaching creditors of the father, who had knowledge of their possession and improvements.²¹ Again, where, in an action against a widow, the complaint alleges that her husband had conveyed real estate to her in pursuance of a written agreement that she took but a life estate, which on her death should revert to the husband's estate, that she was conveying and mortgaging parts of the property, and was insolvent, it was held that plaintiff, who was an heir and creditor of the husband, was entitled to enjoin her from conveying the property and compel her to account for the proceeds of the part already sold and mortgaged.²²

§ 912. **Constructive trusts.**—Where the owner of land conveys it without consideration, under an agreement by the grantee to sell it and to reconvey on demand any portion of it not sold, and the grantee refuses to reconvey or to account for the part sold, there is a constructive trust and the owner may maintain an action to quiet his title and to restrain the grantee from setting up any title under his deed.²³

the plaintiff was constructive notice that he was under a title either legal or equitable. *Patten v. Moore*, 32 N. H. 382; *Doe v. Doe*, 37 N. H. 268. Nor will the fact that Errol has obtained judgment against the plaintiff in the writ of entry deprive him of relief. *Story, Eq. Jur.*, § 874 The defendants invoke in their aid the maxim that 'where the equities are equal the law must prevail:' but that maxim does not apply here. The equities are not equal. The defendants are here claiming through Bragg, with constructive notice of his title. As against the plaintiff he has no title and the defendants stand no better than he does."

21. *Brown v. Prescott*, 63 N. H. 61, per Stanley, J.: "The attaching creditors, therefore, stand in the position of a grantee with notice of a prior claim. *Ferrin v. Errol*, 59 N. H. 234; *Galley v. Ward*, 60 N. H. 331." And, as to the right to specific performance, the court cited *Newton v. Swazey*, 8 N. H. 9; *Tilton v. Tilton*, 9 N. H. 385; *Burnham v. Porter*, 24 N. H. 580; *Kidder v. Barr*, 35 N. H. 236; *Glass v. Hulbert*, 102 Mass. 24.

22. *Collins v. Collins*, 32 Hun (N. Y.), 156; *Moyer v. Moyer*, 21 Hun (N. Y.), 67.

23. *Giffen v. Taylor*, 139 Ind. 573, 37 N. E. 392, per Howard, C. J.:

§ 912a. Transfer to trustee to pay income for life.—Where the owner of property transfers it to another under an agreement to pay the former an annual income during his life and the apparent intention of the parties is that the one to whom it is transferred is to hold it as agent and trustee of the owner, if the transferee, upon the death of such owner, refuses to surrender up and transfer such property to the executors or administrators of the deceased, such refusal is an unlawful action on his part which operates in law to make his holding and transfers by which he took title fraud-

“Counsel for appellant contend that the facts found do not warrant the conclusions of law; that the facts show only a failure on the part of the appellant to keep his promise; that he was without fault up to the time of receiving the deed; that the idea of claiming the property as his own was conceived only afterwards. Counsel make no claim that the land rightfully belongs to appellant, but only that he did no wrong up to the time of procuring the deed; in other words, that the wrongful taking of the property and the appropriation of the proceeds to his own use occurred only after the deed was made, and hence ‘this breach of contract is not fraud, and would not take the case out of the statute.’ It is a salutary maxim that the statute against frauds cannot be used as a cover for fraud. The fraud in this case is clear, shameless, and barefaced. A young business man, a favorite grandson, under pretense of aiding the old people in caring for their property, proceeds deliberately to appropriate to his own use the whole estate of his aged grandparents, and, when called upon to account for the transaction, he coolly informs the court that the statutes enacted to protect innocent holders of real estate from the results of fraud in transfers of

title have become for him a shield under cover of which he proposes to keep his ill-gotten gains. It would be a reproach to the law if such a claim could be allowed. In *Myers v. Jackson*, 135 Ind. 136, 34 N. E. 810, an aged man and wife, as in this case, were induced by a friend to convey their land to him, without consideration, on condition, among other things, that he should reconvey to the wife an undivided one-third of the land. There was there, as in the case at bar, no fraud or misrepresentation up to the time of the procuring of the deed; but afterwards, as in this case, the grantee refused to reconvey, and claimed immunity for his wrongdoing under the statute of frauds. The court, however, held in that case that the facts showed a resulting trust in favor of the aged wife. In *Cox v. Arnsmann*, 76 Ind. 210, a father and mother conveyed their land to their son without consideration, on condition that he should reconvey to his mother. The court said in that case: ‘It was always held that the statute of frauds would not be permitted to accomplish a fraud. Our statute of trusts, above referred to (section 3391, Rev. Stat. 1894; section 2969, Rev. Stat. 1881), is in its first section substantially a re-enactment of the seventh section

ulent and void as against the real owners and entitles the executors or administrators to an injunction restraining him from disposing of the property.²⁴

§ 913. **Federal control of public trusts in States.**—The United States possess no jurisdiction to control or regulate, within a State, the execution of trusts or uses created for the benefit of the public, or of particular communities or bodies therein. The jurisdiction in such cases is with the State, or its subordinate agencies.²⁵ The

of the statute of frauds (29 Car. 112, chap. 23). It therefore will not be permitted to accomplish a fraud. If, by virtue of this section, John Arnsmann were permitted to hold the property as his own, his father and mother would lose their property by fraud. To prevent that result, equity raises a constructive trust in John Arnsmann for the benefit of his mother, pursuant to the agreement by which he obtained the deed of the property, and permits that trust to be proved by parol.' See, also, *Tinkler v. Swaynie*, 71 Ind. 562; *Catalani v. Catalani*, 124 Ind. 54, 24 N. E. 375; *Perry*, Trusts, §§ 226, 227. there is here no question of the rights of third parties. All persons having any concern in the property or under the deed or the contract, were before the court to have equity done them, and that equity has been fairly meted out to them by the conclusions of law and the judgment of the court. There can be no doubt that a just and equitable conclusion has been reached."

24. *Ingersoll v. Weld*, 103 App. Div. (N. Y.) 154, 93 N. Y. Supp. 961.

25. The case of *New Orleans v. U. S.*, 10 Pet. (U. S.) 662, 9 L. Ed. 573, furnishes an illustration of this doctrine. In that case the United

States filed a bill in the District Court for an injunction to restrain the city of New Orleans from selling a portion of the public quay or levee lying on the bank of the Mississippi river, in front of the city, or of doing any other act which would invade the rightful dominion of the United States over the land, or their possession of it. The United States acquired title to the land by the French treaty of 1803. By it, Louisiana was ceded to the United States, and it was shown that the land had been appropriated to public uses ever since the occupation of the province by France. It was contended that the title to the land, as well as the domain over it, during the French and Spanish governments, were vested in the sovereign, and that the United States, by the treaty of cession of the province of Louisiana, had succeeded to the previous rights of France and Spain. The land and buildings thereon had been used by both governments for various public purposes. The United States had erected a building on it for a customhouse, in which, also, their courts were held. It was argued on behalf of the city that the sovereignty of France and Spain over the property before the cession existed solely for the purpose of enforcing the uses to which it was

recording, in 1839, under direction of the Secretary of War, pursuant to act of Congress, of the plat of the Fort Dearborn addition to Chicago, following the requirements of the Illinois act of 1833, relating to town plats, which provided that the land intended for streets or other public uses in any town or city, or addition thereto, "shall be held in the corporate name thereof in trust to and for the uses and purposes set forth and expressed or intended," and the sale of the lots shown on the plat, vested in the city of Chicago the legal title to that part of the ground designated on the plat as public ground, and also the enforcement, as a subordinate agency of the State, of the rights of the public therein; and the United States are not entitled to restrain the diversion of such public ground to private uses.²⁶

appropriated, and that this right and obligation vested in the State of Louisiana, and did not continue in the United States after the State was formed. It was therefore contended that the United States could neither take the property, nor dispose of it, or enforce the public use to which it had been appropriated. A decree was rendered in the District Court in favor of the United States, and an injunction granted as prayed; but on appeal to the Supreme Court it was reversed, and it was held that the bill could not be maintained by the United States, because they had no interest in the property.

26. *United States v. Illinois Central R. Co.*, 154 U. S. 225, 38 L. Ed. 971, 14 Sup. Ct. 1015, per *Curiam*: "The plat, in such cases, had all the force of an express grant, and operated to convey all the title and interest of the United States in the property, for the uses and purposes intended. *Zinc Co. v. City of La Salle*, 117 Ill. 411, 414, 415, 2 N. E. 406, and 8 N. E. 81; *City of Chicago v. Rumsey*, 87 Ill. 348; *Gebhardt v.*

Reeves, 75 Ill. 301; *Canal Trustees v. Haven*, 11 Ill. 554. It is stated in the information that the United States never parted with the title to the streets, alleys, and public grounds designated and marked on the plat, and that they still own the same in fee simple, 'with the rights and privileges, riparian and otherwise, pertaining to such ownership, subject to the use and enjoyment of the same by the public.' But we do not think this position is tenable. A title to some of the streets may have continued in the government so long as the title to any of the adjoining lots remained with it, but not afterwards, without disregard of the statutory regulations of the State, and its provisions for the transfer of the title. When a resort is made by individuals or the government to the mode provided by the statute of a State where real property is situated, for the transfer of its title, the effect and conditions prescribed by the statute will apply, and such operation given to the instrument of conveyance as is there designated. The language of

§ 914. **Set-offs against trustee.**—As a court of equity will look beyond the nominal to the real parties in interest, it will not permit a *cestui que trust* who is insolvent to enforce through his

the statute is clear—‘that the land intended for streets, alleys, ways, commons, or other public uses in any town or city or addition thereto shall be held in the corporate name thereof, in trust to and for the uses and purposes set forth and expressed or intended.’ The interest in and control of the United States over the streets, alleys, and commons ceased with the record of the plat, and the sale of the adjoining lots. Their proprietary interest passed, in the lots sold, to the respective vendees, subject to the jurisdiction of the local government; and the control over the streets, alleys, and grounds passed, by express designation of the State law, to the corporate authorities of the city. It was also held in the Lake Front Case that the ownership in fee of the streets, alleys, ways, commons, and other public ground on the east front of the city bordering upon Lake Michigan, in fractional section 10, was a good title; the reason assigned being that by the statute of Illinois the making, acknowledging, and recording of plats operated to vest the title in the city in trust for the public uses to which the grounds were applicable. 146 U. S. 387-462, 13 Sup. Ct. Rep. 110. It follows from these views that the United States have no just claim to maintain their contention to control or interfere with any portion of the public ground designated in the plat of the Fort Dearborn reservation. The decree dismissing the information will therefore be affirmed, and it is so ordered. Mr. Justice Brewer, dissenting. I am unable to concur in the

views expressed by the court in this case. I agree that the United States have no governmental interest or control over the premises in question; that as a sovereign they have no right to maintain this suit; that by the act of dedication they parted with the title; and that, in accordance with the statute of the State in respect to dedication, the fee passed to the city of Chicago, to ‘be held in the corporate name thereof, in trust to and for the uses and purposes set forth and expressed or intended.’ I agree that the only rights which the United States have are those which any other owner of real estate would have under a like dedication; but I think the law is that he who grants property to a trustee, to be held in trust for a specific purpose, retains such an interest as gives him a right to invoke the interposition of a court of equity to prevent the use of that property for any other purpose. Can it be that if the government, believing that the Congressional Library has become too large for convenient use in this city, donates half of it to the city of Chicago, to be kept and maintained as a public library, that city can, after accepting the donation for the purposes named, give away the books to the various lawyers for their private libraries, and the government be powerless to restrain such disposition? Do the donors of libraries, or the grantors of real estate in trust for specific purposes, though parting with the title, lose all right to invoke the aid of a court of equity to compel the use of their donations and grants for the

trustee a judgment against a party who holds a just and valid demand against the *cestui* which he has no means of collecting if a set-off be denied.²⁷

purposes expressed in the gift or deed? I approve the opinion of the Supreme Court of Iowa in the case of *Warren v. Mayor of Lyons City*, 22 Iowa, 351, 355, 357. In that case the plaintiffs had, years before, platted certain land as a site for a city, and on the plat filed by them there was a dedication of a piece of ground as a 'public square.' After the city had been built up on that site, the authorities, for purposes of gain, and under the pretended authority of an act of the Legislature, attempted to subdivide the public square into lots, and to lease them to individuals for private uses. A bill was filed by the dedicators to restrain such diversion of the use, and a decree in their favor was affirmed by the Supreme Court. I quote from the opinion: 'Nothing can be clearer than that if a grant is made for a specific, limited, and defined purpose, the subject of the grant can not be used for another, and that the grantor retains still such an interest therein as entitles him, in a court of equity, to insist upon the execution of the trust as originally declared and accepted. *Williams v. Society*, 1 Ohio St. 478; *Barclay v. Howell*, 6 Pet. 499; *Webb v. Moler*, 8 Ohio, 548; *Brown v. Manning*, 6 Ohio, 298.' And again, after picturing the injustice which in many cases would result by permitting such a diversion, the court adds: 'Such a doctrine would enable the State, at pleasure, to trifle with the rights of individuals; and we can scarcely conceive of a doctrine which would more effect-

ally check every disposition to give for public or charitable purposes. No; it must be that, if the right vested in the city for a particular purpose, the Legislature cannot vest it for another; that, when the dedicator declared his purpose by the plat, the land cannot be sold or used for another and different one; that, while the corporation took the premises as trustee, it took them with the obligations attached, as well as the rights conferred; that, while the Legislature might give the control and management of these squares and parks to the several municipal corporations, it cannot authorize their sale and use for a purpose foreign to the object of the grant. Without quoting, we cite the following cases: *Trustees of Watertown v. Cowen*, 4 Paige, 510; *Lade v. Shepherd*, 2 Stra. 1004; *Com. v. Alburger*, 1 Whart. 469; *Pomeroy v. Mills*, 3 Vt. 279; *Abbott v. Same*, Id. 521; *Adams v. Railroad Co.*, 11 Marb. 414; *Fletcher v. Peck*, 6 Cranch, 87; *Godfrey v. City of Alton*, 12 Ill. 29; *Sedg. St. & Const. Law*, 343, 344; *Haight v. City of Keokuk*, 4 Iowa, 199; *Grant v. City of Davenport*, 18 Id. 179; *Le Clercq v. Trustees of Gallipolis*, 7 Ohio, 217; *Common Council v. Croas*, 7 Ind. 9; *Rowan's Ex'rs v. Town of Portland*, 8 B. Mon. 232; *Trustees of Augusta v. Perkins*, 3 B. Mon. 437.' I do not care to add more, but for these reasons I withhold my assent to the opinion. I am authorized to say that Mr. Justice Brown concurs in this dissent."

27. *Hobbs v. Duff*, 23 Cal. 596;

§ 915. **Charitable gifts.**—Courts of equity have inherent jurisdiction by injunction to see that a charitable gift is applied in the manner designated by the donor, and that the conditions of the gift are observed by the donee.²⁸ In case of charities, the jurisdiction of courts of equity proceeds upon the ground of a trust and the courts will carry out, so far as it is legal, the intention of the creator of the trust. And where an endowment is made for a certain church, equity will restrain its appropriation for the maintenance of a church of a different faith.²⁹ So one who has conveyed

Walker v. Sedgwick, 8 Cal. 405; *Russell v. Conway*, 11 Cal. 93; *Naglee v. Palmer*, 7 Cal. 543; *Howard v. Shores*, 20 Cal. 277.

28. *United States v. World's, etc., Exposition*, 56 Fed. 630, 646, per Woods, J.: "It has been held in a large number of cases that gifts for educational purposes, gifts for the advancement of learning, gifts for the diffusion of useful knowledge, gifts for the civilization of the Indians, gifts for assisting literary persons in their pursuits, are all such gifts as come within the definition of charitable bequests. So, also, it has been held that gifts to the British Museum come within that clause. *British Museum v. White*, 2 Sim. & S. 594. So, also, it was held in England that a gift by an English subject to the President of the United States in aid of the Smithsonian Institute at Washington came within the definition of a gift for a charitable purpose, and was within the jurisdiction of a court of chancery to see that that money was appropriated and bestowed for that purpose. *President v. Drummond*, cited in *Whicker v. Hume*, 7 H. L. Cas. 124. There is an observation by Lord Justice Selwyn in *Beaumont v. Oliveira*, 4 Ch. App. 309, which states the doctrine thus: 'In the case now

before us, both bequests are bequests to corporations, the object and purposes of which are the diffusion and improvement of particular branches of knowledge. They subsist for these purposes and no others; therefore for public purposes; therefore for the advancement of objects of general public utility; therefore for purposes analogous and similar to those mentioned in the statute of Elizabeth; therefore for charitable purposes; and therefore they come within the jurisdiction of the court of chancery.' A court of chancery has inherent jurisdiction to see to it that the gift is applied in the manner designated by the donor, and that the conditions of the gift are observed by the donee."

29. *Kniskern v. Lutheran Churches*, 1 Sandf. Ch. 439, where the vice-chancellor cited as the leading cases *Gable v. Miller*, 10 Paige, 627, 2 Den. 492; *Attorney-General v. Pearson*, 3 Meriv. 352, 395; and also cited as kindred cases *Field v. Field*, 9 Wend. 401; *St. Mary's Church Case*, 7 Serg. & R. 539; *Presbyterian Church v. Johnston*, 1 Watts. & S. 1; *Den v. Bolton*, 12 N. J. Law, 206; *Bowden v. McLeod*, 1 Edw. Ch. 591; *Attorney-General v. Shore*, 11 Sim. 592.

land on which a church stood, upon the condition that the grantee should always permit the church to remain, may enjoin a school district from converting the church into a schoolhouse.³⁰ An eleemosynary charity which is unsectarian in the scope of its benevolence can become sectarian only by limitations placed upon it by the donor, and is not rendered so merely by making a religious society trustee for it.³¹ And where, in a suit to enjoin the sale of property conveyed under a trust deed, it appears that the trustees have complied with the requirements prescribed by such deed and the answers are responsive to and an express denial of the averments in the bill upon which the equity of the plaintiff's case rests and the plaintiff fails to support by proof the averments in the bill, an order dissolving an injunction is proper and will be affirmed.³²

§ 916. **Enforcement by attorney-general.**—A trust for charitable uses is one for a public use, in which the people have such an interest as entitles the attorney-general, in their name, to maintain an action for its enforcement where the trustee repudiates the trust and claims the fund himself, and the corporations which are the beneficiaries refuse to sue.³³

30. *Howe v. School District*, 43 Vt. 282.

31. *White Lick Meeting, etc., v. Same*, 89 Ind. 136; *Attorney-General v. Moore*, 19 N. J. Eq. 503; *Watkins v. Wilcox*, 66 N. Y. 654.

32. *Johnson Co. v. Henderson*, 83 Md. 125, 34 Atl. 835.

33. *People v. Powers*, 8 Misc. R. (N. Y.) 628, per *Curiam*: "That a charitable use is a public use cannot be denied. Indeed, the validity of a trust for charitable purposes turns in many cases upon the fact that such trusts are public and not private in their nature. *Perry, Trusts*, § 687. In order to be a good trust for a charitable use there must always be some public benefit open to an indefinite and vague number, and unless

that exists the trust is not charitable. *Jackson v. Phillips*, 14 Allen, 571; *Perry, Trusts*, §§ 710, 712. In view of that well-settled principle, it has always been held in England that the attorney-general, representing the king as *parens patriae*, might proceed upon information in a court of equity to establish a trust for charitable purposes or to prevent or correct an abuse or misuse of the funds, and that chancery took jurisdiction of such a suit by virtue of its general jurisdiction. The English law books are full of cases brought upon that principle and referable to that jurisdiction. While such actions are not so common in this country, yet they are known. In *Parker v. May*, 5 Cush, 336, which was brought by

§ 916a. Property in trust for religious organization.—Where property has been contributed and conveyed to the authorities of a general church organization for the purposes of religious worship in accordance with the doctrine and discipline of a particular denomination, persons claiming under said denomination, and not pretending in any way to hold adversely thereto, may be enjoined from using such property contrary to the determination of the

the public prosecutor, then acting as attorney-general, the question was presented of his right to sue, and it was said by Shaw, Ch. J., that such a suit by the public prosecutor in the name of the commonwealth, for establishing and sustaining charitable trusts, was in truth, as well as in form, a suit to protect public interests, and he held that it should have been brought in that way. Many years later, in the same State, the attorney-general had filed an information against certain persons who were trustees of a charitable fund, alleging that they refused to pay over the fund or to apply it to the purposes of the trust, and it was held that the information was sufficient and that it was the right and duty of the attorney-general to interfere in behalf of the proper administration of a public charity, independent of the statute on that subject, and the remarks of Chief Justice Shaw were approved. *Attorney-General v. Parker*, 126 Mass. 216. In *Attorney-General v. Garrison*, 101 Id. 223, the court, upon the information of the attorney-general, removed some of the trustees of a charitable trust because they refused to carry out the trust according to its terms. The history of the litigation with regard to the trust in that case is interesting to show how far the people have an interest and the right to inter-

vene in such cases. *Jackson v. Phillips*, 14 Allen, 539. Because of the interest of the public the text writers lay down the rule that, in a proper case, the attorney-general may bring a bill to establish the trust or to correct abuses in its administration. *Story's Eq. Juris.*, § 1191; *Perry, Trusts*, §§ 732, 744. In this State the nature of the interest which would authorize the attorney-general to sue in the name of the people was discussed by Judge Duer in *Davis v. Mayor*, 2 Duer, 666, 667. The learned judge held that wherever the wrong complained of was public in its nature, the people were proper parties, and he required the attorney-general to be made a party to that action. His action was affirmed by the General Term (3 Duer, 119) but reversed by the Court of Appeals for reasons which did not at all conflict with his views on that subject. *Davis v. Mayor*, 14 N. Y. 506. In *Owens v. Missionary Soc.*, Id. 380, it is plainly stated by Judge Selden that the remedy by information at the suit of the attorney-general in the name of the people is as available here as in England. Four other judges concurred in his opinion and gave to that dictum the weight of their authority. And see *Attorney-General v. Parker*, 126 Mass. 216; *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 371; *People v. Miner*, 2 Lans. 396."

governing authority of the church.³⁴ The court in this case cites an earlier case in that State³⁵ where rival parties of a congregation claimed to represent the true doctrine and discipline of the church, and the one attempted to exclude the other from such property, and to administer it contrary to the determination of the conference, and in respect to this case it is said: "The court granted an injunction, as we think properly, because the question was not one of title or possession, but purely one of administration of trust property in accordance with the terms of the trust." And a court of equity will enjoin persons who are not members of a religious organization from forcibly entering the church edifice, changing the locks thereon and from threatened disturbance of and interference with the rights of the trustee in the management, control and possession of the church property and the peaceable and orderly worship of God.³⁶

§ 917. **Conflicting church trustees.**—Where complainants, praying an injunction, alleged that they were duly elected trustees to hold certain church property, and that defendants, claiming the same property as trustees, were illegally and unlawfully elected such by a seceding faction of the church, and were holding such property in perversion of the lawful trust, it was held that a demurrer for want of equitable jurisdiction must be overruled, the remedy by injunction being peculiarly adapted, and that by ejectment inadequate, to the necessities of the case.³⁷ And where

34. *Bonacum v. Harrington*, 65 Neb. 831, 91 N. W. 886.

35. *Pounder v. Ashe*, 44 Neb. 672, 63 N. W. 48.

36. *Christian Church v. Sommer* (Ala. 1907), 43 So. 8. The court said: "As regards the purely ecclesiastical or spiritual features of the church, the civil courts have steadily asserted their utter want of jurisdiction to hear and determine any controversy pertaining thereto. *State v. Bibb Church*, 84 Ala. 23, 4 So. 40; *Hundley v. Collins*, 131 Ala.

234, 32 So. 575, 90 Am. St. Rep. 33. On the other hand the civil courts have, without hesitation, exercised their jurisdiction to protect the temporalities of the church." Per McClellan, J.

37. *Brundage v. Deardorf*, 55 Fed. 839, per Taft, J.: "The first contention in support of the demurrer is that a court of equity has not jurisdiction to consider the bill, because its averments show that the complainants have a plain and adequate remedy at law in ejectment. I do

persons assuming to be trustees of a religious corporation take possession of a church building and exclude those who had been in possession and enjoin them from retaking possession, and it is decided on the final hearing that the excluded persons are legally the trustees, they may be restored to possession and the others enjoined from again interfering with them in the control of the property.³⁸

not think that this contention can be sustained. It is quite true that he complainants aver that they have a legal title to the property in controversy, but it appears from the bill that they hold it in trust for the use of the members of the local society whom they represent. It is also apparent that the controversy is with another set of trustees, who claim legal title for the purpose of maintaining the property for different uses under the same deed of trust. In other words, the question of title is to be determined by the character of the trust to which the property is to be devoted, and the action is to restrain the use of the property in perversion of the lawful trust. The property is, in a sense brought into a court of equity, for the court to decide what use shall be made of it, and, by its equitable power of injunction, to enforce the proper use. The fact that in doing so it also has to determine the legal title will not oust the jurisdiction of a court of equity. The peculiar character of the possession by the church trustees, and of the use by the pastor and congregation, makes it clear that a mere action in ejectment would be quite inadequate as a remedy to secure the complainant trustees, and those whom they represent, the same peculiar possession and use for them. The writ of injunction is well adapted

to prevent an unlawful intrusion in the pulpit by the pastor, and an unlawful use by the congregation, against all of whom it would be obviously impracticable to institute proceedings in ejectment. In the enforcement of a trust, where the circumstances are such that the remedy is not as complete at law as in equity, a trustee may appeal to a court of equity to assist him. See *Harrison v. Rowan*, 4 Wash. C. C. 202. There are, perhaps, other grounds upon which the jurisdiction here could rest, but the one stated is sufficient. Cases of this kind have frequently been considered by courts of equity, as in *Watson v. Jones*, 13 Wall. 679. It is true that the action there was by one of the *cestuis que trustent*, and not by one of the trustees, in whom was the legal title; but I think that the jurisdiction was asserted because of the character of the controversy, involving, as it did, the disposition and use of trust property. In Pennsylvania, in a number of cases, the inadequacy of a legal remedy, and the necessity for an equitable remedy, in cases of exactly this character, have been frequently recognized. See *Karr v. Trego*, 47 Pa. St. 292; *Ferraria v. Vasconcelles*, 23 Ill. 456; *Gibson v. Armstrong*, 7 B. Mon. (Ky.) 481; *Trustees v. Hoessli*, 13 Wis. 348."

38. *Bartholomew v. Lutheran Congregation*, 35 Ohio St. 567; *Trustees*

§ 918. Departures from doctrine, etc.: mere formal changes. —Church trustees will not be enjoined as for a violation of their trust because of mere changes in matters of form in the conduct of the worship, or in administering the ordinances, which do not affect the substance of doctrine or discipline; and in such a case, where the church property is applied to the common purpose to which it was dedicated, and none of the members are prevented from participation in its use for such purpose, the court will not, at the instance of the seceding faction, interfere by injunction nor order a partition of the property.³⁹ Where a conveyance is made to, or a trust created for the benefit or use of a religious society by its denominational name, with no other particular designation in the deed of the doctrines which it is to be used to advance and support, such name may be a sufficient guide as to the nature of the trust so far as respects fundamental doctrines. In such case, those holding the property in trust for the benefit of the society may be restrained from applying it or its use to the promotion of doctrines adverse to the fundamental doctrines of the denomination at the time and immediately after such trust was created.⁴⁰ A religious society, incorporated or not, is the trustee of a charity and may be prevented by a court of equity from diverting property held in trust from the object and design of the original endowment.⁴¹

v. Hoessli, 13 Wis. 348; *Lutheran Congregation v. Gristgau*, 34 Wis. 328.

39. *Schradi v. Dornfeld*, 52 Minn. 465, 55 N. W. 49.

40. *Hale v. Everett*, 53 N. H. 9. And see *Lawyer v. Cipperly*, 7 Paige (N. Y.), 281; *People v. Steele*, 2 Barb. (N. Y.) 397; *Baptist Church v. Witherell*, 3 Paige (N. Y.), 296; *Winebrenner v. Colder*, 43 Pa. St. 244; *Ferraria v. Vasconcellos*, 31 Ill. 25; *Brunnenmeyer v. Buhre*, 32 Ill. 183; *Attorney-General v. Moore*, 19 N. J. Eq. 503.

41. *Roshi's Appeal*, 69 Pa. St. 462. In *Gilbert v. Arnold*, 30 Md. 29, Rob-

inson, J., said: "The wrongs complained of are subversive of the plainly declared purposes of the trust upon which this church was donated, and destructive of the character in which it has been held and enjoyed, 'namely as an edifice set apart for divine worship by a society of Christians called Methodists.' As such it has been used for more than seventy years, and here, during all this period, the beneficiaries under this deed have been accustomed to worship in the form and according to the doctrines of their distinctive religious faith, and shall it be said that wrong doers without color of title can

§ 919. **Diversion from owner's intended use.**—Where property has been dedicated by way of trust to support and propagate any definite doctrine or principle which is not immoral and is being diverted from the donor's intended use so as to constitute a palpable abuse of trust, such diversion will be restrained by a court of equity.⁴² So where real property has been conveyed in trust for the maintenance of a particular religious faith, and only a minority of the church adhere to the original faith, they are entitled to enjoin the majority from diverting the property to unauthorized uses and are entitled to the exclusive control of the

take possession of a church thus dedicated to pious uses, and a trust like this be perverted, and a court of equity like this powerless to grant relief? We are of opinion the complainants are entitled to the relief prayed. And such seems to be the uniform tenor of decisions in this country. *Beatty v. Kurtz*, 2 Pet. 579, 7 L. Ed. 521; *Wiswell v. First Cong. Church*, 14 Ohio St. 31."

42. *Lamb v. Cain*, 129 Ind. 486, 29 N. E. 13, per Coffey, C. J.: "The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies have been divided into three classes, viz: First, cases where the property which is the subject of controversy has been, by deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument, devoted to the teaching or spread of some specific form of religious doctrine or belief. Second, to property held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned owes no fealty or obligation to any higher authority. Third, to cases of property held by a religious congregation or

ecclesiastical body which is a subordinate member of some general church organization, in which there are superior ecclesiastical tribunals, with general ultimate powers of control, more or less complete, in some supreme judicatory over the whole membership of that general organization. *Watson v. Jones*, 13 Wall. 679. As to the first class, it may be said there is no doubt that a person owning property in his own right may dedicate it by way of trust to support and propagate any definite doctrine, provided it does not violate any law of morality, and sufficiently expresses in the instrument by which the dedication is made the object of the trust. In such cases it is the duty of the courts to see that the property so dedicated is not diverted from the trust attaching to it, and so long as there are persons in interest standing in such relation to the property as that they have a right to direct its control, they may prevent the diversion of the property to any use different from that intended by the donor"—citing *Watkins v. Wilcox*, 66 N. Y. 654; *Attorney-General v. Dublin*, 38 N. H. 459; *Happy v. Morton*, 33 Ill. 398; *Fadness v. Braunborg*, 73 Wis. 257, 41 N. W. 84.

property.⁴³ And a similar conclusion is reached in a case in Wisconsin in which it is decided that where a majority of a religious society has withdrawn therefrom and organized a new church of a different denomination, the minority, adhering to the original society, are entitled to the use and occupation of the church building, held in trust for said society, and the new church and its trustees may be restrained from interfering with such use.⁴⁴ And in this case it was also held that the action to restrain interference with its use and occupation of the church building could be maintained by the original society, and that the trustees who hold the legal title in trust for it are not necessary parties plaintiff.⁴⁵

§ 920. **Same subject.**—Where property is conveyed to trustees for the use of a Baptist church having a well known and established doctrine, faith and practice, a majority of the members has not the power, by reason of a change of religious views, to carry the property thus dedicated to a new and different doctrine, and the fact that the minority, having been forcibly excluded from the church building, organized separately and had church services, claiming to be the true church, does not deprive them of any rights in the church property.⁴⁶ So where the pastor and

43. *Nance v. Busby* (Tenn. 1892), 18 S. W. 874. And see *Bridges v. Wilson*, 11 Heisk. (Tenn.) 458; *Dead-erick v. Lampson*, 11 Heisk. (Tenn.) 523.

44. *Cape v. Plymouth Congrega-tional Church*, 117 Wis. 150, 93 N. W. 449.

45. *Cape v. Plymouth Congrega-tional Church*, 117 Wis. 150. 93 N. W. 449.

46. In *Smith v. Perigo* (Ind.), 33 N. E. 777, the court said: "Upon authority so general as to be beyond question it is held that property given or set apart to a church or religious association for its use in the enjoyment and promulgation of its

adopted faith and teachings, is by said church or association held in trust for that purpose and any mem-bers of the church or association less than the whole may not divert it therefrom. The following cases more or less directly sustain the rule and are but a few of the many bearing on the question: *Kniskern v. Lutheran Churches*, 1 Sandf. Ch. (N. Y.) 439; *Attorney-General v. Pearson*, 3 Meriv. 353; *Baker v. Fales*, 16 Mass. 488; *Stebbins v. Jennings*, 10 Pick. (Mass.) 172; *Hale v. Everett*, 53 N. H. 9; *Baptist Church v. Witherell*, 3 Paige (N. Y.), 296; *Harrison v. Hoyle*, 24 Ohio St. 254; *Field v. Field*, 9 Wend. (N. Y.) 401; *Gable v.*

the majority of the members of a Baptist church adhered to the doctrine of "sanctification by a second experience," which was different from the faith for the advancement of which the church was organized, it was held that a court of equity would interfere to protect the minority in having the trust properly applied in accord with the original intention.⁴⁷ It is the duty of the court to decide in favor of those, whether a minority or majority of the congregation, who are adhering to the doctrine professed by the congregation and the form of worship in practice at the time the trust was declared.⁴⁸

§ 921. **Under the New York statute.**—In New York if property be given or granted to a religious society, incorporated under the statute of 1813, by words vesting the title, and not plainly uniting the right to hold with the faith and doctrine of any particular denomination, a change in the religious tenets held by it at the time of acquisition will not be a ground for injunction, but in such a case the majority of the corporation control and may use the property for any religious purpose.⁴⁹ And where the trust declared in a deed to trustees of a religious society is for its uses and interests, either for the express purpose of building a church on the lot or for a burying place, the deed not declaring the ecclesiastical connection of the society at the time of its date, nor seeking professedly to perpetuate its connection with any ecclesiastical judicatory, and where the trustees by the title described in the deed still occupy and use the lot and church edifice

Miller, 10 Paige (N. Y.), 627, 2 Den. (N. Y.) 492; Meth. Epis. Church v. Wood, 5 Ohio, 284; Happy v. Morton, 33 Ill. 398; Lawson v. Kolbenson, 61 Ill. 407; Fadness v. Branuborg, 73 Wis. 257, 41 N. W. 84; Presbyterian Church v. Congregational Soc'y, 23 Iowa, 567; Schnorr's Appeal, 67 Pa. St. 138; Roshi's Appeal, 69 Pa. St. 462."

⁴⁷ Mt. Zion Bap. Church v. Whitmore, 83 Iowa, 138, 49 N. W. 81.

⁴⁸ App v. Lutheran Congregation,

6 Pa. St. 201; McGinnis v. Watson, 41 Pa. St. 9; Sutter v. Trustees, 42 Pa. St. 503.

⁴⁹ Watkins v. Wilcox, 66 N. Y. 654, the court citing and following: Robertson v. Bullions, 11 N. Y. 243; Petty v. Tooker, 21 N. Y. 267; Gram v. Prussia, etc., Society, 36 N. Y. 161. As to the conclusiveness of the decision of the classes until it was reversed, see Connitt v. Ref. Dutch Church, 54 N. Y. 551.

built on it, the fact that the society has separated from the church with which it was previously connected and united with another denomination, will not amount to such an abuse of or departure from the trust declared in the deed as will be ground for an injunction, and in such a case the trustees cannot be enjoined from excluding from the pulpit a minister appointed by the judicatory with which the society was previously connected.⁵⁰ But in an action to restrain two Protestant Episcopal churches from effecting a consolidation, in accordance with their agreement, it was held erroneous to grant an injunction, *pendente lite*, as the complaint showed no cause of action cognizable in a court of equity, and the injunction averted no damage except that of a hearing and decision by the tribunal expressly prescribed by statute for such a case.⁵¹

§ 922. **In case of independent churches; majority rule.**—A minority of the officers and members of an independent church acting without the consent and against the protest of the majority will be enjoined from intruding into the church building and the public worship an instrument of music and form of worship contrary to the established usage and laws of the church.⁵² The numerical majority of members must control the right to the use of the church property in the case of churches whose principle of church government is that the majority rules. If there are within the congregation officers in whom is vested the right of control, then those who adhere to the acknowledged organism by which the body is governed, are entitled to the use of the property, and a seceding faction can claim no rights in the property from the

50. *Burrell v. Associate Ref. Church*, 44 Barb. (N. Y.) 282.

51. *MacLaury v. Hart*, 121 N. Y. 636, 24 N. E. 1013. And see *People v. Wasson*, 64 N. Y. 167; *Heiser v. Mayor*, 104 N. Y. 68, 9 N. E. 866.

52. *Hackney v. Vawter*, 39 Kan. 615, per Johnston, J.: "Their action in thus forcibly placing the organ in

the church and continuing its use in public worship, contrary to the established principles, rules and usages of the church, and without the consent of the controlling majority, is unauthorized and illegal, and is such a perversion of the church property as the court will restrain."

fact that they were once members.⁵³ Where a church association is merely voluntary, and cannot hold real estate, the title to which is vested in trustees, it is not a proper party plaintiff in a bill to restrain others from interfering with the church property.⁵⁴ Where a minister of a Congregational church is dismissed by the action of a majority of the church, and he thereafter usurps the pastoral office and attempts to exercise its functions, the majority are entitled to an injunction to restrain him and to prevent him and his adherents from using the church without their consent.⁵⁵ Where the trustees of an independent church, having no connection with any religious denomination, decide not to retain the pastor, but he declines to leave, and remains in obedience to the vote of a majority of the society whose wishes, according to the usage of the church should control, the trustees are not entitled to an injunction to prevent the pastor from longer officiating as such.⁵⁶

§ 923. **Deposing pastors, etc.**—A court of equity will not interfere by injunction to eject an Episcopal clergyman from possession of his church and to forbid his preaching in it, where he is in office and placed there by the parish and there is no other person claiming the office, or with whose rights as minister of the parish he is interfering; for the rule of the Episcopal church as to the tenure of its parish ministers, is that when they have once been placed in charge of congregations they can neither leave nor be dismissed except by mutual consent without the bishop's intervention.⁵⁷ Such a case is distinguishable from restraining

53. *Watson v. Jones*, 13 Wall. 679, 725, 20 L. Ed. 666; *Smith v. Nelson*, 18 Vt. 511; *Shannon v. Frost*, 3 B. Mon. (Ky.) 253.

54. *East Haddam Bap. Church v. East Haddam, etc., Soc'y*, 44 Conn. 259.

55. *Hatchett v. Mt. Pleasant Bap. Church*, 46 Ark. 291, per Battle, J.: "In a Congregational church the majority, if they adhere to the organization and to the doctrines, represent

the church. They control in the government of the church and have a right to select its pastor and control its property. Citing *Perry v. Shipway*, 4 DeG. & J. 353; *Cooper v. Gordon*, L. R. 8 Eq. 249; *Bouldin v. Alexander*, 15 Wall. 131.

56. *Trustees, etc., v. Proctor*, 66 Ill. 11.

57. *Youngs v. Ransom*, 31 Barb. (N. Y.) 49.

an entry into an ecclesiastical office of a person not entitled to it or not lawfully elected or appointed to it.⁵⁸ But in a case in Nebraska it is decided that when the governing authority of a religious organization has deprived one of its clergymen of his authority to officiate as such, he may be enjoined from making use of church property in that capacity or under color of the functions of which he has been deprived.⁵⁹ And where the trustees of a Methodist Episcopal church closed the church edifice against the duly appointed preacher on the ground that it was not to the interest of the church that the pastor should continue to officiate and that he was appointed against the wish of the majority of the members, they were compelled by mandatory injunction to open the building to him and to the church.⁶⁰ While the courts will not interfere with the churches in matters of faith and doctrine, they may interfere when the rights of property are in issue. Thus the profession of a priest is his property, and a prohibition of the exercise of that profession by the bishop without accusation or hearing is contrary to the law of the land and may be prevented by injunction.⁶¹ In Illinois where the constitution forbids any judicial interference with religious societies unless rights of property are involved in the controversy, it is held that a rector of the Protestant Episcopal church has not such a property in the right to preach and its emoluments as will authorize the courts to restrain an ecclesiastical tribunal in his trial for an alleged offense against the canons and discipline of the church.⁶² And the general rule is that the courts will not interfere to prevent the deposition of a pastor by church tribunals unless he has been unlawfully deprived of a civil right.⁶³

58. *Humbert v. St. Stephen's Church*, 1 Edw. Ch. (N. Y.) 308; *Potter v. Chapman*, Ambler, 98, 1 Dickens, 146.

59. *Bonacum v. Harrington*, 65 Neb. 831, 91 N. W. 886.

60. *Whitecar v. Michenor*, 37 N. J. Eq. 6.

61. *O'Hara v. Stack*, 90 Pa. St. 477.

62. *Chase v. Cheney*, 58 Ill. 509.

63. *Connitt v. Reformed Dutch Church*, 54 N. Y. 551; *Walker v. Wainwright*, 16 Barb. (N. Y.) 486; *Runkel v. Winemiller*, 4 Harr. & M. (Md.) 429; *Union Church v. Sanders*, 1 Houston (Del.), 100; *Brosius v. Reuter*, 1 Harr. & J. (Md.) 551; *Dutch Church v. Bradford*, 8 Cow. (N. Y.) 457; *Trustees v. Seaford*, 1

§ 923a. **Same subject; pleading.**—In an action by the members of a religious corporation to restrain the defendant from entering upon and discharging his duties as pastor of a church, it is decided

Dev. Eq. 453; *Forbes v. Eden*, L. R. 1 Sc. App. 568; *Ferguson v. Kin-noull*, 9 Cl. & F. 251.

GENERAL NOTE.—A part of the valuable note written by the New Jersey Equity reporter and appended to *Whitecar v. Michenor*, 37 N. J. Eq. 7, is introduced here and credited to that gentleman: "An injunction was granted in the following instances: Where the Archbishop of Canterbury by his will gave all options which should fall to the defendant Chapman, and others in trust, to present his son in the first place, and the others named in the will in succession. A vacancy happening, Chapman procured himself to be presented for installation and induction. *Potter v. Chapman*, 1 Dickens, 146. To restrain the trustees of a church from electing a minister and introducing into the pulpit a person not duly licensed. *Milligan v. Mitchell*, 1 Myl. & K. 446, 3 Myl. & Cr. 72; *Humbert v. St. Stephen's Church*, 1 Edw. Ch. (N. Y.) 308; *Lawyer v. Cipperly*, 7 Paige (N. Y.), 281. Where the vestry of a Protestant Episcopal church dismissed the rector without his consent. *Batterson v. Thompson*, 8 Phila. (Pa.) 251; *Congregation v. Peres*, 2 Coldw. (Tenn.) 620. Where a Roman Catholic bishop removed a priest arbitrarily and forbade him to execute the functions of his office. *O'Hara v. Stack*, 90 Pa. St. 477. To restrain one of two congregations entitled to the joint use of a church building from inviting another pastor and congregation to worship there after its own minister had resigned. *Cam-*

meyer v. German Lutheran Churches, 4 Edw. Ch. (N. Y.) 223. To compel the trustees of a church who persisted in retaining a pastor after he had been cited before the church tribunals and defied them to permit clergymen in good standing to officiate. *Skilton v. Webster, Brightly*, 203. Where a canon of the church required the bishop to consult with the wardens and lay representatives of the parish before appointing a rector to fill a vacancy which the bishop disregarded. *Johnson v. Glen*, 26 Grant, Ch. (Ont.) 162. To prevent the granting of a license to a minister to preach, where the trustees who had the power of selection disregarded the statutory requirement as to the residence, qualifications, etc., of their appointee. *Attorney-General v. Powis, Kay*, 186; or where the mode of election of a vicar was irregular as to the voting. *Edenborough v. Canterbury*, 2 Russ. 93; *Attorney-General v. Pearson*, 3 Meriv. 352. But see *Leslie v. Birnie*, 2 Russ. 114; *Davis v. Jenkins*, 3 Ves. & B. 151; or any informality acquiesced in for a long time in the mode of electing the trustees who appointed the vicar. *Attorney-General v. Cuming*, 2 Y. & C. 139. To restrain a church warden from illegally preventing a chaplain's performing divine service. *Attorney-General v. St. Cross Hospital*, 18 Beav. 601. To exclude from a church one not duly chosen as its pastor, but who, with the aid of a minority, persisted in preaching there and in locking out the rightful trustees. *Perry v. Shipway*, 4 DeG. & J. 353. To prevent

that it must affirmatively appear from the allegations of the complaint that the plaintiffs have exhausted all the means within their reach to obtain redress of the grievances complained of within the corporation itself, and where the complaint contains no allegations of this character it will be bad on demurrer.⁶⁴

the trustees from excluding the minister from the parsonage. *Ward v. Hipwell*, 8 Jur. (N. S.) 666; *Spurgen v. White*, 2 Giff. 473. To enjoin an illegal dismissal of a pastor. *Daugars v. Rivaz*, 28 Beav. 233, 33 Beav. 621. See, also, *Attorney-General v. Litchfield*, 5 Ves. 825; *Carter v. Cropley*, 8 DeG. M. & G. 680. To restrain a minister from occupying the pulpit and preaching in a church contrary to the rules and discipline of the church, though the majority of the congregation approved. *Sarver's Appeal*, 81½ Pa. St. 183; *Trustees v. Stewart*, 43 Ill. 81; *Hale v. Everett*, 53 N. H. 9. An injunction was refused in the following cases: Where the congregation was independent or not connected with any particular denomination. *Trustees v. Proctor*, 66 Ill. 11; *Calkins v. Cheney*, 92 Ill. 463; *Smith v. Nelson*, 18 Vt. 511; *African Church v. Clark*, 25 La. Ann. 282; *Cooper v. Gordon*, L. R. 8 Eq. 249; *Perry v. Shipway*, 1 Giff. 1; *Lucas v. Case*, 9 Bush (Ky.), 297; *Grosvenor v. Society*, 118 Mass. 78. Where the pastor withdrew from the synod with which the church was connected, attached himself to another and introduced into the service practices not approved by the former synod. *Lutheran Church v. Maschop*, 10 N. J. Eq. 57. See *Isham v. Church*, 63 How. Pr. (N. Y.) 465; *Dressen v. Brameier*, 56 Iowa, 756, 9 N. E. 193. Where an incumbent refused to allow the complainant, an attendant at an Episcopal church and

one of the lay members of the synod to partake of the communion; and to prevent his threatened suspension or excommunication. *Dunnet v. Forneri*, 25 Grant. Ch. (Ont.) 199. Where the minister of an independent church who was only entitled to the voluntary contributions of the congregation was dismissed. *Porter v. Clarke*, 2 Sim. 520.

64. *Horst v. Trandt* (Colo. 1908), 96 Pac. 259, wherein the court said: "In such incorporated religious societies the members thereof occupy the same relation to the incorporated body, so far as its temporal affairs are concerned, as the shareholders or stockholders of a corporation organized for profit under the general incorporation laws occupy to it. The courts will not as a general rule at the suit of a stockholder, or any number of stockholders, interfere with the internal affairs or management of a corporation. In addition to averments which would entitle the plaintiff to relief in an action of this character, it must affirmatively appear from the allegations of the complaint that the plaintiff has exhausted all the means within his reach to obtain redress of the grievances of which he complains within the corporation itself. It must appear that he has applied to the managing body of the corporation to institute an appropriate action, and upon the failure of that body to act, that he has made an honest effort to obtain relief through the stockhold-

§ 923b. **Property in trust for certain purpose; injunction against use for another purpose.**—Where land has been conveyed to be held in trust for public use as an ornamental park, the party or parties who have so dedicated it may maintain an action to enjoin the municipal authorities of the town to which the land was donated from devoting the property to an inhibited use. So where the local authorities proposed to build a schoolhouse on land conveyed for such a purpose, it was decided that an injunction would be granted restraining from so doing.⁶⁵

§ 923c. **Enjoining action by ward; for detention of ward.**—The right of a ward to maintain an action against his guardian or the latter's estate may be lost by the laches of the ward where the delay has been so long as to give the ward an unconscionable advantage over the defendant. Thus it was so held where a minor ward delayed, apparently without reason, asking for an accounting by the guardian till the guardian's death, eight years after the ward came of age. He then caused the administrator of the guardian to be cited to settle in the probate court an account of the guardianship which the administrator was unable to do. The ward then brought an action at law against the administrator of a deceased surety on the guardian's bond for the failure to settle an account upon citation according to the terms of the bond. The court held that the delay was so long as to justify the granting of an injunction against the prosecution of the action.⁶⁶ And where an action at law is brought to recover damages for the illegal detention and maltreatment of a ward such action should not be enjoined on allegations that the guardian for the purpose of cheating and defrauding the complainant and to cause it to be believed that the ward was an incompetent person at the time of the execution of a release to complainant, filed a petition for, and fraudulently procured, the appointment of the latter as guardian and upon the ward being sworn falsely testified that such ward was

ers, or a showing must be made that such efforts would be unavailing." Per Maxwell, J.

65. *Rouzee v. Pierce*, 75 Miss. 846,

23 So. 307, 40 L. R. A. 402.

66. *Clark v. Chase*, 101 Me. 270,

64 Atl. 493.

an insane person and incompetent to have charge of her person and estate, as such allegations do not authorize the court to grant an injunction, since the appointment of a guardian can have no effect in the suit at law upon the validity of the release, the ward being then of age and presumptively competent.⁶⁷

§ 924. **Protecting trade secrets, etc.; general rule.**—The learned Story lays down the broad rule that “courts of equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment; and it matters not in such cases whether the secrets be secrets of trade or secrets of title, or any other secrets of the party important to his interests.”⁶⁸ And it has been held that a secret art is a legal subject of property, and that a bond for a conveyance of the exclusive right to it requires the obligor not to divulge the secret to any other than the obligee;⁶⁹ and such a bond is valid and may be enforced in equity.⁷⁰ Thus an injunction may be granted to restrain complainant’s former employees from using in their own factory or communicating to others certain secrets used by complainant in manufacturing which they, in consideration of their employment by him had agreed not to divulge; and such injunction should be retained until the final hearing, though all the facts alleged in the bill be denied in the answer.⁷¹ And an employer may maintain a bill in equity to restrain an employee from practicing or divulging to others secret arts and processes, knowledge of which was acquired by him through his employment by the complainant.⁷² And one who invents or discovers and keeps a secret process of manufacture, whether patentable or not, has a property in it which a court of equity may protect by injunction against one who, in violation of contract and breach of confidence, undertakes to apply

67. *Gallon v. Mandell*, 150 Mich. 621, 114 N. W. 392.

68. Story, Eq. Jur., § 952. And see section 451, *ante*.

69. *Peabody v. Norfolk*, 98 Mass. 452, 459; *Vickery v. Welch*, 19 Pick. (Mass.) 523; *Taylor v. Blanchard*, 13 Allen (Mass.), 373.

70. *Jarvis v. Peck*, 10 Paige (N. Y.), 118.

71. *Salomon v. Hertz*, 40 N. J. Eq. 400. See, also, *Thum Co. v. Tloczynski*, 114 Mich. 149, 72 N. W. 140, 38 L. R. A. 200.

72. *Sanitas Nut Food Co. v. Cemer*, 134 Mich. 370, 96 N. W. 454.

it to his own use or disclose it to others.⁷³ Where a person has a secret process in the manufacture of an article such right is said to be of the same character as the right which one has in a copyright or patent, and it is declared that the remedies which are applicable to such cases are applicable to cases involving the right to a secret process and a party may obtain an injunction to prevent the unlawful use of such process by another.⁷⁴ And an agreement by an employee not to disclose a secret confidentially imparted to him, may be specifically enforced in equity, even though another part of the agreement could not be specifically enforced.⁷⁵ And

73. *Peabody v. Norfolk*, 98 Mass. 452, per Gray, J.: "The jurisdiction in equity to interfere by injunction to prevent such a breach of trust when the injury would be irreparable and the remedy at law inadequate, is well established by authority. In the earliest reported case of this class, Lord Eldon refused to grant an injunction against imparting in violation of an agreement the secret not only of a patent which had been obtained and had expired, and which the whole public was therefore entitled to use; but also that of making a certain kind of pills, for which no patent had been procured; and stated as a reason for the latter, that if the art and method of preparing them was a secret, the court could not, without having it disclosed, ascertain whether it had been infringed. *Newbery v. James*, 2 Meriv. 446. But the same learned chancellor afterwards considered the general question as still an open one, whether a court of equity would restrain a party from divulging a secret in medicine which was not protected by patent, but which he had promised to keep; and in such a case dissolved an injunction of the vice-chancellor upon the sole ground that the secret was not derived from plain-

tiff. *Williams v. Williams*, 3 Meriv. 157. And in a later case he unhesitatingly granted an injunction against one who by the terms of his agreement with the plaintiff was not to be intrusted with the secret and who had obtained a knowledge of it by a breach of trust. *Yovatt v. Winyard*, 1 Jac. & W. 394. Sir John Leach decreed in one case specific performance of an agreement by a trader to sell the good will of a business and the exclusive use of a secret in dyeing; and in another an account of the profits of the secret for making a medicine against a son of the inventor, holding it in trust for his brothers and sisters. *Bryson v. Whitehead*, 1 Sim. & Stu. 74; *Green v. Folgham*, 1 Sim. & Stu. 398." In *Morison v. Moat*, 9 Hare, 241, 21 L. J. (N. S.) 248, Lord Cranworth said: "There is no doubt whatever that when a party who has a secret in trade employs persons under a contract express or implied or under duty express or implied, those persons cannot gain the knowledge of the secret and then set it up against their employer."

74. *Vulcan Detinning Co. v. American Can Co.* (N. J. Ch. 1908), 69 Atl. 1103.

75. *Peabody v. Norfolk*, 98 Mass.

in this connection it is decided that a motion for an accounting of damages in an action to enjoin the use of a secret process will be denied where there is no allegation in the bill that the complainant has suffered any damages as such, or any prayer that any of the defendants shall account for damages or in the testimony any evidence which might be used as a basis for an accounting on this score or even for amending the bill so as to include in it a claim for damages.⁷⁶

§ 925. **Illustrations; secret patterns, etc.**—Where defendant employed one of plaintiff's patternmakers surreptitiously to furnish copies of plaintiff's patterns kept by him as a secret of his business of manufacturing pumps, it was held that defendant should be enjoined from using the patterns, and that the fact that plaintiff had manufactured and sold the pumps did not constitute such a publication of the plans, specifications, and patterns as to justify defendant's conduct.⁷⁷ And an injunction will lie to restrain former confidential employees, and others engaged with them, from divulging or using trade secrets or inventions, which were imparted to or invented by such employees in the course of their employment, where they had agreed to assign to their employer all the improvements which they might make in the line of this business while they were in his employ.⁷⁸ And where

452, 461; *Lumley v. Wagner*, 1 DeG. M. & G. 604.

76. *Vulcan Detinning Co. v. American Can Co.* (N. J. Ch. 1908), 69 Atl. 1103.

77. *Tabor v. Hoffman*, 41 Hun (N. Y.), 5, *aff'd* 118 N. Y. 30, 23 N. E. 12, per Vann, J.: "The courts have frequently restrained persons who have learned a secret formula for compounding medicines, beverages and the like while in the employment of the proprietor from using it themselves, or imparting to others, thus in effect holding, as was said by the learned General Term 'that the sale of the compound article to the world

was not a publication of the formula or device used in its manufacture.' *Hammer v. Barnes*, 26 How. Pr. (N. Y.) 174. We think that the patterns were a secret device that was not disclosed by the publication of the pump and that the plaintiff was entitled to the preventive remedies of the court."

78. *Eastman Co. v. Reichenbach*, 20 N. Y. Supp. 110, per Adams, J.: "The doctrine has obtained in this State for at least half a century and has been enunciated by a line of decisions which with a single exception is unbroken. *Jarvis v. Peck*, 10 Paige (N. Y.), 118; *Hammer v. Barnes*, 26 How. Pr. (N. Y.) 174;

knowledge of secret formulas is given to an employee in the course of his employment by a drug company he will, where he subsequently enters the employ of another company in the same line of business be enjoined from making use of or disclosing such secrets to the latter.⁷⁹ But where defendant conveyed to plaintiff the right "to introduce" a chemical preparation patented by the defendant, including "the rights of the patents taken out," on condition that plaintiff should pay defendant a certain royalty, and employ him at a certain salary, so long as his services were rendered solely in plaintiff's interests, and were satisfactory, and that plaintiff would employ agents, and plaintiff having failed to make the agreed payments to defendant, or to perform other of the specified conditions, defendant entered into a partnership with other persons for the manufacture of his preparation, it was held that an injunction to restrain defendant from revealing the secret of the preparation would be denied, as plaintiff had not, on his part, complied with the conditions of the contract.⁸⁰

§ 926. **Same subject; exceptions.**—In accordance with the principle upon which trade secrets are protected by injunction, it has been held that canvassers who have been employed to procure the insertion of traders' advertisements in a directory and also to furnish the employer the materials necessary for such advertisements, may be enjoined, after the expiration of their employment, from using these materials to procure the traders to advertise in a rival directory.⁸¹ And a party to a cause who has obtained access

Champlin v. Stoddart, 30 Hun (N. Y.), 300; *Tabor v. Hoffman*, 118 N. Y. 30, 23 N. E. 12. By a careful reading of the various decisions upon this subject it will be seen that some of them are made to depend upon a breach of an express contract between the parties, while others proceed on the theory that where a confidential relation exists between two or more parties engaged in a business venture, the law raises an implied contract between them that the employee will not divulge any trade secrets im-

parted to him or discovered by him in the course of his employment. and that a disclosure of such secrets thus acquired is a breach of trust and a violation of good morals, to prevent which a court of equity should intervene."

79. *Harvey Co. v. National Drug Co.*, 75 App. Div. (N. Y.) 103, 77 N. Y. Supp. 674.

80. *New York Chemical Co. v. Halleck*, 15 N. Y. Supp. 517.

81. *Lamb v. Evans* (1892), 3 Ch. D. 462.

to his opponent's papers, under an order to produce, may be enjoined from making them public.⁸² An originator or owner of an idea, secret or system which cannot be sold, negotiated or used without disclosure, must protect it from disclosure by some contract, or it must follow the law of ideas and become the acquisition of whoever receives it; and if he discloses it to another without contract, the latter incurs no liability by using it for his own benefit.⁸³ Any person who has, without the use of unfair means, become acquainted with the mode of compounding a secret unpatented preparation, will not be enjoined from making and selling it, after the death of the discoverer, and describing it by the discoverer's name, provided he does not lead the public to suppose that his preparation is the manufacture of the discoverer's successors in business.⁸⁴ And the purchasers from the trustee of a bankrupt of his interest in a sauce, the secret of which they did not acquire, cannot enjoin the original inventor from making the sauce, of which he alone knows the recipe, under the original title.⁸⁵ And an employee who is not in relation of special confidence toward his employer by means of which he may acquire a knowledge of his business secrets and methods, and who is not in a position to acquire a dominating influence over his customers, will not be enjoined from entering into the employ of the employer's rival, though that may be a breach of contract on the part of the employee.⁸⁶

§ 926a. **Where disclosure of secret process consideration for employment.**—Where a part of the consideration for the employment of a person is the disclosure to the employer of certain secret processes known only to the former, and an agreement not to communicate such processes to any one else or to manufacture from said processes himself in case he should leave the employ of such person, the employee may at the suit of the employer, who has

82. *Williams v. Prince of Wales Co.*, 23 Beav. 338.

83. *Bristol v. Equitable L. Ins. Co.*, 132 N. Y. 264, 30 N. E. 506.

84. *James v. James*, L. R. 13 Eq. 421.

85. *Cotton v. Gillard*, 44 L. J. Ch. 90.

86. *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348.

performed and is still willing to perform his part of the contract, be enjoined from disclosing the processes to anybody else and that a court of equity may do this not only in performance of the contract by which he agreed not to disclose these secrets, but also, in the absence of that negative stipulation, by way of compelling him to perform the contract which he made to disclose these processes to the plaintiff.⁸⁷

§ 927. **Attorney and client.**—In England it is decided that while an attorney may not be enjoined from acting for the opponent of his former client, he may be enjoined from communicating to him anything which had come to his knowledge while acting for the former client and in reference to the same transactions.⁸⁸ So where a solicitor who had negotiated and concluded an agreement on behalf of a woman, after a dispute with her over the payment of his bill for services, began a suit for another to set aside the agreement, he was restrained by injunction from acting as solicitor for the plaintiff in that suit and from communicating any information to him which had come to his knowledge confidentially as the woman's solicitor.⁸⁹ And solicitors cannot dissolve their partnership so as to enable the retiring partner to act against a former client, under circumstances in which the firm could not act.⁹⁰ And a solicitor may be enjoined from acting against the representatives of a deceased client and for a creditor, where a bill is filed to raise the amount of a judgment debt out of the decedent's estate, though the creditor had been the client of the solicitor before he acted for the decedent.⁹¹ But in a case in the United States Circuit Court, where it appeared that attorneys for one party to a litigation subsequently accepted a retainer from the opposite party in the belief that the litigation had terminated, the court refused to grant an injunction restraining them from giving information to others

⁸⁷. *National Gum & Mica Co. v. Braendly*, 27 App. Div. (N. Y.) 219, 51 N. Y. Supp. 93.

⁸⁸. *Little v. Kingswood, etc., Co.*, L. R. 20 Ch. D. 733, following *Hutchins v. Hutchins*, 1 Hogan, 315;

Biggs v. Head, Sausse & S. 335.

⁸⁹. *Davies v. Clough*, 8 Sim. 262.

⁹⁰. *Cholmondeley v. Clinton*, 19 Ves. 261.

⁹¹. *Biggs v. Head, Sausse & S.* 335.

than their original clients of any matter or thing by them acquired from such clients in their professional capacity, it being said by the court that it thought that the honorable obligation of a reputable member of the bar was a better assurance that professional secrets would be respected than would be an order of court.⁹² And an attorney who has a lien on papers of a former client for unpaid fees, will not be compelled to deliver them up to the court, or permit an inspection of them by the client's present attorney, upon a suggestion that he is now retained by persons bringing suits against the client, where no particular suit is specified and the attorney denies that he is prosecuting any action to which the papers in his possession relate.⁹³

§ 928. **Partner's outside use of information.**—The violation by one partner of his undertaking to give to the firm or his associate an opportunity or option to engage in any particular transaction, not within the scope of the firm's business, does not entitle his copartners to convert him into a constructive trustee in respect to the profits realized therefrom, and if he uses information obtained by him in the course of the transaction of the partnership business, or by reason of his connection with the firm, for purposes wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of any benefit derived therefrom.⁹⁴

§ 929. **Dissolution of injunction.**—In case of a pure injunction to restrain a trustee from selling land under a deed of trust to secure a debt, on the ground of usury, where it appears that there is no usury in the debt, the injunction should be dissolved and the bill dismissed, so that the creditor may enforce his rights under the trust, no other creditors being interested in the case.⁹⁵

92. *Lolance & Grosjean Mfg. Co. v. Haberman Mfg. Co.*, 93 Fed. 197.

93. *Finance Co. v. Charleston R. Co.*, 48 Fed. 45.

94. *Latta v. Kilbourn*, 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169;

Dean v. Macdowell, L. R. 8 Ch. D. 345; *Aas v. Benham* (1891), 2 Ch. D. 244, 255.

95. *Watterson v. Miller*, 42 W. Va. 108, 24 S. E. 578.

CHAPTER XXXI.

RELATING TO WILLS AND DECEDENTS' ESTATES.

SECTION 930. Establishing the validity of wills, etc.

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Section 930. Establishing the validity of wills, etc.—As in the United States jurisdiction is granted to courts of probate to pass upon the due execution of wills, bills for the mere purpose of establishing a will in equity, presented by a devisee of real estate who is in possession under the will, ought not to be maintained

unless an exceptional case for the interposition of equity is shown to exist.¹ Actions by an heir at law against a devisee have been maintained both in New York and in England where the heir sought to set aside a will, and where there was an outstanding term granted by the testator in his lifetime, by reason of which an action of ejectment could not be maintained by the heir. In such cases the heir has been permitted to enjoin the devisee from setting up the outstanding term as a defense to the action of ejectment, and it has been held that the court might not only grant the injunction but also grant an issue to be tried at law as to the validity of the will, or it might simply grant the injunction and leave the heir to his action of ejectment.² There is no inherent power vested in courts of equity in the construction of devises, as a distinct and independent branch of jurisdiction, but it exercises this jurisdiction only as incident to its jurisdiction over trusts.³ The New York courts of equity have no inherent jurisdiction to entertain an action by a devisee of the legal estate, who is in possession of the property devised, to establish a will against heirs at law, and the provisions of the Code of Procedure authorizing them to determine the validity of a testamentary disposition of real property are not to be so extended as to apply to the validity of the will making the disposition.⁴ The surrogate hav-

1. *Anderson v. Anderson*, 112 N. Y. 104, 19 N. E. 427. See *Wright v. Fleming*, 76 N. Y. 517.

In a case in Georgia it is decided that there is not an abuse of discretion on the part of the judge of the Superior Court in enjoining the suit of the remaindermen under a will probated in common form against a grantee of the sole heir at law before such probate, until the issue of *devisavit vel non*, made by the application of the latter to require proof of the will in solemn form, has been finally determined. *Hooks v. Brown*, 125 Ga. 122, 53 S. E. 583.

2. *Brady v. McCosker*, 1 N. Y. 214; *Boyse v. Rossborough*, 1 Kay,

Ch. 71; *aff'd* 3 DeG. M. & G. 817, and 6 H. of L. 1.

3. *Bowers v. Smith*, 10 Paige (N. Y.), 193; *Monarque v. Monarque*, 80 N. Y. 321; *Wager v. Wager*, 89 N. Y. 163.

4. *Anderson v. Anderson*, 112 N. Y. 104, 19 N. E. 427. In the opinion in this case the court comments upon and distinguishes *VanAlst v. Hunter*, 5 Johns. Ch. (N. Y.) 148; *Clarke v. Sawyer*, 2 N. Y. 498; *Bailey v. Briggs*, 56 N. Y. 407; *Pryer v. Howe*, 40 Hun, 383; *Drake v. Drake*, 41 Hun, 366; *Adams v. Becker*, 47 Hun (N. Y.), 65. In *Anderson v. Anderson*, *supra*, *Peckham, J.*, says: "In *Weed v. Weed*, 94 N. Y. 243, it was

ing exclusive jurisdiction under the New York Code, to admit to probate, and revoke the probate of wills, an action cannot be maintained to restrain defendant from proceeding before the surrogate to revoke probate of a will and admit to probate a later will, on the ground that the limited powers of the surrogate preclude him from considering the question whether defendant is estopped by having received benefits under the first will, as the surrogate has such power.⁵ In England the court of chancery has jurisdiction and will exercise it to prevent parties from applying to the court of probate or for administration when such restraint is necessary for the purpose of enforcing a contract between the parties, but will not interfere with matters which are within the jurisdiction of the court of probate and should be determined there.⁶

§ 930a. **Injunctions in cases of administration; purpose of.**—In cases of administration injunctions are usually, and it has been said only, resorted to in order to protect legal rights of parties interested in the estate where there is likely to be a misapplication, or *devastavit*, by an insolvent administrator or executor.⁷ So it has been decided that while the appointment of a receiver and order of injunction may be resorted to by a judgment creditor of an insolvent husband, who survives his wife and who is attempting to dispose of the interest he may have in her estate, yet these proceedings are not applicable to her administrator where there is no *devastavit* committed or threatened.⁸

held that a devisee who claimed a mere legal estate in the real property of the testator, when there is no trust cannot maintain an action for the construction of the devise, but must assert his title by a legal action, or if in possession, must await an attack upon it and set up the devise in answer to the hostile claim. It is true that there was an action for the construction of certain clauses in a will, and hence is not directly in point here. But it shows the tendency of the court to continue in the same path it has tread for many years by

denying jurisdiction in equity in matters regarding wills separated from trusts, and to send to the legal branch of the court questions of that nature for determination. *Chipman v. Montgomery*, 63 N. Y. 221; *Wager v. Wager*, 89 N. Y. 161."

5. *Paxton v. Patterson* (1891), 26 Abb. N. C. 389.

6. *Wilcocks v. Carter*, L. R. 10 Ch. App. 440.

7. *Mahoney v. Stewart*, 123 N. C. 106, 31 S. E. 384. Per *Furches*, J.

8. *Mahoney v. Stewart*, 123 N. C. 106, 31 S. E. 384.

§ 931. **Enforcing agreement in execution of will.**—An oral agreement between the devisees under a will as to the disposition of the real property in execution of the will may be enforced by a court of equity where there has been full performance by one of the parties and the other subsequently refuses to perform and relies upon the statute of frauds as a defense, as under the circumstances it is said that it would be a virtual fraud to allow the defendant to interpose the statute as a defense and thus secure to himself the benefits of what has been done in part performance. And in such a case an injunction may be granted restraining the one refusing to perform from doing any act in regard to property under his control which might deprive the other party of his rights under the agreement. This rule was applied where a testator died seised of two parcels of land; one of them, on which was the homestead, he devised for the occupancy and support of his second wife and her children, with the direction that, under certain contingencies, it should be sold, and the proceeds divided among her children, or the survivors of them, and the other tract he charged with the maintenance of his second wife during her lifetime, and her children during their minority, and then directed that it be sold, and the proceeds divided among the children of the first wife. At a meeting of the widow and her children, including defendant herein, and the children of the first wife, including plaintiff, it was verbally agreed that the second tract should be sold at once, and the proceeds divided among the widow and all the children, and that, when the homestead became subject to sale under the will, its proceeds should be likewise divided among all. Accordingly all the parties in interest joined in a conveyance of the second tract to plaintiff as trustee, and he sold the same, and divided the proceeds as agreed. It was held that this was a sufficient part performance to take the agreement out of the statute of frauds, and to warrant a decree for specific performance against defendant, who had become solely entitled to the homestead under the will, and to entitle plaintiff to an injunction to prevent defendant from disposing of the

homestead until the rights of the parties could be definitely settled.⁹

§ 932. **Forged will; injunction; laches.**—In a suit to set aside a will as being forged, no laches can be imputed to plaintiff on account of the length of time which has elapsed since testator's death, where the suit was commenced immediately after the will was probated by the parties claiming under it, and there are no

9. *Riggles v. Erney*, 154 U. S. 244, 38 L. Ed. 976, 14 Sup. Ct. 1083, per Brown, J.: "If the contract was made, as claimed, the sale and division of proceeds of the lots in square 179 was a part performance of such contracts under the decisions both of this court and of Maryland. The case of *Caldwell v. Carrington's Heirs*, 9 Pet. 86, is not dissimilar. This was a bill filed by Carrington's heirs in the Circuit Court for the district of Kentucky, claiming certain lands in that State, under a parol agreement, by which Carrington agreed with Williams for an exchange of lands which Carrington owned in Virginia for certain military lands in Kentucky. Williams took possession of the lands in Virginia, and sold a part of them. The bill prayed that the heirs of Williams should be decreed to convey the military lands in Kentucky. This court held that, although the statute of frauds avoid parol contracts for lands, yet the complete execution of the contract in this case by Carrington, by conveying to Williams the lands he had agreed to give him in exchange, prevented the operation of the statute. See, also, *Galbraith v. McLain*, 84 Ill. 379; *Paine v. Wilcox*, 16 Wis. 202. So in *Neale v. Neale*, 9 Wall. 1, a parol gift of land was made to a donee, who took possession, and, induced by

the promise of the donor to give a deed of it, made valuable improvements on the property. It was held that, the donor having stipulated that the expenditure should be made, this should be regarded as a consideration or condition of the gift, and a specific performance was decreed. To same effect is *Hardesty v. Richardson*, 44 Md. 617. So in *Bigelow v. Armes*, 108 U. S. 10, 1 Sup. Ct. 83, 27 L. Ed. 631. Armes proposed in writing to Bigelow to exchange his real estate for Bigelow's, with a cash bonus. The latter accepted in writing. Armes complied in full; Bigelow in part only. It was held to be unnecessary to determine whether the written memorandum was sufficient, as it was the duty of the court, in view of the full performance by Armes, to decree performance by Bigelow. There are other cases in this court in which the evidence was deemed sufficient to justify a decree for specific performance, but the principle of the cases above cited has never been questioned. *Colson v. Thompson*, 2 Wheat. 336, 4 L. Ed. 253; *Purcell v. Miner*, 4 Wall. 513, 18 L. Ed. 435; *Grafton v. Cummings*, 99 U. S. 100, 25 L. Ed. 366. Indeed, the rule is too well settled to require further citation of authorities that, if the parol agreement be clearly and satisfactorily proven, and the plaintiff, relying upon such agree-

rights of third persons involved.¹⁰ In such a suit in Oregon, brought by the children and husband of a deceased woman, the plaintiffs may enjoin the parties claiming under the will from disposing of the devised realty so as to cloud the plaintiffs' title thereto, and the Federal Circuit Court may assume jurisdiction of such a suit, where the amount in controversy is sufficient and the parties are citizens of different States.¹¹

ment and the promise of the defendant to perform his part, has done acts in part performance of such agreement, to the knowledge of the defendant—acts which have so altered the relations of the parties as to prevent their restoration to their former condition—it would be a virtual fraud to allow the defendant to interpose the statute as a defense, and thus to secure to himself the benefit of what has been done in part performance.”

10. *Richardson v. Green*, 61 Fed. 423, where the court distinguishes and comments on *Badger v. Badger*, 2 Wall. 94, 17 L. Ed. 836; *Marsh v. Whitmore*, 21 Wall. 184, 21 L. Ed. 482; *Wood v. Carpenter*, 101 U. S. 140; *Gibbons v. Hoag*, 95 Ill. 45; *Daggers v. Van Dyck*, 37 N. J. Eq. 130.

11. *Richardson v. Green*, 61 Fed. 423, per Knowles, J.: “In the case of *Hubbard v. Hubbard*, 7 Or. 42, the Supreme Court said: ‘Under the English practice there were two modes of proving a will of personal property—“the common form,” in which the will was propounded by the executor, and proved *ex parte*; “the solemn form,” in which the next of kin of the testator were cited to witness the proceedings, and in which the proof was taken *per testes*, or in the form of law, as it was called.

. . . In this State, probate in com-

mon form is the only one which appears to have been adopted by any positive enactment of the Legislature. Code, §§ 1051, 1052, 1060, 1061.’ The same conclusion was reached in *Luper v. Werts*, 19 Or. 122-126, 23 Pac. 850. In this last case the court urges that it would be better for the legislative authority to require the Probate Court to issue citation to be served on parties interested in the estate, and have a contest concerning any will. This, I think, shows there was no law in Oregon, when this action was commenced, to warrant any contest upon the validity of a will at the time the same was being probated. What was the effect of probating a will in this manner? The Supreme Court of Oregon has held that in that State the will could not be attacked in any collateral proceeding. *Hubbard v. Hubbard*, *supra*. Under the English law, and in most of the States, a will devising real estate, so far as it affected the same, could be attacked collaterally, such as in an action of ejectment. The probating of a will in the common form had no effect as regards real estate in England. I Jarm. Wills, p. 51 (*28). This is a rule in most of the States, but in Oregon a different rule has been established. Under the decisions of the Supreme Court of Oregon, after a will has been probated, then any one interested in the estate can at-

§ 932a. Execution of writ of assistance; right of administrator to enjoin.—The right of an administrator to restrain the execution

tack the will in what is called a 'direct proceeding.' Jones v. Dove, 6 Or. 188; Hubbard v. Hubbard, 7 Or. 42; Brown v. Brown, 7 Or. 299; Clark's Heirs v. Ellis, 9 Or. 133; Chrisman v. Chrisman, 16 Or. 128, 18 Pac. 6; Luper v. Werts, 19 Or. 122, 23 Pac. 850; Potter v. Jones, 20 Or. 240, 25 Pac. 769; Rothrock v. Rothrock, 22 Or. 551, 30 Pac. 453. It is important to determine the nature of this proceeding. In the first place, we find that there are parties to the same (see the style of the above causes); that it is not an action *in rem*, in which a contest is made against the validity of the will, and no parties in the sense that one is plaintiff and the other defendant. In the case of Clarks Heirs v. Ellis, *supra*, we find in the statement of facts the following: 'This proceeding was originally commenced in the County Court of Union county by petition of respondents as the heirs at law of William Clark, deceased, against the appellants, to set aside the will of said Clark, and to revoke the probate thereof.' We now come to the question, can this proceeding be classed as a suit of a civil nature at common law, or in equity? It is provided in section 629, Rev. Stat. U. S., that: 'The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law, or in equity,' etc. In the case of Weston v. City Council, 2 Pet. 449, Chief Justice Marshall said of the term 'suit:' 'The modes of proceeding may be various, but, if the right is litigated between parties in

a court of justice, the proceeding by which the decision of the court is sought is a suit.' In the case of Gaines v. Fuentes, 92 U. S. 10, Justice Field, in delivering the opinion of the court, said: 'The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is in all essential particulars a suit for equitable relief, to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony.' An examination of the dissenting opinion of Justice Bradley in this case will show that the question as to whether such an action was a suit in equity of a civil nature was the one under discussion. The court held it was such a suit. In this case, also, we observe pointed out the difference between a proceeding in a Probate Court to prove and establish a will and a case where the validity of a will is litigated between parties. After stating that a federal court has no jurisdiction of the proceeding to probate a will, Justice Field says 'The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties. Indeed, in the majority of instances, no such controversy exists. In its initiation all persons are cited to appear, whether of the State where the will is offered or of any other States. From its nature, and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation

of a writ of assistance depends upon his being in possession of the property and if he is not in possession it is decided that his

of cases at law or in equity.' 'An examination of the case of *Ellis v. Davis*, 109 U. S. 485, 3 Sup. Ct. Rep. 327, will show that the Supreme Court again makes a distinction between the probate of a will and an action to try the validity of a will between parties, and when there is a decree or judgment which affects only the parties to the action. In the *Broderick Will Case*, 21 Wall. 503, it is stated that ordinarily the probate of a will is a proceeding *in rem*. It should be observed that in California the proof of a will is of a solemn character, and much different from the *ex parte* mode of probating a will in Oregon. The suit for contesting a will after the probating of the same in Oregon is undoubtedly one between parties, and binding only the parties thereto, and hence is such a one as a Circuit Court of the United States could take jurisdiction of when the amount in controversy is sufficient, and the parties plaintiff and defendant citizens of different States. In the suit of *Gaines v. Fuentes*, *supra*, after stating that a suit to annul a will and limit the operation of its probate was in the nature of a suit for equitable relief, the Supreme Court again says: 'There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not designated "suits in equity," but they are none the less essentially such suits; and if by the law obtaining in the State, customary or statutory, they can be maintained in a State court, whatever designation that court may bear, we think they may be maintained by original pro-

cess in a federal court where the parties are, on the one side, citizens of Louisiana, and the other, citizens of other States.' Here it will be seen that if a suit is essentially a suit of a civil nature for equitable relief, and it is customary to prosecute the same in any State court where the action arose, whether the same is a County Court or a Probate Court or a District or Circuit Court, the proper federal court will have concurrent jurisdiction of the same with such State courts, where the amount is sufficient and the parties are citizens of different States, as prescribed by the United States statutes. It should be observed, also, that when it is customary for such State courts to hear and determine such equitable suits, a United States court, under proper conditions, may hear them. In the *Broderick Will Case*, it was admitted, if a State by statute authorized the bringing of a suit to declare a will void in its courts of law or equity, the same could be maintained in a proper case in a federal court. The views here expressed are supported by the case of *Brodhead v. Shoemaker*, 44 Fed. 518. I do not think the case of *In re Cilley*, 58 Fed. 977, can be considered as an authority against them. That was an attempt to remove a proceeding probating a will, and which had been appealed from the Probate Court to a higher court. As near as can be collected from the statement of the facts, it was a proceeding *in rem*, in which a contest was presented, and not a suit between parties. The title of the cause, *In re Cilley*, clearly indicates this. It is urged by appel-

rights can not in any degree be affected by the execution of the writ and that he will not be entitled to restrain it. And in this

lants that this suit cannot be maintained, because the appellees had a plain, speedy and adequate remedy at law. No such remedy has been pointed out to this court under the laws of Oregon. It is true that in *Ellis v. Davis*, *supra*, the court decided that under the laws of Louisiana the complainant had a remedy at law in an action of revindication. This action would seem to be somewhat in the nature of an action of ejectment at common law, and the action to recover possession of real estate under the Code practice. The will devising real estate could be thus attacked in England and many of the States, but in Oregon, when a will is probated, it cannot be attacked in any collateral proceeding. James Terwilliger had the right to the possession of the property as a tenant by curtesy, and no action could be maintained against him for the possession of the premises. There seems to be a dispute between the counsel for the opposite parties in this case as to the right the plaintiff would have, under the laws of Oregon, to compel the production of the will in the Probate Court, and the probating of the same. Whether or not such right would exist depends upon the construction of a statute of that State which does not seem to have been interpreted by the highest court thereof. But let it be granted that plaintiffs could have caused the production of the will in the Probate Court, what relief would that have afforded them? As we have seen, the probating of the will would have been the common form—*ex parte*. They would not have been a party to

the proceeding. What relief the course suggested would have afforded plaintiffs it is difficult to see. The only effect of probating a will in common form in most of the States is that it can be introduced in evidence. This, I think, is the effect of the decisions in Oregon. As a valid will conveys title to real estate to the devisees named therein, it would appear that the assertion of the devising by will of certain real estate by parties residing on the land would be a cloud upon the title of the heirs, and there ought to be some remedy for removing that cloud. In this case plaintiffs had no remedy at law. They could not bring an action to recover the possession of the property. The probating of the will afforded no relief to them. They would not be a party to the proceeding. It would be *ex parte*. Phllinda Terwilliger died in 1873. This action was commenced in 1889. Sixteen years had elapsed since her death, and the deed had not been recorded, and the will was not probated. All this time there was a vague assertion of title to the premises in Julia Terwilliger, now by virtue of a deed, and again by virtue of a will. Plaintiffs had never seen these instruments. They had not been exhibited to them. The only remedy that could be afforded them would be to compel the probating of this will in an *ex parte* manner, so that they might bring the very suit they have in this case. It will be observed that under the decisions in Oregon, when a will is attacked as a forgery, after it is probated, the probating amounts to nothing, and the burden is cast upon the parties claim-

connection it is declared that the question whether he is or is not in possession is one of fact to be determined by the trial court.¹²

§ 933. Testamentary trust; equitable action to enforce.—

Beneficiaries under a will cannot maintain a suit in equity against the executors and trustees under the will as such, and also as individuals, to enforce the performance of the trust, for an accounting of the trust estate, and to declare void certain orders of the probate court in relation to such estate, before a final settlement of the accounts of such trustees, and distribution by the probate court.¹³ And where a mother who held the legal title to land con-

ing under the will to prove the validity of the will. *Hubbard v. Hubbard, supra*. This is analogous to the rule that prevails in those States where a will to real estate can be attacked in a collateral action in a suit at law, such as ejectment. It would seem like demanding a plaintiffs a vain thing to institute proceedings to compel the probating of a will under such circumstances. It is true, there are decisions which hold that a court of equity will not try the validity of a will. Such is the rule expressed in 1 Story, Eq. Jur. 184, and 2 Story, Eq. Jur. 1445, 1446. This rule is based upon the ground that, as far as personal property is concerned, the probate of the will was vested in courts having the same powers as the ecclesiastical courts of England, and was conclusive; and, as to the real estate, the probating was not conclusive, and there was a remedy at law, namely, ejectment, in which the validity could be tried. At the time this rule was adopted no such conditions were presented as we find in Oregon. Considering the conditions of this case, that time was passing, and witnesses liable to die, and it would seem that a remedy ought to

be afforded in a court of equity for the wrongs alleged on the part of plaintiffs. As Judge Sawyer said in the case of *Sharon v. Hill*, 10 Sawy. 48, 20 Fed. 1: 'There is a charge of forgery and fraud, and we think the instrument, if a forgery and fraud, ought to be canceled. If there is no remedy in equity for such a wrong as is charged, then the law is, indeed, impotent to protect the community against frauds of the most far-reaching and astounding character. If there is no precedent for a case upon the exact state of facts disclosed by the bill, it must be because no instance exactly like it has ever before arisen.'

12. *Hibernia Sav. & L. Soc. v. Robinson* (Cal. 1907), 88 Pac. 720.

13. *Dougherty v. Bartlett*, 100 Cal. 496, 35 Pac. 431. In this case the plaintiffs are nieces and nephews of the decedent, and allege in the bill, in substance, various wrongful and fraudulent acts and omissions on the part of defendants in connection with the management of the estate, resulting in loss and waste; the appropriation of trust funds to their own use; collusion with the widow of deceased, whereby she has obtained

veyed the same to her husband to be held in trust by him and to be devised by him to their daughter at the mother's death, it was held that an action could be maintained by the daughter after the death of her mother to restrain the father from either encumbering or alienating the land.¹⁴

§ 934. **Murderer of testator prevented taking under will.**—A legatee who murdered the testator in order to prevent a revocation of the will, may be prevented by a court of equity from taking under it, and the administrator may be enjoined from using any of the property, real or personal, left by the testator for the benefit of the murderer.¹⁵ And so a particular portion of a will may be

and is about to obtain more than she is entitled to under the will; and that certain orders of the probate court, setting apart certain property as a homestead for the widow, making family allowances, and appointing and compensating an attorney to represent absent or minor heirs, were void for want of jurisdiction. Per De Haven, J.: "The demurrer to the complaint was properly sustained. Until distribution of the estate of deceased, by the probate court, the respondents hold the property of said deceased as executors of his will, and they must account to the probate court for all property of the estate of said deceased received by them as such executors, and for their management of the same prior to its distribution under the will of deceased. We do not understand from the complaint that the executors, who are also the trustees under the will of the deceased, have failed to 'annually distribute the residue of the rents and profits of the trust estate' among the nephews and nieces of the deceased, as directed by the will, or that this is an action to enforce this particular duty of the defendants,

who are named as executors and trustees under the will; and we express no opinion upon the question whether such an action could be maintained in a court of equity prior to the distribution of the estate under the will."

14. *McCreary v. Gewinner*, 103 Ga. 528, 29 S. E. 960.

15. *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188, Earl, J., said he could assent to the doctrine of *Owens v. Owens*, 100 N. C. 240, where a wife convicted of being an accessory before the fact to the murder of her husband, was nevertheless held entitled to dower. In *N. Y. Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997, Field, J., said: "Independently of any proof of the motives of Hunter in obtaining the policy, and even assuming that they were just and proper, he forfeited all rights under it when, to secure its immediate payment, he murdered the assured. It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might

excluded from probate or held inoperative if induced by the fraud or undue influence of the person whom it benefits.¹⁶

§ 935. **Limited equity jurisdiction.**—Courts of equity will not, except in extraordinary cases, supersede the probate courts in the administration of decedent estates.¹⁷ And the latter courts may often exercise an equitable jurisdiction when necessary to further the ends of justice.¹⁸ Thus a widow holding a note against the decedent estate may be enjoined by the County Court from negotiating it until an amount which has been improperly awarded to her shall be credited on the note.¹⁹ Where, however, in an action to enjoin an administrator *de bonis non* from selling land of the intestate for assets, it appeared that a petition for that purpose was pending in the probate court, and that the legality of the administrator's appointment was denied, and that no inventory had been taken of the intestate's personalty, it was held that plaintiff had an adequate remedy in the probate court, and therefore that the injunction should not be granted.²⁰ But where a bill for an injunction presents a state of facts which show that an irreparable injury is impending, against which the probate court is powerless to grant relief, a court of equity will interfere.²¹ And where a court of equity for special reason assumes jurisdiction of the administration of a decedent's estate, it will continue to act until all the questions involved have been adjusted.²² The right of a

he recover insurance money upon a building that he had wilfully fired."

16. *Allen v. McPherson*, 1 H. L. Cas. 191; *Harrison's Appeal*, 48 Conn. 202.

17. *Shepard v. Speer*, 140 Ill. 238, 29 N. E. 718; *Harding v. Shepard*, 107 Ill. 264; *Crain v. Kennedy*, 85 Ill. 340; *Heustis v. Johnson*, 84 Ill. 61; *Hales v. Holland*, 92 Ill. 498.

18. *Wolf v. Beard*, 123 Ill. 588, 15 N. E. 161; *In re Corrington*, 124 Ill. 363, 16 N. E. 252. But it has been held in New York that neither before nor after the Code of Proceed-

ure have surrogates' courts possessed the general powers of a court of equity. *Matter of Wagner's Estate*, 119 N. Y. 28, 23 N. E. 200; *Bevan v. Cooper*, 72 N. Y. 317; *Stilwell v. Carpenter*, 59 N. Y. 414.

19. *Spencer v. Boardman*, 118 Ill. 555, 9 N. E. 330.

20. *Johnson v. Jones*, 75 N. C. 206. And see *Sprinkle v. Hutchinson*, 66 N. C. 450.

21. *Haag v. Sparks*, 27 Ark. 594.

22. *Bechtold v. Read*, 49 N. J. Eq. 111, 22 Atl. 1085; *Blake v. Barnes*, 28 Abb. N. C. 401.

creditor to resort to the real property of his deceased debtor did not exist at common law, nor was the collection of debts from realty ever regarded as a part of the jurisdiction of equity.²³ That right was conferred by statute and it must be asserted and proved in the mode prescribed by statute.²⁴ As the Georgia Code has largely invested the court of ordinary with the power of control over executors and administrators, courts of equity will not interfere in the removal of those officers, though they may in a proper case interfere for the protection of assets.²⁵ An injunction to restrain, pending final hearing, the disposition of assets not in dispute would be only to restrain the executor from using or disposing of the same otherwise than as directed by the will, and this being his duty by law, the discretion of the judge in granting the injunction will not be interfered with.²⁶

§ 936. Abuse of trust by executor, etc.; fraudulent waste; incompetency.—An injunction going to the whole power of the executor who is charged with abusing his trust will not ordinarily be granted in the first instance, for that would leave the estate without a representative. In such cases the appointment of a receiver is sometimes sufficient.²⁷ But where a judgment is taken against an administrator in another county than his residence, and by his collusion, it does not bind the estate, and his surety has such an interest in setting it aside that he may by injunction restrain its enforcement against the estate.²⁸ And where the administrator of an estate and others conspire to bring proceedings in a probate court to procure the sale of estate property upon fraudulent claims allowed by the administrator, such proceedings may be restrained by injunction; but if the proceedings are regular on their face, the probate order will not be set aside, but the relief will be con-

23. MacLaury v. Hart, 121 N. Y. 636, 24 N. E. 1013.

24. Hogan v. Kavanaugh, 138 N. Y. 417, 34 N. E. 292.

25. Powell v. Hammond, 81 Ga. 567, 8 S. E. 426; Dean v. Cotton Press Co., 64 Ga. 674; Smith v. Byers, 41 Ga. 447; Harrup v. Winslet,

37 Ga. 655; Johns v. Johns, 23 Ga. 31.

26. Powell v. Hammond, 81 Ga. 567, 8 S. E. 426.

27. Boyd v. Murray, 3 Johns. Ch. (N. Y.) 48. And see Edmunds v. Bird, 1 Ves. & B. 542.

28. Washington v. Barnes, 41 Ga.

fined to preventing the sale.²⁹ In another case an executrix was entitled by the will to the possession of testator's realty, with the rents and profits, with power to sell in her discretion. In a bill to enjoin her from cutting and selling timber, it was alleged that these acts rendered the estate of doubtful sufficiency to satisfy plaintiff's legacies which were charged on the land. It was held that, as it was not shown that defendant was acting illegally, or that the value of the estate was impaired, and as defendant's interest as legatee was sufficient to cover any damages that might accrue, plaintiffs were not entitled to relief, for they were amply secured in the executorial responsibility of defendant on an accounting.³⁰

§ 937. **Arbitrating claims against estate.**—Though as a general rule an administrator may submit claims against the estate to the award of arbitrators, yet if he be in fact a mere trustee having the legal title, but no beneficial interest in the controversy, the court will control his action and will restrain him by injunction from submitting to arbitration without their consent a question in which the *cestuis que trust* alone are interested.³¹

307. And see *Haag v. Sparks*, 27 Ark. 594, where administrators were enjoined from fraudulent disposition.

29. *Larue v. Friedman*, 49 Cal. 278; *Hager v. Shindler*, 29 Cal. 47.

30. *Keller v. Ogsbury*, 121 N. Y. 362. 24 N. E. 803.

31. *Crum v. Moore*, 14 N. J. Eq. 436, per Green, Ch.: "That an administrator may submit claims against the estate to arbitrators will not as a general rule be questioned. So, as a general rule, the plaintiff in an action at law may release the claim, submit to a reference, or enter satisfaction of the judgment. But if he be in fact the mere trustee of another, the court will control his action and protect the interest of his *cestui que trust*. *Legh v. Legh*, 1 Bos. & P. 447; *Winch v. Keeley*, 1

T. R. 619; *Johnson v. Bloodgood*, 1 Johns. Cas. 51; *Wardell v. Eden*, 2 Johns. Cas. 121; *Littlefield v. Storey*, 3 Johns. 425; *Briggs v. Dorr*, 19 Johns. 95; *Timan v. Leland*, 6 Hill, 237; *Jackson v. Blodget*, 5 Cow. 202. Aside from the general principle there are circumstances in this case which render it peculiarly proper that the administrator should be restrained from proceeding with the arbitration. The very nature of the controversy renders it an unfit matter to be disposed of in a tribunal not sufficiently familiar with the principles of law and equity to administer either effectually in complicated cases. The claim is made by a son against the estate of his father for services for a period of more than twenty years. He has always resided

§ 937a. **Misappropriation of personal property by stranger; action by next of kin.**—Next of kin are not without interest in the protection of personal property before an administrator is appointed and where such property is in the hands of a stranger the next of kin may properly invoke the aid of a court of equity to enjoin its misappropriation by such person.³² The court said in this case: "While it is true that personal property of a deceased must pass to a personal representative and be distributed under order of court to next of kin of deceased, it is not true that the next of kin are without interest in the protection of the property before an administrator is appointed. Where, as in this case, it is alleged by the next of kin that the personal property of a deceased intestate is being misappropriated by a stranger, it is the peculiar province of this court to protect the property and preserve its present status until an administrator shall have been appointed."³³

§ 937b. **Enjoining action to remove administrator.**—Where an action to remove an administrator is clearly not brought in good faith but with the evident intention of depriving the estate of his services to the detriment of the estate the parties seeking to obtain his removal may be enjoined from prosecuting the action. So where a proceeding was brought by a county in a County Court for the removal of an administratrix and the latter brought an action to enjoin the proceedings for her removal, it was decided that an injunction should be granted where it appeared that at the time such proceedings were instituted the administratrix and the county were engaged in litigation over a large claim asserted by the latter against the estate; that several actions had been brought by the county to establish its claim, which it had been unable to do, the administratrix having made an honest and apparently successful defense thereto and that the proceeding for

with his father from the time he was of age. He alleges in his answer that though his claim is thus ancient, no part of it is barred by the statute of limitations. It is obvious that this state of facts must of necessity give rise to questions of doubt and diffi-

culty peculiarly proper to be disposed of by the constituted tribunals of justice."

32. *Buchanan v. Buchanan* (N. J. Ch. 1908), 68 Atl. 780.

33. *Per Leaming, V. C.*

her removal was instituted in a court presided over by one who had been most active in behalf of the county and under whose direction the litigation was being conducted. The court declared that this proceeding could not have been instituted in good faith, but for the purpose of annoying and harassing her and to illegally deprive the estate of which she was administratrix of the right to defend against the actions and suits brought by the county on an alleged wrongful claim and that if the county had a valid claim the courts were open to it to enable it to establish the claim in a regular and orderly manner. And it was also decided in this case that the proceeding for an injunction was not one which in any sense interfered with the exclusive jurisdiction of the County Court over proceedings in the administration of estates and the appointment and removal of executors and administrators, as the decree for an injunction was not addressed to the court, and only operated upon the parties which is a jurisdiction clearly vested in a court of equity.³⁴

§ 938. **Unlawful sales of realty.**—Where a will provides that the executor, after closing up his trust and making settlement with the court, shall not then be finally discharged, but shall act as trustee of certain land devised for life in case the devisee shall fail to keep the taxes thereon paid, or shall attempt to sell it in gross, it is decided that the executor may enjoin an insolvent purchaser from such devisee from taking possession of the land, it appearing also that the land has been sold for taxes, and that the executor has in his hands no means with which to pay them.³⁵ And an administrator may be enjoined by heirs from selling lands to pay expenses of administration and costs of litigation incurred not in the interest or at the request of any heir or creditor, but for selfish purposes of his own.³⁶ And the grantees of certain realty conveyed by the heir at law of an intestate may have an injunction against the administrator and their grantor to restrain them from

34. *Alderman v. Tillamook County* 549, 30 N. E. 787.
(Oreg. 1907), 91 Pac. 298.

36. *Owens v. Childs*, 58 Ala. 113.

35. *Champ v. Kendrick*, 130 Ind.

attempting to dispose of the land to satisfy claims against the estate, when the personalty is sufficient to meet those claims.³⁷ Again, where it is alleged that a testator, acting as a fiduciary, has invested plaintiff's money in real estate, his executor may be restrained until the hearing from selling such real estate for assets.³⁸ And an administrator's sale, though made under a void order, will be treated as valid as to those who have received the fruits of it, and the purchaser or one claiming under him, to whom the administrator and heir have conveyed the legal title, may by injunction prevent the cloud on the title which would be caused by a second sale by the administrator *de bonis non* under an order of the probate court.³⁹ An executor, being defendant in a suit for partition and accounting, brought by one claiming as residuary devisee, and who was unaware of any other claimant, prior to the institution of proceedings, in escheat, may also be enjoined from prosecuting a suit for partition and division subsequently brought by himself against the escheator, in which he admitted the liability of said devisee's interest to escheat; and an amended complaint praying for such injunction was properly allowed to be filed by such devisee.⁴⁰ But one who is in possession of real estate as owner is held to have no right to an injunction against the sale of such property on the ground that the succession has no title thereto. In such a case it is decided that if the succession has no title, the purchaser can acquire none and the succession sale of the property can not affect the rights of the one seeking the aid of the court. If such a sale should be effected and the purchaser attempt to exercise rights of ownership or possession it then would be time enough to invoke the aid of the court.⁴¹

§ 939. Powers, defective execution of.—Where a sale has been fairly made by an administrator, under order of court, for a

37. Hill v. Mitchell, 40 Mich. 389.

38. McCorkle v. Brem, 76 N. C. 407.

39. Bell v. Craig, 52 Ala. 215. And see Pickens v. Yarborough, 30 Ala. 408.

40. Muir v. Thomson, 28 S. C. 499. In Ducote v. Bordelon, 24 La. Ann.

145, it was held that the fact that the notary who took an inventory of a succession failed to cite the tutor to the minor heirs is not a good ground for enjoining the sale of the succession property to pay its debts.

41. Rapides Lumber Co. v. Hartiens, 111 La. 793, 35 So. 910.

valuable consideration, the court will not permit advantage to be taken of a defective execution of a power by one only of two administrators, but will, by injunction, compel the other to join in the execution where there is a duty and trust to be performed, by the proper exercise of the power, though it would be otherwise if it were a mere power.⁴² And where two administrators sell land under an order of the orphan's court, and the price is paid, and only one of them executes the deed, the heirs will be enjoined from prosecuting an ejectment to recover back the land from the purchaser on the ground of such irregularity.⁴³ An injunction against the sale of land for assets may also be granted on the motion of heirs, where the land is advertised under a power contained in an instrument purporting to be a will, which was admitted to probate without notice to the heirs, and the validity of which is in controversy.⁴⁴ A general power in trust, not involving the exercise of discretion of a particular executor, does not die with him but

42. *Thorp v. McCullum*, 6 Ill. 614, 629, per Scotes, J.: "The general rule ought to depend upon the nature of the power and its objects. It is laid down by the chancellor in *Brown v. Higgs*, 8 Ves. 570, in these words: 'But there are not only a mere trust and a mere power, but there is also known to this court a power, which the party to whom it is given is entitled and required to execute; and with regard to that species of power, the court considers it as partaking so much of the nature and qualities of a trust that, if the person who has that duty imposed upon him does not discharge it, the court will to a certain extent discharge the duty in his room and place. See, also, *Harding v. Glyn*, 1 Atk. 469. For no trust shall fail in equity for want of a trustee. Executors and administrators have a power connected with a trust in collecting, selling, and paying debts and distribut-

ing the surplus. If there are no limitations in the will restricting the persons or the manner of executing these powers, the court will aid to give effect to a fair sale or transaction, which cannot take effect otherwise on account of a defective execution of their powers conferred by law. In attempting to perform these duties, the administrators make a sale of the land and one only executes the conveyance. Here is a defective conveyance of the power by one which the law has conferred upon both. But it partakes so much of the nature and qualities of a trust that the court will compel the other administrator, in a proper case, to join in the conveyance." And see *Gibbs v. Marsh*, 2 Met. 243; *Parsons v. Parsons*, 9 N. H. 309.

43. *Wortman v. Skinner*, 12 N. J. Eq. 358.

44. *Galbreath v. Everett*, 84 N. C. 546.

survives and vests in a court of equity having full power to compel its execution.⁴⁵

§ 940. **Restraining execution of powers.**—Though an executor may be empowered generally by the will under which he is acting to make sales of real or personal property and to make or continue investments without being accountable, yet circumstances may arise, such as gross mismanagement or a waste of the estate, which will justify a court of equity in enjoining a further exercise by him of such powers. So where a widow was authorized by her husband's will to make and continue such investments of the estate as to her should seem best, without her being held accountable for any loss or mismanagement incurred during her widowhood, it was held in an action to restrain waste by her that the court had power to grant an injunction as prayed for and to appoint a receiver.⁴⁶ And in case of an appeal from a judgment removing a person as executor a sale of land by him pending the appeal may be enjoined though a *supersedeas* bond has been given by him.⁴⁷ But where, in an action to restrain the exercise of a power of sale in a will on the ground that the devisees, who were the legal owners, had elected to take the land, it appeared that on testator's death they took possession of the land, and continued therein; that they exercised control over the respective shares, and collected for their own use the rents and profits; that they had renewed a lease of the land; that plaintiff had asked for a partition, which was resisted by the other devisees; and that less than three years had elapsed between testator's death and the attempted exercise of the power. It was held that there was no election on the part of the devisees to take the land, and that the executor should not be enjoined from exercising the power of sale.⁴⁸

45. *Delaney v. McCormack*, 88 N. Y. 174.

46. *Bentley v. Bentley* (N. J. Ch. 1897), 38 Atl. 286.

47. *Walker v. Maddox-Rucker B'k'g Co.*, 97 Ga. 386, 23 S. E. 897.

48. *Mellen v. Mellen*, 139 N. Y. 210, 34 N. E. 925, per An-

draws, C. J.: "The plaintiff cannot maintain the action under the statute for the reason that she is neither heir at law nor devisee of the testator, and holds her title not immediately under the will, but as a purchaser from the grantee of her husband. The plaintiff is in the pos-

§ 941. When creditor may compel exercise of power.—Where a power or authority to sell is given by will to executors without

session of the land under this title, and it would, we think, be both an unreasonable and inconvenient construction of the statute which should enable one whose title comes through a devise to a former owner to institute an action for the construction of a will which formed one of the links in the chain of title. Moreover, the language of the statute is confined to actions to determine the "validity, construction, or effect of a testamentary disposition." The question whether the power of sale given to the executor by the will of Abner Mellen is valid did not affect the 'testamentary disposition' made by the testator of his lands. It is collateral to the gift, and, whether exercised or not, does not change the substantial interest of the devisees under the will. The statute should be construed liberally in aid of the remedy intended, but it would be unwise to so interpret it as to draw into the Supreme Court every controversy, however trivial, which could be suggested by a doubt as to the construction of some provision of a will not affecting some substantial interest thereunder. The claim made in behalf of the plaintiff, that the power of sale given to the executor is repugnant to the prior absolute devise to the widow and children of the testator, and creates a cloud upon the title, and that the action is maintainable in this view, is not tenable. If the power is invalid its invalidity appears on the face of the will, and it is well settled that, where the rights of parties depend upon the legal construction of a written in-

strument, an action to correct the instrument, or to declare it invalid, under the jurisdiction of courts of equity to remove clouds upon title, cannot be maintained. In such cases there is no cloud, in a legal sense. Unless the lien, charge, or incumbrance is apparently legal and valid, there is no ground for invoking this jurisdiction. The court does not entertain such an action to remove a doubt which might be created in the minds of persons dealing with the title, provided the means of forming a correct legal judgment are patent on the face of the instrument or proceeding by which the existence or nonexistence of the right in question must be determined. *Bailey v. Briggs*, 56 N. Y. 407; *Townsend v. Mayor*, etc., 77 N. Y. 542, and cases cited. But there can be no doubt of the validity of the power of sale. There is no repugnancy between a devise in fee and a subsequent power of sale given to the executor for the benefit of the devisees. This is a common incident of testamentary dispositions. The title to the lands vested in the widow and children of Abner Mellen under the devise, and was a fee, subject to the power of sale given to the executor. In case of a sale under the power, the title of the devisees in the land would be divested and an interest in the proceeds substituted. *Crittenden v. Fairchild*, 41 N. Y. 289. The devisees of the land in the present case were in a situation to make an election. All the debts and legacies of the testator had been paid. The devisees were of full age, and were the only persons

limitation and not in terms discretionary and its exercise is rendered necessary by the scope of the will and its declared purposes, the authority is to be deemed imperative if the testator's purpose

interested in the land or its proceeds. If in fact they had elected to take the land as land, free from the power of sale, prior to the advertisement of the land for sale by the executor under the power, I am of opinion that an action would lie in behalf of the parties interested, to enjoin the executor from selling under the power. It is not necessary to consider what would be the right of a purchaser in good faith, without notice, on a sale by the executor in assumed execution of the power, after the former had been terminated by an election. A sale under such circumstances would at least create a cloud on the title, and an action to enjoin the sale would be an available and proper remedy. See *Butler v. Johnson*, 111 N. Y. 204, 18 N. E. 643. But we are of opinion that the complaint is insufficient to sustain this cause of action for the reason that it is neither directly alleged that the plaintiff and the other persons interested and deriving title as original devisees of Abner Mellen, or under them, had elected to take the land in its unconverted state, free from the power of sale, nor are any facts averred from which an election can be legally inferred. The allegation that the devisees took possession of and occupied and controlled the land devised as owners, and appropriated the rents and profits, is not inconsistent with an outstanding power of sale in the executor. The devisees had the legal title to the land as tenants in common, and as such had the right to the possession and to the rents and profits. They may, nevertheless, have

desired that the power of sale should continue in the executor, for convenience in passing the title upon a sale, or for other reasons. The commencement of the partition action by the plaintiff naturally signified her election, and, if all the other parties interested had joined in asking a partition, this would, I think, have amounted to an election that the power of sale in the executor should not be exercised. It would show an intention by all the parties interested to sever the tenancy in common, and take their respective shares of the land in severalty. But the other parties interested resisted the partition, and an election by one of the parties, without the concurrence of the others, would not defeat the power. The renewal of the lease of some of the property, in March, 1890, by the parties owning the land, for the period of a year would be a significant, and probably a decisive fact showing an election, if the act was inconsistent with the continued existence of the power of sale. Great weight was given by Lord Hardwicke in *Crabtree v. Bramble*, 3 Atk. 680, to the circumstance that the parties beneficially entitled under a will had executed a lease of the premises for a term, upon the point of an election. But in that case the trustee for sale took, under the English law, title to the estate as trustee, and the lease was in hostility to his right, and the lessors had bound themselves to make good the lease. The act was inconsistent with the continuation of the power of sale, and was significant of an intention on the part of the les-

is unequivocal and his intention cannot be otherwise carried out.⁴⁹ And the executors may be compelled to exercise such an imperative power of sale in favor of any person entitled under the will to the proceeds of the real estate when sold, and so may be compelled by a creditor whose debt is directed by the will to be paid, and for the payment of which the personal estate proves insufficient.⁵⁰ It is only when a power is in trust that a court of equity will decree its execution. Thus where by a deed the grantor reserves a power to create a future estate in the land conveyed, the power, unless coupled with a trust, is not imperative, and its execution depends upon the will of the grantor.⁵¹

§ 942. Restraining the payment by executor of outlawed debts.

—Where an executor, having a power of sale of the testator's real estate to pay debts, is taking steps to execute the power for the purpose of paying debts which are outlawed, those who have succeeded to the testator's title may maintain an action to restrain such sale, as it would place a cloud on their title.⁵²

sors to take the land and not the proceeds. The lease in the present case bound the land, and was made by the legal owners, and was not in hostility to the power of sale. A purchaser under the power would take subject to the lease. We fail to find any evidence in the facts alleged in the complaint, certainly no 'unequivocal' evidence, of an election subverting the power of sale, and no allegation that such an election had been made. The concluding allegation in the complaint, that 'by reason of the premises' there was an election, etc., simply refers back to the preceding allegations as ground for this conclusion, and they furnish no sufficient evidence thereof.

49. *Scholle v. Scholle*, 113 N. Y. 261, 21 N. E. 84; *Chamberlain v. Taylor*, 105 N. Y. 194, 11 N. E. 625; *Hobson v. Hale*, 95 N. Y. 598.

50. *Matter of Gantert*, 136 N. Y. 106, 32 N. E. 551, per *Curiam*: "We are referred to many cases where it has been held that a power of sale is not available for the payment of debts, but they are all cases where the power was either discretionary or limited to some other specific purpose, or where it could not be exercised without breaking up and destroying the scheme of the will and frustrating the intention of the testator. *Kinnier v. Rogers*, 42 N. Y. 531; *Matter of McComb*, 117 N. Y. 378, 22 N. E. 1070; *Matter of Bingham*, 127 N. Y. 296, 27 N. E. 1055."

51. *Towler v. Towler*, 142 N. Y. 371, 36 N. E. 869.

52. *Butler v. Johnson*, 111 N. Y. 204, 18 N. E. 643, per *Peckham, J.*: "An executor or administrator is bound to set up the bar of the statute, and he would not be allowed in

§ 942a. **Enjoining breach of covenant by executor.**—Where there is nothing to show that an executor and general guardian of an infant had any power under the will to make a contract, imposing a burdensome restriction upon an infant's real estate, such as a covenant with a stranger against its use for a certain purpose, equitable relief in the form of an injunction restraining the breach of such covenant by the executor will not be granted. If such a contract were valid the remedy would be by an action for damages against the executor as an individual.⁵³

§ 943. **Protecting assets from actions at law, etc.**—A bill filed by an administrator alleged that defendant, the intestate's widow, was proceeding to collect, by action at law, money belonging to the estate, falsely claiming it as a gift; and that defendant was insolvent. The action at law was enjoined; and, upon the filing of a sworn answer averring that the money was a gift from intestate, and admitting insolvency without the money in question, motion was made to dissolve the injunction. It was held that such motion was properly denied; the case not falling within the

his accounting any sum paid upon a debt which, at the time of its payment by him, was barred by such statute. *Bloodgood v. Bruen*, 8 N. Y. 362; *Bucklin v. Chapin*, 1 Lans. 443, 448; *Burnett v. Noble*, 5 Redf. (N. Y.) 69. As against an estate, therefore, a debt barred by the statute must be regarded as no debt. There is not only no moral obligation to pay it, but on the contrary there is a duty to set up the bar of the statute. . . . Assuming that the claims are outlawed and that the executrix, if sued by the creditors of the estate or by the legatee, could successfully interpose the bar of the statute to the maintenance of such suit or of any proceeding against her, can these plaintiffs properly enjoin the defendant from taking steps to

voluntarily pay debts which are thus outlawed? We think they can, as it is the duty of the executrix to set up the bar of the statute. . . . We think that the plaintiffs have a right to ask the court to prevent this substantial trustee from violating her duty and from placing this cloud upon their title, even though in so doing the plaintiffs necessarily use the statute of limitations as the foundation of their claim; under such circumstances the bar of the statute is simply a defense to the affirmation and improper proceedings of the defendant, and is not an attack upon any right of a third person."

53. *Curry v. Keil*, 19 App. Div. (N. Y.) 375, 46 N. Y. Supp. 495.

rule that when a bill avers facts, the burden of proving which is on complainant, if the sworn answer made on knowledge contains a denial of the charges on which the right to an injunction rests, the injunction must be dissolved, as the burden was on defendant to establish the gift.⁵⁴ And in such a case, though there might be a legal remedy under the statutory provision for interpleader, yet the enlargement of the jurisdiction of courts of law does not, in the absence of a statutory prohibition, impair the original jurisdiction of the courts of chancery.⁵⁵ An administrator may be enjoined from selling the property of decedent under an arbitrator's award where he can derive a valid power to sell only from the court of ordinary.⁵⁶ And an executor may be prevented by injunction from disposing of the testator's property in violation of the directions of the will, and from favoring some of the creditors at the expense of others.⁵⁷

§ 943a. **Marshalling assets; enjoining suit by creditor; usury.**
—Where it is provided by Code that all titles to property made as

54. *Jackson v. Jackson*, 84 Ala. 343, per Stone, C. J.: "Under the averments of the bill, the burden of disproving the alleged gift from intestate to his wife does not rest on complainant. On the contrary stated as the question is in the bill it was for her to satisfy the court by proof that the gift had been made to her. The answer on this point is in the nature of a confession and avoidance and will not avail to dissolve an injunction. *Rembert v. Brown*, 17 Ala. 667; *Miller v. Bates*, 35 Ala. 580."

55. *Lee v. Lee*, 55 Ala. 590; *Westmoreland v. Foster*, 60 Ala. 448. At an administrator's sale of his intestate's real estate for payment of debts, the equity of redemption in land subject to a deed of trust, was sold at a nominal price, the purchasers agreeing to pay off the incumbrance; but, on their refusal to do this, the administrator paid a large part of it out of the assets of the es-

tate, and procured an order for the sale of the remaining real estate, including a residuary interest of the heirs in land set apart as a homestead. Thereupon the intestate's widow and heirs brought suit to restrain such sale, and for other relief, against the administrator, the purchasers of the equity of redemption, and the probate judge. It was held that there was no cause of action against any of the parties except the administrator, who might be restrained from proceeding with the proposed sale, because of his failure to enforce his right to subrogation in place of the beneficiaries in the deed of trust, as against the purchasers of the equity of redemption. *Swan v. Thompson*, 36 Mo. App. 155.

56. *Lawrence v. Philpot*, 27 Ga. 585.

57. *Depau v. Moses*, 3 Johns. Ch. (N. Y.) 349.

a part of a usurious transaction are void and an administrator brings an equitable petition against all the creditors of the estate to marshal its assets and prays therein for an injunction restraining a creditor, who holds a deed given as security for a loan infected with usury, from prosecuting his claim upon the note thereby secured, otherwise than as a party defendant to such petition, and at the hearing of the application for an interlocutory injunction the evidence as to the alleged usury is conflicting, there is no abuse of discretion in granting such injunction and thus preserving the status until the question can be passed upon by the jury.⁵⁸

§ 944. **Foreign executors.**—An injunction will not be granted against a resident of New York to restrain him, at the suit of a residuary legatee, from paying over funds to a foreign executor where such executor is not within the State and is not served with process there.⁵⁹ But in a recent case in Iowa it is decided that where a duly appointed administrator has collected the assets of the estate of a decedent who was a resident within the estate and whose creditors are also residents of such State, a court of equity will enjoin one of the creditors from interfering with the estate through the medium of another administrator appointed in a foreign jurisdiction.⁶⁰ And as an exception to the general rule it has been held that a foreign executor who comes into the State and brings with him assets of a decedent who died in Ireland may be compelled to account for such assets here and pay over to complainants resident here their distributive shares of such assets.⁶¹ One who holds securities hypothecated to secure advances may be enjoined from remitting the surplus to a foreign country, where those who are entitled to receive it reside here.⁶²

58. *Equitable Mortg. Co. v. Braswell*, 98 Ga. 139, 26 S. E. 487.

59. *Kanter v. Peyser*, 19 Jones & Sp. (N. Y.) 441. In *Murray v. Toiland*, 3 Johns. Ch. (N. Y.) 577, Kent, Ch., said: "The inconvenience of following a man to his place of residence abroad does not appear to me to be of itself a sufficient ground for

departing from the settled doctrine of the court."

60. *O'Connor v. Root*, 130 Iowa, 553, 107 N. W. 608.

61. *McNamara v. Dwyer*, 7 Paige (N. Y.), 239.

62. *Puleston v. McCulloch*, N. Y. Daily Reg. of Aug. 6, 1880.

§ 945. Enjoining sale of realty after unreasonable delay.—In Missouri there is no statute of limitations prescribing the time within which an administrator must procure an order for the sale of real estate to pay the decedent's debts, but he must do so within a reasonable time according to the circumstances. A delay of twelve years after the granting of letters of administration is, however, inexcusable, and an injunction will lie to prevent a sale under an order of the probate court obtained after so unreasonable a delay, where the effect of it will be to place a cloud on the plaintiff's title.⁶³

§ 946. Enjoining judgment for and against execution.—A judgment in a suit by an administrator cannot be enjoined⁶⁴

63. *Gunby v. Brown*, 86 Mo. 253, per Black, J.: "The chancellor in *Moore v. White*, 6 Johns. Ch. 375, said: 'But I am not prepared to admit that the executor or administrator can at any time, and in his discretion, apply for and be entitled to an order for the sale of real estate; and I am of opinion that whatever may be the merits of the present demand, the defendant as executor is now too late to apply for a sale of the real estate, and that his capacity for that purpose is entirely extinguished.' Then referring to the statutes, he proceeds: 'I infer from them that the law intended that the executor, etc., should make his application with due diligence and in a reasonable time, and if he does not, the judge or surrogate has, from the nature of his judicial trust, a discretion to reject the application. What is a reasonable time may be another question.' This doctrine has met with approval in many of the States where there is no statute of limitations applicable to such proceedings. *Estate of Crosby*, 55 Cal.

574; *Estate of Godfrey*, 4 Mich. 315; *Wolf v. Ogden*, 66 Ill. 224; *McCrary v. Tasker*, 41 Iowa, 255."

64. *Williams v. Carr*, 4 Colo. App. 368, 36 Pac. 646, per Reed, J.: "This was a suit in equity brought by plaintiff in error to restrain the collection of the judgment at law obtained by the defendant in error against the plaintiff in *Williams v. Carr*, 4 Colo. App. 363, 36 Pac. 644, and is an adjunct of that case. The allegations in the complaint are identical in substance with the motions; and defenses set up in the answer, and adjudicated in that case, contain no new matter whatever. It is hard to determine the theory upon which counsel based the suit, unless it can be gathered from the following, contained in the argument of counsel: 'The deposition of Ulman was taken in the State of New York, and that his testimony therein given and recorded was in support of the answer filed by the plaintiff, Williams, in the suit at law. That McCrary having died in the meantime, and the defendant, Carr, being the prosecutor

merely because, under the statute, the defendants were incompetent to testify in the suit in which the judgment was entered, and there was no other evidence to sustain their defense; for if such were not the rule, the statutory prohibition rendering the evidence

of said cause, in the capacity of administrator for McCrary, deceased, the deposition of Ulman could not be read in evidence in said cause. By reason of such fact the bill of complaint alleges that the cause coming on for trial on the 29th day of March, A. D. 1892, before the district court of Arapahoe county, a finding was had against this plaintiff, and in favor of the defendant herein, as prayed for in the complaint, for the amount of said note less certain part payments and credits thereon, together with interest and costs. That Ulman was the only witness who knew of the extensions in time of payment of said note, and the subsequent payment thereof, and inasmuch as he was held incompetent as a witness against the administrator, by reason of his interest, and also that he was a party to the record, the plaintiff herein was deprived of the benefit of his defense in said cause at law. An injunction was prayed for, perpetually enjoining and restraining the defendant from further attempting to enforce said note, or prosecuting any case at law for its collection. A temporary injunction was allowed by the court below, which was afterwards dissolved, and the bill dismissed, upon the sustaining of the defendant's demurrer to plaintiff's bill of complaint. Whereupon, the court gave judgment in the law action for the plaintiff, and against the defendant.' A mistaken theory, based upon the supposition that by an attempted

change from law to equity the same issues could be retried, the evidence rejected in the former admitted, and, with no new evidence or facts, a different result could be reached. In support of this theory it is said in argument: 'The injunction prayed for is not asked for the purpose of restraining a court at law from the exercise of any of its rights and powers, nor is it asked under the impression that the equity side of the court exercises and yields a supremacy over the side at law. In all of such proceedings the injunctive relief is directed, not to the court itself, so as to hamper and retard it in any way, but to the litigants for the purpose of preventing and restraining them from taking any further steps in the prosecution of their cause.' I cannot see that this doctrine is applicable, or in any way assists, for whether the injunction were directed to the court or parties, the effect would be the same—a reversal of the former judgment; and it would seem to be a matter of very little importance to a plaintiff who had obtained a judgment at law whether the judgment was reversed by the same court, or any other adjudication in equity, or he was perpetually enjoined from collecting or attempting to collect it. Either would be equally fatal. One important and indispensable requisite to obtaining equitable relief has been entirely overlooked. It is clearly and briefly stated in 1 High, Inj., § 47: 'And to warrant the interference a

incompetent could be abrogated in every instance by a resort to equity. Creditors who have obtained judgments against an executor cannot enjoin other creditors from also obtaining judgment, as whatever priority one creditor may have over another may be asserted as well after judgment as before.⁶⁵

§ 947. **Insolvency of executor, etc.**—That the executrix of an insolvent estate is insolvent, and a creditor fears that if real estate is sold he cannot collect his debt, does not justify enjoining the sale, no attempt at waste or mismanagement being alleged. Her insolvency is no ground for equitable relief if she is in the same financial condition as when she was appointed and qualified; and the fact that complainant cannot bring suit until a year has elapsed, is not her fault but is a condition imposed by the law on all persons.⁶⁶ And where an executrix was authorized to sell land to pay debts, in such parcels as seemed to her best, this power was judicially determined to effect a conversion, and to entitle her to the possession of land, and where a complaint, seeking to enjoin her from cutting and selling timber, alleged that it was very doubtful whether there was sufficient property to pay plaintiff's legacies after paying prior ones, and that the cutting and sale of the timber had reduced the value of the land and made more

clearly established case of fraud, accident, or mistake must be shown, sufficient to deprive the person aggrieved of the defense at law.' See, also, 2 Story, Eq. Jur., § 885; Sacket v. Hillhouse, 5 Day, 551; Dale v. Roosevelt, 5 Johns. Ch. 174; Field v. Cory, 7 N. J. Eq. 574; Rogers v. Cross, 3 Chand. 34. In this, neither fraud, accident, nor mistake are asserted, and nothing more than that the defendant in the action at law had no legal and competent evidence to sustain his defense. The statutory prohibition rendering both Williams and Ulman incompetent to testify was the same in equity as at law. If such were not the fact, the statute

could be abrogated in every instance by a supposed resort to equity. In support of the general propositions here stated, see *Butler v. Rockwell*, 14 Colo. 138, 23 Pac. 462; *Fetta v. Vandevier*, 3 Colo. App. 419, 34 Pac. 168; *Savage v. Allen*, 54 N. Y. 458; *Mixell v. Lutz*, 34 Ill. 388. The judgment of the district court, sustaining the demurrer and dismissing the complaint, will be affirmed."

65. *Turk v. Ross* 59 Ga. 378.

66. *Elam v. Elam*, 72 Ga. 162. That the insolvency of the executor is not a sufficient ground for an injunction, see *Schanck v. Schanck*, 7 N. J. Eq. 140.

doubtful the sufficiency of the estate to pay such legacies, and it was not alleged that the timber was sold for less than its value, or that the proceeds had been improperly disposed of, or that the estate had lost thereby, or that defendant was insolvent; but the allegations tended to show her ability to respond for any damage to the estate, it was held that the complaint showed no ground for an injunction.⁶⁷ But an executor who resides out of the State and is insolvent, and is seeking in a domestic court to get possession of a fund belonging to the decedent's estate, may be enjoined from further proceedings, where there is danger of waste by him, until he voluntarily comes in and submits himself to the jurisdiction of the court under a bill filed by the creditors for the protection of the fund.⁶⁸ And where complainant alleges in his bill that execution has been issued against him in favor of executors, and that they are indebted to him as one of the legatees of the testator, in a sum greater than that named in the execution, and that the executors are insolvent, it is held to be error not to enjoin the collection of the execution.⁶⁹ In another case an action was brought by principals against the administratrix of their agent, who acted for them in a fiduciary capacity in the collection of drafts, to recover certain moneys collected by the agent, in which the insolvency of the estate of the agent was alleged. The defense was a balance due to defendant's intestate by plaintiffs. It was held that an injunction *pendente lite* awarded plaintiffs, restraining a bank from paying over funds collected by decedent for plaintiffs, and deposited with the bank by him, was properly continued until trial.⁷⁰

§ 948. **Where estate insolvent.**—Where there are no assets of the intestate in the hands of an administrator, he may enjoin an execution of a judgment rendered against him in his official

67. *Keller v. Ogsbury*, 121 N. Y. 362, 4 N. Y. Supp. 639, 24 N. E. 803. *Carter v. McMichael*, 20 Ga. 96; *Moody v. Ellerbie*, 36 Ga. 666; *Dorsey v. Simmons*, 49 Ga. 245.

68. *Dougherty v. Walker*, 15 Ga. 442.

70. *Roca v. Byrne*, 17 N. Y. Supp.

69. *Dobbs v. Prothro*, 57 Ga. 14; 891.

capacity.⁷¹ And when a return of *nulla bona* is made to an execution and a judgment or decree against an administrator, and which was to be levied on the decedent's estate, and the estate is afterward declared insolvent, an execution issued after the declaration of insolvency, against him personally will be enjoined;⁷² even though the insolvency was caused by the administrator's neglect to collect the solvent assets.⁷³ And where the decedent's estate and the executor are both insolvent, and he is about to sell property of the estate under a fraudulent mortgage to him from the testator, the creditors may have an injunction to prevent the sale, as they have no other adequate remedy.⁷⁴ But where the right is expressly conferred by statute upon an administrator to make an application in the orphan's court that the estate be declared insolvent, a court of equity will sustain a demurrer, assigning specially want of jurisdiction, to a bill filed to enjoin the prosecution of such application and to require the settlement of the accounts in the latter court where the orphan's court has the power to adjudicate upon all the questions raised by the bill as to such application.⁷⁵

§ 949. **Set-offs.**—In a suit by an executor on certain notes of his testator, to which defendant pleads credits, in accordance with a written contract between himself and deceased, for board of deceased and goods furnished him, for certain payments, and that his claim as residuary legatee be set off,—it is held that there is no reason for equitable interference by injunction, as all the credits are legal demands which can be better adjudicated by a court and jury than by a court of equity.⁷⁶ But the enforcement of a judgment against an administrator may be enjoined where, subsequent to the rendering of it, but not before, he discovers set-offs and credits to which his intestate was entitled.⁷⁷

71. Haydon v. Goode, 4 Hen. & M. (Va.) 460.

72. Balkum v. Harper, 50 Ala. 429; Lambert v. Mallett, 50 Ala. 73.

73. Balkum v. Harper, 50 Ala. 429.

74. Becker v. Anderson, 6 Neb.

499. And see Hagan v. Walker, 14 How. (U. S.) 29, 14 L. Ed. 17; Bate v. Graham, 11 N. Y. 237.

75. McMahon v. Weart (N. J. Ch. 1906), 55 Atl. 444.

76. Miller v. Miller, 25 W. Va. 495.

77. Terril v. Southall, 3 Bibb

§ 950. **Execution on property in executor's, etc., custody.**—Money and property in the possession of an executor or administrator, in his official capacity, cannot ordinarily be reached under execution against a legatee, both because it is *in custodia legis*, and because it does not properly belong to the legatee until his right to it has been finally established. Therefore an administrator, with the will annexed, may in such a case enjoin a sale upon the execution.⁷⁸

§ 951. **Accounting.**—An accounting by an executor is not such a matter of strict right in favor of persons interested in a testator's estate that the executor will be compelled to make one on the petition of one whose right to it is barred by his release.⁷⁹ And this rule applies, whether the petitioner be a co-executor or the widow of decedent who charges fraud in the procurement of the release from her.⁸⁰ As a decree to account against an executor or administrator, either separately for the suing creditor, or specially on behalf of himself and all other creditors, is a decree for the benefit of all the creditors, an injunction may be granted on the motion of either party to stay all proceedings of any of the creditors, taken subsequent to the decree.⁸¹ Where, on final accounting, a fund is set apart in the executors' hands, to be held by them in trust for a specified legatee, the fact that such legatee was not cited to appear on the accounting does not render the distribution of the estate wholly invalid as to the residuary legatees, so as to compel

(Ky.), 458. And see *Dobbs v. Prothro*, 57 Ga. 14.

78. *Stout v. La Follette*, 64 Ind. 365. And see:

Delaware.—*Marvel v. Houston*, 2 Harr. 349.

Georgia.—*Suggs v. Sapp*, 20 Ga. 100.

Maine.—*Waite v. Osborne*, 11 Me. 185.

Massachusetts.—*Barnes v. Treat*, 7 Mass. 271.

Mississippi.—*Hancock v. Titus*, 39 Miss. 224.

New Hampshire.—*Beckwith v. Baxter*, 3 N. H. 67.

79. *Matter of Pruyn*, 141 N. Y. 544, 36 N. E. 595.

80. *Matter of Wagner's Estate*, 119 N. Y. 28, 23 N. E. 200.

81. *Brooks v. Dent*, 4 Md. Ch. 473; *Thompson v. Brown*, 4 Johns. (N. Y.) 619.

them to reimburse the specified legatee for the subsequent waste of his legacy by the executor.⁸²

§ 951a. **Enjoining action by administrator; heirs necessary parties.**—It is a general rule that all persons who have a material interest in the litigation, or who are legally or beneficially interested in the subject matter of the suit, and whose rights or interests are sought to be concluded thereby are necessary parties and in the application of this rule it is decided that where it is sought to enjoin the prosecution of an action of ejectment by an administrator from lands which were deeded to the deceased on the ground that the deed was intended to be a mortgage to secure an indebtedness, the heirs of the intestate are necessary parties to the bill.⁸³

82. *Mills v. Smith*, 141 N. Y. 256, 36 N. E. 178, per Gray, J.: "All the evidence in the case goes fairly to prove that the trust fund created for the plaintiff's father was invested, held, and set apart by the executors, and existed in that condition at the time of the rendition of the surrogate's decree. That being the proof, the plaintiff cannot be heard, as against the residuary legatees who received their portions of the estate pursuant to this decree, to say that for the irregularity in the accounting proceedings the distribution of the estate to them was wholly invalid and null, and that they should refund sufficient to make good to him the amount of the lost trust fund. In the absence of any proof of a fraudulent connivance or

combination on the part of the residuary legatee, whereby the trust fund appointed to be held for his father's life was affected or diverted, or of any proof to show that that fund was non-existent in the executor's hands, and never was set apart and held as a trust, the plaintiff is without sufficient ground for an action against the distributees of the residuary estate to compel them to refund merely because there was a failure to cause his appearance upon the proceedings for a settlement, or some irregularity of procedure." As to abatement of injunction suit on executor's removal from office, see *Trimmer v. Todd* (N. J. 1894), 28 Atl. 581.

83. *Wynn v. Fitzwater* (Ala. 1907), 44 So. 97.

CHAPTER XXXII.

RELATING TO PARTNERS AND OTHERS JOINTLY INTERESTED.

SECTION 952. Enforcing partnership rights and agreement—Clean hands.

952a. Same subject—Exclusion of partner—Refusal to carry out agreement.

953. Same subject—Exceptions.

954. Protecting the partnership good will.

954a. Breach of covenant as to engaging in same business.

955. Injunction at creditor's suit.

956. Lessor and lessee as partners.

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958a. Same subject—Parties not strictly tenants in common.

959. Where one partner takes title.

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961. Sale under judgment against co-partner.

962. Appointing receivers.

963. Appointing receivers on dissolution.

Section 952. Enforcing partnership rights and agreement; clean hands.—A partner may be enjoined from violating the rights of his copartner in partnership matters, though no dissolution of the partnership be contemplated.¹ So a court of equity has jurisdiction at the suit of a partner to enjoin a copartner from transferring property of the partnership.² Thus where a partner in a firm which is not engaged in commerce, and while the partnership is existing, makes a credit sale of the whole joint effects without the consent of the copartner and because he cannot agree with him, such a disregard of his rights is so flagrant that he may be enjoined and a receiver appointed.³ And where plaintiff and defendant had formed a partnership for the purpose of sawing lumber from timber to be taken from plaintiff's land, and the defendant was to manage the business, he was enjoined from obtaining his timber elsewhere than from plaintiff's land.⁴ Again, where

1. Rutland Marble Co. v. Ripley, 10 Wall. (U. S.) 339, 19 L. Ed. 955.

3. Sloan v. Moore, 37 Pa. St. 217, 224.

2. Causten v. Barnette (Wash. 1908), 96 Pac. 225.

4. New v. Wright, 44 Miss. 202.

a partner files a bill alleging that a copartner refuses to allow an examination of the firm books and is appropriating firm assets to his private use and obtaining discounts at exorbitant rates, and otherwise recklessly involving the firm in debt, an injunction should be granted and receiver appointed to protect and preserve the partnership property until the respective rights and equities of the parties can be adjudicated.⁵ And where the owners of a farm placed a farmer upon it, setting off the use of it against his skill and labor, they and he to stock it on joint account and to divide the profits, and they to have the right to terminate it on six months' notice if the farm failed to pay ten per cent. profit on the capital invested, it was held on its appearing that the farm did not yield the specified profit, that it was not error to grant an injunction and appoint a receiver to wind up the partnership.⁶ And in this connection it has also been decided that one claiming to be a partner may be enjoined from interfering with the business of another in any way or from holding himself out as a partner when no partnership relation is shown to exist between the parties.⁷ But where, in an action against a former partner to restrain him from engaging in a business at a certain place, it appeared that plaintiff bought out defendant, and agreed to pay all partnership debts, and defendant agreed to give him the good will of the business, and not to engage in it at that point, it was held that as plaintiff had not paid an overdue debt in compliance with the contract on his part, he was not entitled to the injunction.⁸

§ 952a. **Same subject; exclusion of partner; refusal to carry out agreement.**—Where persons have entered into a partnership

5. *Shannon v. Wright*, 60 Md. 520. In *Wolbert v. Harris*, 7 N. J. Eq. 605, 621, the violent exclusion of a partner from the partnership premises and books was held a prominent ground for an injunction and the appointment of a receiver, citing *Wilson v. Greenwood*, 1 Swanst. 481; *Const. v. Harris*, Turn & Russ, 496. See, also, *Miller v. O'Boyle*, 89 Fed. 140. In *Stockdale v. Ullery*, 37 Pa. St.

486, a partner was enjoined who attempted to pledge firm notes for his private debts.

6. *Dunn v. McNaught*, 38 Ga. 179.

7. *De Groot v. Peters*, 124 Cal. 406, 57 Pac. 209, 71 Am. St. Rep. 91.

8. *Hollis v. Shaffer*, 38 Kan. 492, 17 Pac. 86. And see *Smith v. Fromont*, 2 Swanst. 330.

agreement one who has fulfilled his part of the agreement cannot be excluded from participating in the business of the firm in accordance with the terms of their contract and the other partner or partners will be enjoined from excluding him.⁹ So in a case in New Jersey it appeared that after the formation of a partnership between complainant and defendants, defendants ignored complainant, and disavowed the partnership relation and attempted to exclude the complainant from the partnership business. It also appeared that there was a contract for the construction of certain public works, which enterprise was the subject of the partnership agreement. The contract provided for the retention of twenty per cent. of the contract price until the work was completed and for the retention of five per cent. of one-fourth of the twenty per cent. for any defects which might be developed in the work, and it was substantially understood that such five per cent. would probably be absorbed for that purpose. Complainant sued for an accounting and for the appointment of a manager to supervise the execution of the contract and it was held that the defendants would not be enjoined from receiving payments made in the course of the execution of the contract but that they would be restrained from anticipating or assigning the final payment of twenty per cent. and would be required to furnish complainant with a list of all payments made by them and to give complainant information as to the details of the business.¹⁰ And where three persons entered into a verbal partnership agreement under which each was to put in fifteen hundred dollars and one of the three into whose custody the money was placed refused to carry out the agreement and proceeded to draw the money from the bank in which it was deposited and to apply it to personal purposes, it was decided, in an action for an injunction to restrain such misapplication and for a receiver, that the evidence in proof of such allegations was sufficient to justify the granting of the relief sought.¹¹ But where

9. *Miller v. O'Boyle*, 89 Fed. 140.

10. *McCabe v. Sinclair*, 66 N. J. Eq. 24, 58 Atl. 412.

A bank may be enjoined from paying a certificate of deposit issued by it for money deposited with it by

an insolvent partner who withdrew the same from the partnership funds. *Grobe v. Roup*, 44 W. Va. 197, 28 S. E. 699.

11. *Fitzgerald v. Flynn* (R. I. 1908), 69 Atl. 921. Compare *Gus-*

a bill in equity brought to restrain alleged partners of the complainant from ousting him from participation in the alleged partnership business, fails to state any facts from which a court can adjudge whether or not a partnership in fact existed, and where a contract between the parties exhibited as part of such bill is in its terms inconsistent with the existence of a real partnership between them, a demurrer to the bill is properly sustained and the bill will be dismissed.¹²

§ 953. **Same subject; exceptions.**—The payment of a note given by one partner to another out of partnership assets, pursuant to an agreement between the parties, or the failure of the payee to apply such assets to its payment, do not create such equities in favor of the maker as to entitle him to an injunction against an action on the note in another State pending a suit for an accounting.¹³ And an employer or principal will not be compelled by injunction to carry out a contract to continue a business in which plaintiff as agent would receive a percentage of the sales, and especially where plaintiff has an adequate remedy in damages.¹⁴ Where, in a suit to restrain the collection of certain judgments and the prosecution of an action at law, it appeared that complainant and defendants were partners, and that the judgments were recovered on certain bonds and notes given by complainant to his copartners in the settlement of partnership transactions, and the grounds for the complaint were want of consideration for the bonds and notes, and fraud in their procurement, but the evidence only disclosed involved partnership transactions carelessly conducted, but no actual fraud or clear mistake, it was held that an injunction would not be granted.¹⁵ But where plaintiff agreed to deliver fertilizers to defendant, who was to sell them, and the profits were to be equally shared, it was held that whether the relation

dorff v. Schleisner, 85 Md. 360, 37 Atl. 170.

12. Collier v. Dasher (Fla. 1906), 41 So. 269.

13. Donnelly v. Morris, 13 N. Y. Supp. 427.

14. Bronk v. Riley, 50 Hun (N. Y.), 489, 20 N. Y. St. Rep. 401.

15. Shannon v. Wright, 60 Med. 520. In Wolbert v. Harris, 7 N. J. Eq. 605, 621.

was one of partners or of principal and agent, it might be terminated at any time at the option of either, as the contract did not impose any limit of time, and that an injunction might be granted to restrain in the one case the further use of the partnership name, and in the other the continued use of the plaintiff's name as the principal of the defendant.¹⁶

§ 954. **Protecting the partnership good will.**—The good will of a business built up by a firm is a valuable interest which belongs equally to all and which a court of equity may protect by appointing a receiver to sell it, and by restraining the parties in the meantime from carrying on the same business in the same place.¹⁷ So where retiring partners sell their interest and good will to the remaining partner, and agree in writing not to do anything to injure such interest and good will, they may be enjoined from soliciting the former customers.¹⁸ And where it is alleged and not denied that the good will of a partnership constituted, after dissolution, the most valuable part of the partnership assets, the appropriation of it to the exclusion of the other and without his permission, is a wrong which will be restrained by injunction, even though a partnership receiver has been appointed and there has been an assignment of the partnership assets to an assignee in bankruptcy.¹⁹ But the firm name, in respect to which there has been no agreement or settlement upon dissolution, is an undivided partnership asset which one of the former partners cannot enjoin

16. *Coe v. Davidge*, 6 N. Y. St. Rep. 93.

17. *Williams v. Wilson*, 4 Sandf. Ch. 379.

18. *Angier v. Webber*, 14 Allen (Mass.), 211, per Bigelow, C. J.: "That this good will was a valuable existing interest in the outgoing partner which the law will protect, does not admit of doubt. *Kennedy v. Lee*, 3 Meriv. 441; *Bryson v. Whitehead*, 1 Sim. & Stu. 74. For this violation of their covenant plaintiff is entitled to relief in equity. An

action at law will furnish no adequate remedy. The injury caused by defendant's acts is a constantly recurring one, for which multiplied suits at law would afford but an imperfect remedy. *Williams v. Williams*, 2 Swanst. 253."

See, also, *Jennings v. Jennings* [1898], 1 Ch. 378, 77 Law T. Rep. 786; *Trego v. Hunt*, 65 L. J. Ch. N. S. 1, 73 Law T. Rep. 514.

19. *Bininger v. Clark*, 60 Barb. (N. Y.) 113.

the other from using.²⁰ And where plaintiff and defendant have been doing a partnership business, using as the firm name the name of the defendant followed by the words “& Company,” the latter will not upon a dissolution of the partnership be restrained from using such firm name, he having continued in the same business with another partner though the plaintiff purchased the interest of the defendant in the business in which they were partners where it appears that neither the articles of partnership nor of dissolution contain any provision as to the good will or the use of the firm name, it being declared that the articles being silent on this matter it was the clearly understood agreement that the defendant reserved the use of his own name in connection with the phrase “& Co.”²¹

§ 954a. Breach of covenant as to engaging in same business.

—Where it is sought to enjoin the breach by a partner of a covenant in a partnership agreement to entitle the complainant to the relief sought such covenant should be clear and specific and where it is not clear in all details a court of equity will act only in respect to that part or parts which are not open to doubt.²² A covenant in a partnership agreement that upon withdrawing from the firm no partner shall “thereafter carry on the same kind of business in such manner as to interfere with, draw any customers from, be in opposition to, or in any way hurt or damage the business already established and carried on by said firm,” does not prevent a retiring partner from carrying on the business in the same locality, but means only that he shall not do so in a manner to interfere with or draw any customers from or damage the old firm and as the covenant is so indefinite as to what shall constitute a violation thereof equity will not enforce the same only so far as its meaning is not in doubt and it will merely enjoin direct or indirect solicitation of the customers of the firm by a retiring partner.²³

20. Banks v. Gibson, 34 Beav. 566.

21. Leprow v. Kettler, 115 App. Div. (N. Y.) 231, 100 N. Y. Supp.

779.

22. Sanford Dairy Co. v. Sanford, 114 App. Div. (N. Y.) 862.

23. Sanford Dairy Co. v. Sanford, 114 App. Div. (N. Y.) 862.

§ 955. **Injunction at creditor's suit.**—An injunction may be granted and a receiver appointed at the suit of a judgment creditor, on its being shown that a partnership is insolvent and its property in danger of being misappropriated.²⁴ In some jurisdictions similar relief will be afforded at the suit of creditors at large.²⁵ But where a judgment creditor seeks injunctive relief against a partnership on the ground that his debtor is a member of the firm such relief will not be granted until it has been established that he is in fact a partner.²⁶

§ 956. **Lessor and lessee as partners.**—One partner may obtain an injunction in equity to restrain his copartner from violating his rights under the contract of partnership, even when the dissolution of the partnership is not asked. A contract between the lessor and lessee of a theater, in effect, made them partners in the theater business; the lessee, however, to have sole management thereof, and the lessor to have no control, authority, or voice therein. It was held that it was no breach of the contract, justifying a re-entry by the lessor, that the lessee did not personally attend to the management of the theater building, but was looking after the business elsewhere; and that the lessee was entitled to a mandatory injunction restoring him to the possession of the theater from which the lessor had ousted him.²⁷

24. *Johnston v. Straus*, 26 Fed. 57, 63; *Collins v. Hood*, 4 McLean, 186; *Jones v. Lusk*, 2 Metc. (Ky.) 356.

25. *Washburn v. Bellows Falls Bank*, 19 Vt. 278; *Hubbard v. Curtis*, 8 Iowa, 13; *Thompson v. Frist*, 15 Md. 24; *Sanders v. Young*, 31 Miss. 111; *Rappleye v. International Bank*, 93 Ill. 396; *Fink v. Patterson*, 21 Fed. 602.

26. *Guild v. Meyer*, 56 N. J. Eq. 183, 38 Atl. 959.

27. *Leavitt v. Windsor Land Co.*, 54 Fed. 439, per Caldwell, J.: "The contract between the parties, in legal

effect, is a contract of partnership. By its terms one party contributes to the business of the partnership the use of the theater building, and is to pay certain expenses incident to the use thereof, and the other party contributes his time and skill in the management and conduct of the business, and is to pay a fixed sum per month for lighting and heating the building, and in addition thereto a fixed sum for rent, and the lessor is to receive, 'as additional rent, . . . one-half of the net annual profits accruing from the business of the theater,' and each party is to pay one-

§ 957. **Joint owners.**—Complainant railroad company and defendant car company entered into a contract for the joint ownership and operation of parlor and sleeping cars; the accounts to be kept by defendant, and monthly balances and payments to be made; complainant, in case of termination, to pay defendant the cash value of its interest in the joint property. On the termination of such contract, the property being in custody of complainant, defendant brought trover to recover his interest in the property, whereupon complainant filed a bill in equity for an accounting, alleging incorrect and unfair accounts by defendant of the receipts and expenses, and the retention by defendant of profits in excess of its interest in the property, and asking to restrain the action at law. It was held that, as the rights of both parties could be completely protected in equity, the action at law should be enjoined.²⁸

half of the losses of the business. This constitutes them partners. If the agreement between the parties was a lease, simply, the cause would not, upon the allegations of the original bill, be one of equitable cognizance; for, divested of the element of partnership, it would have been a bill for a summary proceeding in the nature of a forcible entry and detainer, or an action of ejectment, and must have been dismissed upon the ground that the complainant had a plain, speedy and adequate remedy at law. But, in view of the partnership relation created by this contract, the jurisdiction of equity to entertain the original bill seems to be clear. The case of *Marble Co. v. Ripley*, 10 Wall. 339, 350, is an authority directly in point. That case shows that the contract in the case at bar is, in the language of Mr. Justice Strong, 'in a very practical sense, a contract of partnership.' The case is also an authority for the rule that equity

will interfere by injunction to restrain one partner from violating the rights of his copartner, even when the dissolution of the partnership is not contemplated. The reason for this rule is thus stated by Vice Chancellor Wigram in *Fairthorne v. Weston*, 3 Hare, 387: 'If that were the rule of the court, if a bill would in no case lie to compel a man to observe the covenants of a partnership deed unless the bill seeks a dissolution of the partnership, it is obvious that a person fraudulently inclined might, of his own mere will and pleasure, compel his copartner to submit to the alternative of dissolving a partnership, or ruin him by a continued violation of the partnership contract.'

28. *Chicago, etc., R. Co. v. Pullman Palace-Car Co.*, 49 Fed. 409, per Gresham, J.: "It is the peculiar province of a court of chancery to pass upon such accounts and adjust the equities of the parties. It would

§ 958. **Tenants in common.**—One who is a tenant in common of real property may maintain a bill to enjoin a cotenant from the doing of any act in regard to the property which will injuriously affect the rights of the former therein.²⁹ So in a recent case in Georgia it is decided that in case of injury to the common property, or of unlawful interference with its use and enjoyment by a cotenant, relief may be had by injunction at the suit of the other cotenant.³⁰ And where there is a controversy as to the existence of a tenancy in common between the parties, and there is both a conflict of evidence and difficult questions of law, an injunction may be granted and receiver appointed, in order to preserve the property until the parties' respective rights are fixed by the final decree.³¹ So where trees growing on a boundary line serve to shelter and protect the buildings of one of the adjoining owners, the other owner may be enjoined from cutting them down, even though their presence is a damage to his land, for the trees are owned by them as tenants in common.³² And where, in an action by a tenant in common of a safe to compel the other to allow him free access, the judgment rendered, not only directed that plaintiff should have free access to and egress from the safe, but that he might take possession of such of the contents as belonged to him in his representative capacity or as an individual, it was held not error, as prejudging plaintiff's right to any particular item of such property.³³ But in the absence of wilful injury, or of unnecessary injury or destruction, caused by negligence or unskillfulness, a

be necessary for the jury to examine and pass upon numerous books and accounts covering a period of eight years, and it is not to be expected that the verdict would be satisfactory. There is no necessity for prosecuting both suits at the same time, and in this suit in equity the court can afford complete protection to all the rights of both parties."

29. *Rodgers v. Turpin*, 105 Iowa, 183, 74 N. W. 925; *Smith v. Wake-man*, 141 Mich. 611, 72 N. W. 599;

Woods v. Early, 95 Va. 307, 28 S. E. 374.

30. *Hancock v. Tharpe*, 129 Ga. 812, 60 S. E. 168.

31. *Comer v. Comer*, 92 Ga. 569, 18 S. E. 417.

32. *Musch v. Burkhart*, 83 Iowa, 301, 48 N. W. 1025. And see *Dubois v. Beaver*, 25 N. Y. 124; *Griffin v. Bixby*, 12 N. H. 456.

33. *Hackett v. Patterson*, 16 N. Y. Supp. 170.

tenant in common will not, at the instance of his cotenants, be enjoined from prosecuting the business of mining on their common claim.³⁴

§ 958a. **Same subject; parties not strictly tenants in common.**

—Though parties may not be strictly tenants in common of the property in question yet where their relationship to it is so closely analogous to the rights and relationship of tenants in common in and to the property held in common, they may be treated as tenants in common and as such entitled to that protection in a court of equity which one of such tenants is entitled to against another, who seeks by an unlawful act to destroy or interfere with the use of common property or unlawfully to deprive his cotenant of his legitimate use and enjoyment of his common property. So where the relation of parties who had jointly constructed a telephone line was of such a character, it was decided that an injunction should have been granted restraining any further interference with the

34. *McCord v. Oakland Quicksilver Min. Co.*, 64 Cal. 134, 27 Pac. 863.

In a bill to set aside a sale of land, complainant alleged that he and defendant were joint owners of a certain store-house and lot; that he was carrying on business in the house, paying defendant rent for his undivided one-half interest; that there had been differences between them, and defendant had frequently threatened to eject him; that he had sold his interest to defendant for a specified sum, and as a special inducement to the sale it had been verbally agreed between them that after a six-months lease from defendant to complainant, which was in writing, should expire, defendant was to lease him the premises from year to year for three years, which he afterwards refused to do. There was no allegation that complainant sold his interest for less than its value. Defendant in his answer denied the verbal

agreement, and there was no proof introduced on behalf of complainant. It was held that complainant was not entitled to a temporary injunction restraining defendant from interfering with his possession of the property, or from selling the same. *Birnbaum v. Salomon*, 22 Fla. 610.

In Montana injunctive relief against a tenant in common was in some cases authorized by the Code Civ. Proc. 1895, § 592. *Harrigan v. Lynch*, 21 Mont. 36, 52 Pac. 642; *Anaconda Copper Min. Co. v. Butte & B. M. Co.*, 17 Mont. 519, 43 Pac. 924. So where persons were tenants in common of a mining claim it was held that one of them could not use the common property to its injury for the purpose of operating an adjoining claim of which he was the sole owner. *Butte B. Consol. M. Co. v. Montana Ore Purchasing Co.*, 21 Mont. 539, 55 Pac. 112; *Connole v. Boston & M. C. C. & S. M. Co.*, 20 Mont. 523, 52 Pac. 263.

telephone line and wires in controversy, which tended to impair or destroy their utility for the purposes in contemplation of the parties at the time of such construction.³⁵

§ 959. **Where one partner takes title.**—Where by agreement the legal title to partnership real estate is vested in one of the partners, the other cannot compel a conveyance to him of his interest therein without bringing an action for dissolution and an accounting.³⁶ But where real property is acquired with the funds and for the purposes of a partnership, but the partner conducting the transaction, without the knowledge or consent of the other partner takes the title to himself which should have been conveyed to both, a resulting trust arises in favor of the other which he may enforce without bringing a suit for dissolution and accounting.³⁷ And where one partner fraudulently takes the title of a steamboat to himself alone and excludes the other from all participation in the business, the latter can maintain an action in equity to compel a conveyance to him of one half of the boat and an accounting of the proceeds, and in the meantime may enjoin the defendant from selling or encumbering his half of the boat.³⁸ Where, however, a contract to speculate in lands constitutes a partnership, and one party thereto holding title in his own name has entered into an executory contract to sell partnership lands at their fair market value, a temporary injunction restraining such sale

35. *Hancock v. Tharpe*, 129 Ga. 812, 60 S. E. 168.

36. *Kruschke v. Stefan*, 83 Wis. 373, 53 N. W. 679.

37. *Traphagen v. Burt*, 67 N. Y. 30; *Davis v. Davis*, 60 Miss. 615.

38. *Zimmerman v. Chambers*, 79 Wis. 20, 47 N. W. 947, per Orton, J.: "In an equitable action, all the equities of the parties in the subject matter may be adjusted. *Winslow v. Crowell*, 32 Wis. 639. Equity will compel one who takes the title to himself of property which he agrees to obtain for another by the use of

the money of such other person, to convey it to the proper person. *Spence v. Spence*, 17 Wis. 448. Equity will reform a contract to conform it to the real intent of the parties and enforce specific performance thereof. *Fery v. Pfeiffer*, 18 Wis. 510. It is too familiar a rule to require authorities that a court of equity only can afford relief in partnership cases when one partner has taken possession of all the partnership property and refuses to account. When an accounting is necessary, the party must resort to equity, or when

will be refused in an action by the other partner brought to obtain a permanent injunction prohibiting such sale. Under such circumstances it is said that the law is well established that real estate purchased for the partnership, is held by one of the partners, where the title is in him, as the trustee of the partnership and that where it appears that the price which the property is to bring is the fair market value of the same, it is not the province of the court on appeal from an order vacating the injunction to interfere with such order and that all of the rights of the plaintiff can be protected in the orderly administration of the law without the interposition of an injunction.³⁹

§ 960. **Levy against partner and against firm.**—An injunction should not be granted to restrain the collection from one member of a firm of a judgment against the partnership since he has his remedy by contribution.⁴⁰ And injunctions in such cases would cause delay and embarrassment to creditors.⁴¹ But specific articles of partnership property cannot be levied upon and sold to satisfy the individual debt of one partner, and when the officer, instead of selling the whole interest of a partner, sells the whole of certain specified articles of partnership property, the other partners may treat him as a trespasser, and may enjoin the sale and delivery of the articles so sold.⁴² And a grantee of lands of a partner in a firm, against which judgments had been recovered, may enjoin a purchaser of lands of the partnership, which are subject to the lien of such judgments, and for whose benefit the judgments have been bought in, to prevent him from enforcing the judgments

specific performance is to be enforced."

39. *Babcock v. Leonard*, 111 App. Div. (N. Y.) 294.

40. *Bier v. Ash*, 16 N. Y. W. Dig. 189.

41. *Moody v. Payne*, 2 Johns. Ch. (N. Y.) 548.

42. *Indiana*.—*Williams v. Lewis*, 115 Ind. 45, 17 N. E. 262; *Stumph*

v. Bauer, 76 Ind. 157; *Branch v. Wiseman*, 51 Ind. 1.

Kansas.—*Spalding v. Black*, 22 Kan. 55.

Maine.—*Moore v. Pennell*, 52 Me. 162.

New York.—*Atkins v. Saxton*, 77 N. Y. 195.

Vermont.—*Miner v. Pierce*, 38 Vt. 610.

against any portion of plaintiff's land until the determination of the equities between the partners.⁴³

§ 961. Sale under judgment against copartner.—When the record of title to land does not disclose a trust in favor of a firm, a partner may maintain a bill to restrain a sale of such land under a judgment rendered against his copartner individually.⁴⁴ But

43. *Rossow v. Bank of Commerce*, 22 N. Y. W. Dig. 448.

44. *Harney v. First Nat. Bank*, 52 N. J. Eq. 697, 29 Atl. 221, per Bird, V. C.: "While it is well settled that a mere creditor at large of the firm has no standing in this court to prevent an improper application of the firm's assets (*Young v. Frier*, 9 N. J. Eq. 465), it is equally well settled, as I think, upon the plainest principles, that a partner, as such, may maintain such a suit in this court by virtue of his equitable right or lien in the property in question. *Deveney v. Mahoney*, 23 N. J. Eq. 247, at pages 249 [bottom], 250, and cases cited; to which I add: 1 Madd. Ch. Pr. 135; 1 Story, Eq. Jur., § 678, and cases cited; *Bevan v. Lewis*, 1 Sim. 376; *Kerr*, Inj. 169; *Lindl. Partn.* 359; *Greenwood v. Brodhead*, 8 Barb. 593. It was further contended that this court should not stop the sale under the judgment, since the judgment creditors are, upon complainants' theory, entitled, at least, to hold their lien subject to the complainants' superior lien, and to have what is left after satisfying their equity. This is undoubtedly true—that, if the conveyance to the partners in this case showed on its face that it was thereby devoted to partnership purposes, there would be force in the contention, at least as against complainants—since the pur-

chasers at sheriff's sale would take with notice, and all purchasers from them would hold subject to the same notice, because it was found in their chain of title. And this is the situation in cases of levy upon personal property, which is usually in the possession of the other partners, and their possession is standing notice to judgment creditors of one of the partners that the property levied upon is partnership property. But in this case the record of the title does not disclose the trust in favor of the partnership. The result is that, although the plaintiffs in execution would, if they became buyers at the sheriff's sale, acquire no rights as *bona fide* purchasers, yet, as before observed, other parties purchasing at the sheriff's sale, and paying their money, would, as before shown, be under no such disability. 2 Pom. Eq. Jur., § 724. If it be suggested that complainants may protect themselves by giving notice of their equity at the sale, the answer is that, to compel them to resort to and rely upon such a remedy would be to compel them to rely upon matters *in pais*, to preserve their rights. Besides, if either the defendants or a stranger acquires title to the share of William A. Harney with notice of complainant's rights, what will prevent them from conveying to a *bona fide* purchaser without notice? Jus-

though the rights of partnership creditors to be paid out of partnership property, as a rule in equity, are superior to those of creditors of an individual partner, yet an individual creditor will not be enjoined from making a levy on partnership property where it does not already appear that the partnership debt existed at the time the property was levied on.⁴⁵ And where a person obtained judgment against a railroad company for personal injury received through its negligence, and levied on an engine belonging to it and two other companies, which were in partnership, but of which partnership he was not aware, it was held that under the Vermont statute he had a special right in his attachment of the engine superior to the general equity of the partners in the partnership property, and that he should not be enjoined from proceeding under his levy.⁴⁶ A creditor who has not obtained judgment cannot have, on the ground of fraud, an injunction to restrain an execution creditor of an individual partner from enforcing his lien upon the partnership property.⁴⁷ But under the Maryland statute of 1835, a partnership creditor might have an injunction to prevent any

tice Story (Story, Partn., § 264) considers this a controlling consideration; and see §§ 260, 263. No harm is done to the judgment creditors by stopping the sale. Their lien will not be divested, but they will receive the share, if any, remaining to their debtor after the due administration of the assets of the partnership. I think the complainants are entitled to the relief prayed for, and that the sale should be stayed until the partnership debts are paid, and the accounts adjusted; and will advise a decree accordingly."

45. *Lamoille, etc., R. Co. v. Bixby*, 55 Vt. 235, per Redfield, J.: "It is settled law that the partnership creditors have in equity a superior right to the property of the firm to insure the payment of its debts over the attaching creditor of one member of the partnership. And this is based upon

the supposed lien which the partners have among themselves upon the assets of the firm. But the embarrassment in this case arises upon the application of these principles to the case in hand. The principle invoked obtains only in equity; and at law the defendant Bixby might attach and sell one-third of the property in question without regard to the equities of the others. *Bardwell v. Perry*, 19 Vt. 292; *Reed v. Shepardson*, 2 Vt. 120. It does not clearly appear that the partnership debt existed at the time of the seizure on execution; if not, the bill is without foundation." See *Brewster v. Hammet*, 4 Conn. 540.

46. *Lamoille, etc., R. Co. v. Bixby*, 55 Vt. 235; *Bardwell v. Perry*, 19 Vt. 292; *Ex parte Ruffin*, 6 Ves. 119.

47. *Mittnight v. Smith*, 17 N. J. Eq. 259, per Green, Ch.: "A bill

fraudulent disposition of partnership property which was prejudicial to his claim.⁴⁸

§ 962. **Appointing receivers.**—In the case of a subsisting partnership the general rule is that the court will not interfere by injunction and receiver unless it satisfactorily appears that the complainant is entitled to have a dissolution, and though an injunction has been granted in the suit, it does not follow that a receiver should be appointed.⁴⁹ The mere fact of dissolution of a partnership does not give one partner an absolute right as against his copartner, to have a receiver. Where the partnership articles provided that on dissolution any differences should be adjusted by arbitration, and when the term expired one partner brought an action for dissolution and moved for a receiver, and the other moved for a stay of proceedings, it was held that the court might stay all proceedings in the action except for the purpose of carrying out the order for the receiver.⁵⁰ But where a contract of partnership has been entered into as a result of false representations, it may be set aside by a court of equity at the suit of the one who was so induced to enter into the contract. And in such a case a receiver may be appointed in which event it is declared that an injunction follows as a matter of course.⁵¹ And such relief is also properly granted pending an action by a partner against his copartner for an accounting where it appears that the partnership property is in the possession of the latter and the allegation

filed, by a creditor of a firm, forms no exception to the general rule. A partnership creditor, before judgment, has no such *quasi* lien on the partnership property as to entitle him to the aid of the court in protecting and enforcing his claim, either against the individual partners or against a creditor of a partner. *Young v. Frier*, 9 N. J. Eq. 465. And as to the general rule, see *Edgar v. Clevenger*, 2 N. J. Eq. 258; *Dunham v. Cox*, 10 N. J. Eq. 437; *Glenn v. Gill*, 2 Md. 16.

48. *Sanderson v. Stockdale*, 11 Md. 563.

49. *Garretson v. Weaver*, 3 Edw. Ch. (N. Y.) 385. See *Smith v. Jeyes*, 4 Beav. 503; *Phillip v. Von Raven*, 26 Misc. R. (N. Y.) 552, 57 N. Y. Supp. 701; *Sloan v. Moore*, 37 Pa. St. 217.

50. *Pini v. Roncoroni* (1892), 1 Ch. 633, following *Compagnie du Senegal v. Woods*, 53 L. J. (Ch.) 166.

51. *Jones v. Weir* (Pa. 1907), 66 Atl. 550.

that he is insolvent is not decided.⁵² And where property is actually owned by a copartnership, but the title stands in the name of a corporation organized for the sole purpose of operating the property, and one partner brings an action for dissolution and accounting for fraud on the part of another partner and makes the corporation a party, a receiver may be appointed to take charge of the property.⁵³ The control, however, of the firm assets and business should not be taken from a surviving partner by the appointment of a receiver, without a clear showing of mismanagement or improper conduct, and of danger of ultimate loss to the estate of the deceased partner.⁵⁴

§ 963. **Appointing receivers on dissolution.**—It is quite common to appoint a receiver when the partnership has closed and the parties cannot agree as to the disposition and control of the property, especially when the partnership articles do not provide for the settlement of the partnership affairs in such a case.⁵⁵ And where on motion to dissolve an injunction granted in a suit by one partner against another to wind up the partnership, it appeared that the other was determined to ruin the business, the injunction was retained and a receiver appointed.⁵⁶ And where

52. *Taylor v. Russell*, 119 N. C. 30, 25 S. E. 710.

53. *Fischer v. Superior Court*, 98 Cal. 67, 32 Pac. 875.

54. *Painter v. Painter* (Cal.), 36 Pac. 865.

55. *Whitman v. Robinson*, 21 Md. 30; *Marten v. Van Schaick*, 4 Paige, 479; *Law v. Ford*, 2 Paige, 310; *Sloan v. Moore*, 37 Pa. St. 217; *Walker v. House*, 4 Md. Ch. 43. A bill alleged that complainant and defendant had done business under an agreement whereby defendant was to furnish stone, from his quarry, to be manufactured at plaintiff's mills; that the product was to belong to plaintiff, who was to have sole control of the finances of the business;

that defendant was to sell the products, and receive a commission thereon; that the business was done under an assumed name; that the business was ended, and asking that defendant be enjoined from receiving the mail relating thereto, and making collections. It was held that the preliminary injunction should not be dissolved, but as defendant had done business under the same name since the old business was ended, a disinterested person would be appointed to receive the mail and deliver it to the proper party. *Wagoner v. Warne* (N. J.), 14 Atl. 215.

56. *Sutro v. Wagner*, 23 N. J. Eq. 388. In *Heflebower v. Buck*, 64 Md. 15, *Alvey, C. J.*, said: "Upon such

in a partnership agreement no time is named for its continuance, and no provision made for the settlement of its affairs upon dissolution, it is dissolvable at the will of either of the partners, and an action may be brought for that purpose, and the appointment of a receiver therein is proper.⁵⁷ But where the parties have, by the partnership articles or otherwise by their mutual agreement, entrusted the settlement of the partnership affairs to a particular partner, the court will not appoint a receiver in his place unless he has been guilty of some clear breach of duty or conduct amounting to fraud, or by reason of his insolvency, the assets will be greatly imperiled if confided to his administration.⁵⁸ Where, in an action to dissolve a partnership, the defendant moved to stay the action and defer the matters in dispute to arbitration in accordance with a provision of the articles, the motion for a stay was granted, as the arbitrators would have the power under the

an application the court does not determine the questions arising between the partners, the only question for consideration being whether, upon the facts disclosed, there is an apparent necessity for either an injunction or a receiver to protect the assets until the partner's rights can be determined upon full hearing of the case. The court acts in such cases as in other cases where the same remedy is invoked. *Speights v. Peters*, 9 Gill, 475; *Blondheim v. Moore*, 11 Md. 365; *Voshell v. Hynson*, 26 Md. 83. In *Williamson v. Wilson*, 1 Bland (Md.), 418, 426, Bland, Ch., said: 'It is proper that this court should now lay its hands upon the joint property of this partnership and let all its creditors come in *pari passu* and according to their respective priorities, if any. Both partners profess to have had this equitable distribution in contemplation; both acknowledge themselves to be in that insolvent condition in which the mak-

ing of such an equitable distribution has devolved upon them as a duty. And yet each charges the other with having made an effort and formed a fixed design to disregard this duty. Neither of them seems to have the least confidence in the other. I consider this as a case in which it is peculiarly fit and proper that a receiver should have been appointed before answer, and should now be continued as a means of winding up the affairs of the partnership in safety and with justice to all concerned. It is further ordered that the injunction be continued in full force until the hearing.'

57. *McElvey v. Lewis*, 76 N. Y. 373, per Danforth, J.: "Lord Eldon, in *Goodman v. Whitcomb*, 1 Jac. & W., says: 'If the court can see that a dissolution must be declared, it follows very much, of course, that receiver must be appointed.' This is the general rule."

58. *Heflebower v. Buck*, 64 Md. 15;

reference to award a dissolution.⁵⁹ That the partnership business is unprofitable and should be discontinued, is not a sufficient reason for enjoining one of the partners from settling up the affairs and incurring the expense of a receivership.⁶⁰ In New Jersey it is decided that even after a dissolution a receiver will be appointed only when necessary to protect the interests of the parties.⁶¹ And in suits between partners to dissolve a partnership, a receiver will not be appointed or an injunction granted to restrain a partner from acting, unless the facts shown are such as would, upon the final hearing, entitle the complainant to a decree of dissolution. Upon such a showing a receiver will ordinarily be appointed and then, almost as a matter of course, the defendant will be enjoined from disposing of or meddling with, the firm property.⁶² But upon a bill between partners for closing the affairs of a partnership after dissolution, the defendant's insolvency will entitle the complainant to the appointment of a receiver and an injunction.⁶³

Drury v. Roberts, 2 Md. Ch. 157;
Walker v. Trott, 4 Edw. Ch. (N. Y.)
 38; *Waters v. Taylor*, 15 Ves. 10, 19.

59. *Belfield v. Bourne* (1894), 1
 Ch. 521.

60. *Moies v. O'Neill*, 23 N. J. Eq.
 207.

61. *Renton v. Chaplain*, 9 N. J.
 Eq. 62; *Birdsall v. Colie*, 10 N. J.
 Eq. 63; *Cox v. Peters*, 13 N. J. Eq.
 41.

62. *Sieghortner v. Weissenborn*, 20
 N. J. Eq. 172; *Birdsall v. Colie*, 10
 N. J. Eq. 63; *Cox v. Peters*, 13 N. J.
 Eq. 40; *Goodman v. Whitcomb*, 1
 Jac. & W. 569; *Smith v. Jeyes*, 4
 Beav. 503.

63. *Randall v. Morrell*, 17 N. J.
 Eq. 343. And see *Heathcot v. Ra-*
venscroft, 6 N. J. Eq. 113.

CHAPTER XXXIII.

RELATING TO HUSBAND AND WIFE.

SECTION 964. Upholding contracts between them—Protecting her realty.

965. Protecting wife's realty from husband's creditors.

966. Protecting wife's dower and homestead rights.

967. Protecting wife's separate estate.

968. Protecting wife's estate from administrator, etc.

968a. Suit for divorce in another State.

969. Actions for divorce—Alimony—Decree lien on realty.

970. Same subject.

970a. Same subject—Statute construed.

971. Jurisdiction of alimony.

972. Wife's bad faith.

973. Husband's rights.

Section 964. Upholding contracts between them; protecting her realty.—In Indiana it is decided that contracts which would be sustained at law if made by a husband with a trustee for the benefit of his wife will be upheld in equity if made directly with his wife,¹ and that a husband may not only voluntarily perform a contract to repay money borrowed from his wife but that a court of equity will compel such performance.² And where a husband has without fraud conveyed property to his wife in consideration of an existing debt to her, the conveyance may be reformed in her favor so as to correct actual mistakes therein which are prejudicial to her, and as thus reformed the property conveyed will be protected by injunction against a levy for a debt of the husband.³ That in a proper case the separate property of the wife will be protected from execution under judgments against the husband

1. *Wilson v. Wilson*, 113 Ind. 415, 15 N. E. 513; *Bank v. Kimble*, 76 Ind. 195; *Thompson v. Mills*, 39 Ind. 528; *Sims v. Rickets*, 35 Ind. 181.

2. *Proctor v. Cole*, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303; *Goff v. Rog-*

ers, 71 Ind. 459. And see *Clough v. Russell*, 55 N. H. 279; *Albin v. Lord*, 39 N. H. 196.

3. *Comstock v. Coon*, 135 Ind. 640, 35 N. E. 909.

has also been shown in a preceding chapter.⁴ And it is decided that, where a husband and wife convey land in trust to a person on his promise to reconvey to her, the trustee's prior judgment creditors may be enjoined, after such reconveyance, from selling the land under executions issued on their judgments.⁵ Where the wife's title to realty is acquired by purchase at sheriff's sale under execution against her husband issued on a chancery decree in her own favor which would not be conclusive on a purchaser at a subsequent execution sale against the husband, and in the event of a contest with such purchaser the controversy would involve transactions between husband and wife, she may be entitled to have her rights declared by a court of equity and to enjoin such subsequent sale.⁶ And a husband may obtain an injunction restraining a wife from disposing of property by will other than in accordance with her agreement with him in consequence of which he had originally paid for such property and conveyed the same to her.⁷

§ 965. **Protecting wife's realty from husband's creditors.**—In West Virginia as a sale of realty under an execution for a private debt is an absolute nullity, a wife cannot have an injunction to prevent a sale of her real property under an execution against her husband as such a sale would not even cast a cloud on her title.⁸ But in New Jersey a wife may enjoin the execution creditors of her husband from selling lands the title of which stands in his name but which were bought by him in good faith for her and with her money.⁹ And where a husband bought land as his wife's agent, giving his own note for the price and taking title in his own name, but the greater part of the price was paid out of his wife's funds, it was held that she was entitled to demand a conveyance on the payment of the balance of the price and to enjoin the

4. Sections 718, 719, *ante*.

5. *Cox v. Arnsmann*, 76 Ind. 210, per Ricknell, J.: "Property so held in trust cannot be sold in execution for the debts of the trustee, though it may be sold for the debts of the *cestui que trust*. *Bates v. Spooner*,

45 Ind. 489, 492; *Shryock v. Waggoner*, 28 Pa. St. 430."

6. *Brevard v. Jones*, 50 Ala. 221.

7. *Duvale v. Duvale*, 56 N. J. Eq. 375, 40 Atl. 440, 39 Atl. 687.

8. *Dunn v. Baxter*, 30 W. Va. 672.

9. *Cass v. Demarest*, 37 N. J. 393.

vendor from selling the land under an execution to satisfy an independent claim against the husband.¹⁰

§ 966. **Protecting wife's dower and homestead rights.**—The wife's inchoate dower right in her husband's realty entitles her to an injunction to prevent its wrongful alienation under fraudulent judgments procured and consented to by him for the purpose of defeating such right.¹¹ And she may obtain a decree to compel the reconveyance of the realty.¹² The interest of a widow before dower is assigned may be protected by injunction against injuries to land in which she might have an estate in dower.¹³ A voluntary conveyance of realty made by a man on the eve of marriage, unknown to the intended wife, and made for the purpose of defeating her dower right, is fraudulent and void.¹⁴ And where a wife has relinquished and conveyed her homestead estate under compulsion and threats practiced upon her by her husband and the grantee, she may maintain an action to annul the deed and to compel the defendants to surrender it for cancellation.¹⁵ But in a case in New York it is decided that when a receiver has been

10. *Cunningham v. Bell*, 83 N. C. 328, per Dillon, J.: "The plaintiff, if the land was purchased for her, and to be paid for by her, and if the same had been paid for in whole or part by her means, had an equity on extinguishing the purchase money to have a trust declared of the legal title to her use, and to have a conveyance of the same to her in fee. *Dula v. Young*, 70 N. C. 450; *Lyon v. Akin*, 78 N. C. 258; *Dockery v. French*, 69 N. C. 308."

Where real estate is bought by a wife and paid for in part by her and in part by money loaned by her insolvent husband and business is carried on therein under the wife's name for some time the husband's creditors are entitled out of the proceeds for subsequent

sale of the property only to the amount loaned by the husband with interest and not to any portion of the profits by the wife's venture. *Karstorp's Appeal*, 158 Pa. St. 30, 27 Atl. 739.

11. *Busenbark v. Busenbark*, 33 Kan. 572, 7 Pac. 245. And see *Buzick v. Buzick*, 44 Iowa, 259; *Thayer v. Thayer*, 14 Vt. 107.

12. *Gilson v. Hutchinson*, 120 Mass. 27; *Holland v. Cruft*, 20 Pick. (Mass.) 321.

13. *Shepard v. Manhattan Ry. Co.*, 5 N. Y. Supp. 189.

14. *Youngs v. Carter*, 50 How. Pr. (N. Y.) 410; *Pomeroy v. Pomeroy*, 54 How. Pr. (N. Y.) 228; *Petty v. Petty*, 4 B. Mon. (Ky.) 215.

15. *Helm v. Helm*, 11 Kan. 19.

appointed to collect and pay over dower and a widow assigns her dower to a third person for the alleged purpose of defeating a collection of a judgment obtained against her in another action, there is no authority for extending the receivership to a third action brought to set aside the assignment as fraudulent and that the assignee of the dower should not be enjoined from receiving the same when the moving affidavits allege no fact showing that the assignment was without consideration or that the assignee is a non-resident, except upon information and belief, and there is no allegation that he is irresponsible, while on the contrary the affidavits in reply show that the assignee is a resident and financially responsible.¹⁶ An action by a wife to protect her inchoate interest in her husband's real estate, conveyed by them in trust, will not, after a judgment in her favor, and after an appeal has been taken, abate on account of her death though her cause of action would not survive her.¹⁷

§ 967. **Protecting wife's separate estate.**—In an action by a wife against her husband for the protection of her separate estate and an accounting, she may, in a proper case, enjoin him *pendente lite* from interfering with her property, and from collecting rents or receiving moneys belonging to her.¹⁸ In Indiana, when a judgment is rendered against a married woman and a copartner for debts contracted in carrying on a partnership business, the levy and sale of her separate real estate for the collection of the judgment will not be enjoined as her contracts made during coverture are binding on her separate property.¹⁹ Where a married woman deposits money as her own with a bailee, who afterwards takes out letters of administration on the estate of her deceased husband, and claims the money as belonging to the estate, the contract of bailment towards her still continues, and he cannot enjoin her from prosecuting a suit to recover the money, for if he could show that the money did not belong to her this

16. *Dolan v. Conlon*, 114 App. Div. (N. Y.) 570, 99 N. Y. Supp. 1090.

17. *Kelly v. Kelly*, 137 Ind. 690, 37 N. E. 545.

18. *Seabra v. Seabra*, N. Y. Daily Reg. of April 11, 1883.

19. *Burk v. Platt*, 88 Ind. 283; *McDaniel v. Carver*, 40 Ind. 250;

would be a good defense to her action at law.²⁰ In such a case, however, the *onus* is on the bailee affirmatively to establish the defense.²¹ Though under the laws of Alabama a wife has been relieved of certain disabilities of coverture, yet she cannot sign an injunction bond as her husband's surety, as it is provided by the Code of that State that she shall not directly or indirectly become the surety of her husband.²² And the authority conferred by statute upon the chancellor to relieve married women of certain disabilities, is not a general power to enable her to contract and be contracted with.²³ But where the right of a wife to contract as a *feme sole* in respect to her separate property is recognized, it has been decided that upon the filing of a bill for divorce she may be granted an injunction against any interference by her husband in respect to such property.²⁴ On a bill filed by a wife for an injunction to restrain an execution issued against her husband and levied upon personalty claimed by her, the simple assertion of title by her as against her husband or his creditors is not sufficient; there must be clear, affirmative proof to show how the property was acquired, and, if purchased, that it was bought on the credit, or paid for with the money of the wife exclusively.²⁵

§ 968. Protecting wife's estate from administrator, etc.—

Where the administrator of a husband undertook to convey away a claim standing in the name of the husband, but the separate property of his wife, she had the right to an injunction preventing

Wagner v. Ewing, 44 Ind. 441; Burk v. Hill, 55 Ind. 419.

20. Jackson v. Jackson, 97 Ala. 372, 12 So. 437.

21. Young v. East Ala. R. Co., 80 Ala. 102; Powell v. Robinson, 76 Ala. 423; Calhoun v. Thompson, 56 Ala. 171; Croswell v. Lehman, 54 Ala. 367.

22. Schening v. Cofer, 97 Ala. 726, 12 So. 414.

23. Hatcher v. Diggs, 76 Ala. 189.

24. Robinson v. Robinson, 123 N. C. 136, 31 S. E. 371.

In Kansas where a wife files her petition for a divorce and for an injunction to protect her person and property from the husband's interference, it has been held that such an injunction can be granted under the Kansas code, only by the District Court and not by a probate judge. In re Pavey, 52 Kan. 675, 36 Pac. 878.

25. Erdman v. Rosenthal, 60 Md. 312; Hinkle v. Wilson. 53 Md. 292; Seitz v. Mitchell, 94 U. S. 580, 583, 24 L. Ed. 179.

the money due on account of such claim from coming into the possession of the administrator or his assignee, and compelling payment direct to her.²⁶ And where the executor threatens to sell inventoried articles which a widow has a right to select and take at the appraised value, and which she needs and cannot replace, an injunction against him is the appropriate remedy.²⁷ In such a case it is not enough that there is a remedy at law, if it is less practical and efficient than the injunction.²⁸ Where a wife is given a life estate by will, she is entitled to possession, and her grantee has a right to protection by injunction against the unlawful interference with such possession.²⁹

§ 968a. **Suit for divorce in another State.**—Where a husband and wife have their matrimonial domicile in a certain State the court of equity of such State, on a bill filed by the wife, has jurisdiction to enjoin the husband from prosecuting a suit for divorce in another State, the jurisdiction of which he invoked on a false and fraudulent allegation of his residence in that State.³⁰ These decisions, however, are not to be construed as disputing the right of a husband to change his domicile and to acquire a *bona fide* residence in another State entitling him to invoke the jurisdiction of the courts of the State in which such new domicile has been acquired. And where it clearly appears that in acquiring

26. *Potter v. Potter's Adm'r*, 64 Vt. 298, 23 Atl. 856, per Ross, C. J.: "The indebtedness which the oratrix seeks to hold accrued to her with her husband's consent and agreement. She was the meritorious cause of the indebtedness. *Baird v. Fletcher*, 50 Vt. 603. The master has found that the husband gave the oratrix the right to have the debt which should accrue from keeping her father, and that it accrued to her. This the husband could legally do, if it amounted to a gift, unless it touched upon the rights of creditors. *Barron v. Barron*. 24 Vt. 375; *Cardell v. Ryder*, 35 Vt. 47. . . . The administrator of the hus-

band having undertaken to convey it away, the oratrix had the right to invoke the aid of a court of equity to prevent its coming into the possession of the administrator or his assignee."

27. *Denny v. Denny*, 113 Ind. 22, 14 N. E. 593.

28. *Watson v. Sutherland*, 5 Wall. 74, 18 L. Ed. 580; *Bishop v. Moorman*, 98 Ind. 1.

29. *Nicholson v. Drennan*, 35 S. C. 333, 14 S. E. 719.

30. *Kempson v. Kempson*, 63 N. J. Eq. 783, 52 Atl. 360, 625, 92 Am. St. Rep. 682. See, also, *Kittle v. Kittle*, 8 Daly (N. Y.), 72; *Forest v. Forest*, 2 Edm. Sel. Cas. 180.

the new domicile he acted in good faith, a suit for divorce instituted in that State will not be enjoined by a court of equity of the State in which he formerly resided and in which his wife remained.^{30a}

30a. *Levy v. Levy*, N. Y. Law Journal, May 22, 1907. The following extract from the opinion by Mr. Justice Bischoff is of value in this connection:

"Motion to continue *pendente lite* a preliminary injunction which restrains the defendant from instituting and prosecuting an action against the plaintiff for divorce or separation in South Dakota and in any jurisdiction other than that of the State of New York, that being the matrimonial domicile of the parties and the domicile of each of them. Action for final injunctive relief to the same effect. The parties to this action, a married couple, their matrimonial domicile and the domicile of each of them being within the State of New York, are living apart, and the plaintiff, the wife, apprehensive of the defendant's, her husband's, intention of taking up a residence in South Dakota. whither he has gone, for the purposes of bringing and prosecuting an action for divorce against her in one of the courts of that State upon grounds valid there but not legally sufficient here, her apprehension proceeding reasonably from the husband's avowals, has brought the present action for injunctive relief, and this motion is to continue *pendente lite* a preliminary injunction which restrains the defendant from 'in any wise or manner bringing, instituting, carrying on or prosecuting any action for divorce or separation against the plaintiff in the State of South Dakota, or in

any other than the State of New York.' Some adjudged cases are cited in support of the motion, but upon their analysis they severally appear to afford no tenable argument for the plaintiff's position. In each of these cases the constituent facts differed materially from the facts of the case in hand, and upon the facts as they were the adjudications proceeded from established principles (*Streitwolf v. Streitwolf*, 181 U. S. 179). In *Forest v. Forest* (2 Edmonds' Select Cases, 180), there was an action for divorce pending between the parties in the Supreme Court of this State, where both parties were domiciled when it was commenced, and the husband, the defendant, was enjoined from prosecuting a petition for divorce addressed to the Legislature of Pennsylvania, and also from prosecuting an action for the like purpose in one of the courts of the same State, the petition having been made and the action for divorce having been brought before the wife's similar action in this State, the husband having falsely asserted his domicile to be in Pennsylvania for the purposes of his status before the tribunals of that State. In *Kittle v. Kittle* (8 Daly, 72), the husband, defendant in his wife's action for divorce in this State, was enjoined from prosecuting an action brought by him in Connecticut, that being the later action of the two; and in *Kempson v. Kempson* (58 N. J. Eq., 13 Dick. Ch. Rep. 94; 63 N. J. Eq. 18 Dick. Ch. Rep. 783), it appeared that both

§ 969. **Actions for divorce; alimony; decree lien on realty.**—A court of equity, in order to protect the rights of a wife in respect to alimony, has jurisdiction to grant an injunction restraining a husband from transferring property, and an injunction to this effect is to be construed as meaning that he shall neither mortgage

parties were domiciled in New Jersey, and that the husband had, at the time when the injunction was applied for, actually begun his action for divorce in one of the North Dakota courts, asserting for the purpose of jurisdiction a pretended domicile within that State. The *ratio decidendi*, therefore, in the Kittle case rests upon the well-recognized power of the courts of one State, having jurisdiction of the parties as well as of the subject-matter, to enjoin the litigation of the same issues between the same parties in another jurisdiction (*Locomobile Co. of Am. v. Am. Bridge Co. of N. Y.*, 80 N. Y. App. Div. 44; *Stevens v. Cent. Nat. Bank of Boston*, 144 N. Y. 50, 60, 22 Cyc. of Law of Pro. 813, etc.); that in each of the Forest and Kempson cases upon the want of power of the court in which the action enjoined was brought to entertain and determine it for the reason that neither the matrimonial domicile nor the domicile of either party was within the territorial jurisdiction of that court, the husband's assertion to the contrary notwithstanding (*Haddock v. Haddock*, 201 U. S. 562; *Andrews v. Andrews*, 188 U. S. 14; *Bell v. Bell*, 181 U. S. 175; *Streitwolf v. Streitwolf*, *supra*). For the purposes of the case at bar it may be conceded that the husband has taken up a residence in South Dakota, intending at some future time to avail himself of the laws of that State and to sue for divorce there upon the grounds not

legally sufficient here after he shall have abided in South Dakota for the periods there prescribed by statute for such cases. But as yet no action has been begun by him, and the plaintiff must necessarily, therefore, base her claim to the relief prayed for wholly upon her fear that the husband's action, if he proceeds in accordance with his intention, may be instituted by him in South Dakota at a time when he may not have acquired a *bona fide* domicile within that State, a residence *animo manendi*, the *sine quo non* of jurisdiction (*Hunt v. Hunt*, 72 N. Y. 217). This fear, however, is not of itself a persuasive ground for the relief asked for (*Reynolds v. Everett*, 144 N. Y. 189). As was said by Judge Denio in *Scott v. Onderdonk* (14 N. Y. 9, 13): 'Ordinarily a party must wait until his rights have been actually interfered with before he can implead another from whom he anticipates an injury. . . . Courts have commonly occupation enough in determining controversies which have become practical without spending time in hearing discussions respecting such as are merely speculative or potential.' The plaintiff asserts that she has grounds for divorce against the defendant of which she refuses to avail herself, and assuming, without deciding, that a wife may under such circumstances maintain a domicile separate and apart from that of her husband (*Hunt v. Hunt*, *supra*), it by no means follows that the hus-

nor encumber the same until the further order of the court.³¹ So on a wife's petition for divorce and alimony, and alleging that the husband had conveyed real estate in order to defeat her right to alimony, it was held that under the provisions of the Georgia Code an injunction might be allowed to restrain the conveyance, and a receiver be appointed and other necessary relief afforded, and to that end all necessary parties might be joined as defendants with the husband.³² And persons who combine with the husband to deprive the wife of her permanent alimony by pretended purchases of his property, may be enjoined in order to preserve the *status quo* until the charge of collusion is investigated.³³ And in an action by the wife for divorce and alimony, a decree for alimony in money payable in gross will operate, *per se*, as a lien upon the lands of the husband in the county where it is rendered, and may be enforced by levy of execution upon such

band's right to change his domicile is thereby extinguished. As already stated, all that was held in the *Forrest* and *Kempson* cases is that since the action enjoined was not maintainable in the court of the sister State, neither party being domiciled there, the husband's assertion of domicile for the purposes of jurisdiction was an attempted fraud upon the court of the sister State, which fraud because of its injurious effect upon the wife (*Kempson v. Kempson*, *supra*), the courts of the domicile of both parties or of either party could and would redress by restraining the husband from taking advantage thereof (*Streitwolf v. Streitwolf*, *supra*). It was not held that the action enjoined could not be maintained had the party instituting it at the time acquired a *bona fide* domicile within the State in which the action was brought. Nor was it intimated in the cases adjudged and last above alluded to that the action in the sister State would have been

interfered with had there been such a domicile. The husband has an indisputable right to change his domicile as often as his pleasure, health or business dictates (*Stewart, Husband and Wife*, sec. 60), though the wife may choose to live apart from him, excusably so if the new domicile imposes cruel and reasonable avoidable hardships upon her, and that right cannot be diminished or its exercise impeded merely because the wife so wills."

31. *Thomason v. Thomason*, 73 S. C. 129, 52 S. E. 870. See *Newton v. Newton* [1896], P. 36, 65 L. J. P. D. & A. N. S. 15.

All persons with notice are bound by a restraining order to this effect though the court files do not show a return of service. *Uhl v. Irwin*, 3 Okla. 388, 41 Pac. 376.

32. *Price v. Price*, 90 Ga. 244, 15 S. E. 774.

33. *Gray v. Gray*, 65 Ga. 193. And see *Ricketts v. Ricketts*, 4 Gill. (Md.) 105.

lands, when they have been conveyed by the husband after the rendition of such decree; and the levy and execution sale will not be enjoined at the suit of the subsequent purchaser having knowledge of the alimony decree at the time of purchase.³⁴ So in Iowa, in an action for divorce and alimony, the husband may be restrained from disposing of his property in order to defeat the claim for alimony, the remedy by attachment given by the Code being cumulative only and not exclusive.³⁵ But in Maryland it is the settled law of that State that a husband may alienate his property at will even though in the exercise of this right he strips himself of all means of supporting or maintaining his wife, provided he does so *bona fide* and with no design of defrauding her of her just claims upon him and his estate. The husband will not be enjoined in an action against him for divorce from disposing of his property, as for instance his home and place of business, on the mere allegations in the bill of a declared purpose to do so and the belief of the plaintiff that he will do so to her injury, where there is no allegation of any intent to defraud her of her marital rights.³⁶ Again, a wife who has commenced a suit for divorce may obtain an injunction restraining her husband, during the pendency of the suit, from entering her dwelling.³⁷

§ 970. **Same subject.**—An injunction should not be granted to restrain a husband from incumbering or disposing of his property pending a divorce or alimony suit where he is neither attempting nor threatening to sell or incumber his property and no other

34. *Conrad v. Everich*, 50 Ohio St. 476, 35 N. E. 58. In *Springfield, etc., Ins. Co. v. Peck*, 102 Ill. 265, Scott, J., said: "Where the wife in her bill for divorce alleges the husband is about to place her property beyond the jurisdiction of the court to control it, a court of equity has always assumed, by temporary injunction, to preserve the property within its control, that it may be charged by a decree for alimony, should a divorce

be granted. No reason is perceived why the same thing may not be done where the wife only asks for separate maintenance."

35. *Wharton v. Wharton*, 57 Iowa, 696, 11 N. E. 638.

36. *Stewart v. Stewart* (Md. 1907), 66 Atl. 16.

37. *Lyon v. Lyon*, 102 Ga. 453, 31 S. E. 34, 42 L. R. A. 194, 66 Am. St. Rep. 189.

equitable ground for the issuance of the writ is shown.³⁸ And in a suit for divorce by a wife against her husband, she cannot have an injunction to restrain him from selling or encumbering his property where her bill or petition contains no allegation or prayer for alimony or for other relief to justify any decree disposing of such property.³⁹ And a wife will not be allowed to restrain her husband from collecting his choses in action, pending a suit for divorce, unless it is clear that the fund will be put in peril by coming into his hands.⁴⁰ And if an injunction is broader than is necessary to prevent the husband from wasting his property, and restrains him from using his property for the necessary support of himself and children, or from carrying on his ordinary business, it will be dissolved, but with leave to the wife to renew her application for an injunction on an amended bill.⁴¹ And instead of directing that the husband be perpetually enjoined from selling his property and be imprisoned until he give bond for the payment of alimony, the decree should make the alimony a lien upon his realty, to be secured by mortgage, and sale by him to be enjoined until the mortgage is completed.⁴²

§ 970a. **Same subject; statute construed.**—A statute providing that at any time during a suit for divorce the wife may, for the preservation of her rights, require an inventory and an appraisalment to be made of both real and personal estate which are

38. *Melvin v. Melvin*, 129 Ga. 42, 58 S. E. 474; *Smith v. Smith*, 51 S. C. 379, 29 S. E. 227.

A denial of the allegations under oath, where the husband is not in default in payment of the alimony, is sufficient to justify the refusal of an injunction. *Carter v. Carter* [1896], P. 35, 65 L. J. P. D. & A. N. S. 48.

In Oklahoma the plaintiff need not allege in her complaint the facts showing her right to an injunction. *Uhl v. Irwin*, 3 Okla. 388, 41 Pac. 376.

39. *Handlan v. Handlan*, 37 W.

Va. 486, 16 S. E. 597. *A re exeat* against the husband and an injunction to restrain from disposing of his property will not be granted upon the mere apprehension of an abandonment, and the abandonment must be charged in the bill and sustained by proof. *Anshutz v. Anshutz*, 16 N. J. Eq. 162.

40. *Johnson v. Johnson*, 59 Ga. 613.

41. *Rose v. Rose*, 11 Paige (N.Y.), 166.

42. *Errissman v. Errissman*, 25 Ill. 136; *Draper v. Draper*, 68 Ill. 17.

42a. *Tex. Rev. St.* 1895, § 2984.

in the possession of her husband, and an injunction restraining him from disposing of any part thereof in any manner, is construed as meaning that upon averment of the plaintiff in her petition that the defendant, during the progress of the suit is likely to dispose of the community property, then it becomes the duty of the trial court to issue its restraining order preventing such disposition.⁴³

§ 971. **Jurisdiction of alimony.**—The jurisdiction of a court of equity to decree alimony or separate maintenance in favor of the wife is not inherent or original, but is incidental to her application to be allowed to live apart from him on the ground of his cruelty or adultery.⁴⁴ Where a husband applies to a court of equity for the purpose of obtaining possession of the wife's property, the court may compel him to do equity by making a suitable provision out of it for her maintenance; but where the estate is legal, and he is in absolute possession by virtue of the marriage, a court has no jurisdiction to decree any equitable settlement for the wife out of the property.⁴⁵ On a bill by a wife for separate maintenance, she is not entitled to restrain her husband from interfering with property acquired by her since the adoption of the Maryland Code of 1860, where it is not clearly alleged that he has attempted to collect the rents of the property, nor charged that she is in danger of irreparable injury from his acts.⁴⁶ In such a case, as her main purpose to secure a separate maintenance out of the rents and profits is beyond the equitable jurisdiction of the court, the incidental injunctive remedy cannot be allowed.⁴⁷

§ 972. **Wife's bad faith.**—In New Hampshire, where the court has a discretionary power to grant injunctions when necessary to prevent fraud and injustice, a husband will not be restrained from

43. *Turner v. Turner* (Tex. Civ. App 1907), 105 S. W. 237.

44. *Helms v. Franciscus*, 2 Bland (Md.), 568; *Jamison v. Jamison*, 4 Md. Ch. 294; *Ball v. Montgomery*, 2 Ves. 195; *Nicholls v. Danvers*, 2 Vern. 671; *Gilchrist v. Cator*, 1 DeG. & S. 188.

45. *Hall v. Hall*, 4 Md. Ch. 283;

Mann v. Higgins, 7 Gill (Md.), 266. And see *Schindel v. Schindel*, 12 Md. 294; *Wiles v. Wiles*, 3 Md. 8.

46. *Wagoner v. Wagoner*, 77 Md. 189. And see *Binney's Case*, 2 Bland (Md.), 104; *Peacock v. Pembroke*, 4 Md. 280.

47. *Spear v. Orendorf*, 26 Md. 43.

taking his child when the mother has for six months kept it fraudulently concealed, for such an exercise of discretion would tend to promote rather than prevent fraud and injustice.⁴⁸ Where a wife filed her bill against a purchaser at sheriff's sale of her husband's property, and from whom she and her husband had since rented, to enjoin him from dispossessing them on the ground that the property was hers, and her claim rested on a voluntary conveyance from her husband made for the purpose of defrauding his creditors after the debt under which the sale took place was contracted, the injunction was refused on the ground that she did not come into court with clean hands.⁴⁹ Where a husband obtains an absolute divorce from his wife on the ground that she had a husband living at the time she married him, he is entitled to enjoin a judgment for alimony obtained by her in an action for separation, since having never sustained the legal relation of wife to him, she ought not to have any alimony based upon that relation.⁵⁰

§ 973. **Husband's rights.**—Specific performance of an antenuptial agreement for the use of land may be enforced in favor of a husband against his wife and an injunction granted as auxiliary to such performance. Thus, where it was agreed before marriage that if he would carry on her farm, she would contribute the products to the support of the family, and relying on the agreement he made extensive improvements at his own expense, it was held that he could enjoin her grantee of the farm, having notice of the agreement, from recovering the farm, under the landlord and tenant act, and could also compel her to permit him to occupy the farm in accordance with the agreement.⁵¹ But one who became a debtor to a woman before her marriage cannot enjoin the collection of the debt at the suit of husband and wife, for payment of the debt would protect him against any future claim by a trustee under the antenuptial contract, who had not interfered to prevent the collection of the debt of the husband.⁵²

48. *Higgins v. Higgins*, 57 N. H. 224.

51. *Stratton v. Stratton*, 58 N. H.

49. *May v. Huntington*, 66 Ga. 473.

208.

52. *Hill v. Garman*, 2 Del. Ch. 273.

50. *Scurlock v. Scurlock*, 92 Tenn. 629, 22 S. W. 858.

CHAPTER XXXIV.

RELATING TO CREDITORS AND DEBTORS.

- SECTION 974.** Fraudulent transfers by debtors—Parties.
 975. Enjoining assignments for creditors—Preferences.
 976. Fraudulent chattel mortgages.
 977. Railroad creditors.
 978. Attaching creditors.
 979. Judgment creditor's right of selection.
 980. Wife's creditor's bill.
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 985. Debtors in bankruptcy—State jurisdiction.
 986. Same subject—Federal jurisdiction.
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 987a. Same subject—Act of 1898.
 987b. Same subject—Power of referee.
 987c. Same subject—Right of appeal.
 988. Insolvent corporation—Maritime liens.
 989. Creditor's action against insolvent in another State, etc.
 989a. Injunction as excusing failure to sue stockholders.
 989b. Injunction granted at chambers.

Section 974. Fraudulent transfers by debtors; parties.—A court of equity may grant an injunction restraining a debtor from alienating his property where it appears that he intends or is about to transfer it with intent to defraud his creditors, and in many States such relief is especially provided for by statute in such cases.¹ And where the relief sought in equity is to set aside a

1. Rohrer v. Babcock, 114 Cal. 124, 45 Pac. 1054; Winans v. Reidler, 6 Okla. 603, 52 Pac. 405. See the statutes of the various States.

Where there is an adequate remedy at law by attachment an injunction will not be granted. Winans v. Beidler, 6 Okla. 603, 52

Pac. 405. See, also, Carstarphen Warehouse Co. v. Fried, 124 Ga. 544, 52 S. E. 598; Petty v. Dunlap Hardware Co., 99 Ga. 300, 25 S. E. 697.

If it does not appear that the debtor has done or intends to do any act in respect to the property which will injuriously affect the rights of a

fraudulent transfer of goods and chattels, made to hinder and defraud creditors, an injunction is often useful as ancillary to that relief. In such cases, the difficulty of tracing out and identifying the goods, and the multiplicity of suits necessary to get possession of them, makes it a case for a court of equity to interfere by injunction.² So a sale under a deed of trust, if made to defraud creditors, may be enjoined and set aside, and a judgment creditor may be permitted to redeem the land from the lien.³ But creditors whose debts are distinct, and arise out of different transactions cannot be enjoined by the debtor from bringing separate suits in order to avoid multiplicity of suits.⁴ And an assignee in bankruptcy cannot maintain a suit to set aside a void sale of his property by the bankrupt and to enjoin the purchaser from prosecuting an action of trespass in the State court against attaching creditors of the bankrupt for seizing the goods sold, where the property has already come into the possession of the assignee and he is not a party to the proceedings of the State court.⁵ And a creditor's bill, in aid of which an injunction has been allowed, should be dismissed where no assets either legal or equitable are discovered

plaintiff in case he recovers a judgment, an injunction will not be granted. *Clark v. Herbert Booth King & B. P. Co.*, 20 App. Div. (N. Y.) 405, 57 N. Y. Supp. 975.

The decree on a bill in aid of execution should not enjoin alienation and provide for the sale of land that is clearly the debtor's homestead. *Gasser v. Crittenden*, 140 Mich. 301, 103 N. W. 601.

2. *Hyde v. Ellery*, 18 Md. 496. And see *Lucas v. McBlair*, 12 Gill. & J. (Md.) 1, 12.

In a case in Georgia it is decided that whatever may be the rights of a plaintiff in error upon the assumption that, as a *bona fide* creditor of her deceased sister, she obtained from the latter's executor and sole heir a deed to the land in controversy, in part settlement of the debt

alleged to be due her by the deceased, yet where there is evidence warranting the judge in finding that no such indebtedness ever really existed, and that consequently the deed was not *bona fide*, but fraudulent, there is no abuse of discretion in granting an injunction or in appointing receivers. *Brown v. Stanley*, 105 Ga. 469, 30 S. E. 656.

Sufficiency of pleading.—

Where the complaint in an action to set aside a transfer and for an injunction merely alleges that the grantee will transfer the property without any allegation of facts to support it, it is insufficient. *Rockford Watch Co. v. Rumpf*, 12 Wash. 647, 42 Pac. 213.

3. *Findley v. Findley*, 93 Mo. 493.

4. Sections 538, 539, *ante*.

5. *Main v. Bromley*, 10 Biss. 199.

which can be applied in satisfaction of the judgment.⁶ Again, in a creditors' bill to reach chattels in the hands of a fraudulent vendee, and to enjoin their disposition, danger of irreparable loss is not shown by the insolvency of the debtor, but that of the fraudulent vendee should also appear to sustain an injunction.⁷ In a suit by creditors of an insolvent to enjoin sales under fraudulent attachments, the insolvent debtor is a necessary party, and the court may, in its discretion, refuse to dissolve the injunction on the filing of answers fully denying the allegation of the bill, if it appears that greater injury may be caused to complainant by its dissolution than to defendant by its continuance till final hearing.⁸

6. *Pond v. Harwood*, 139 N. Y. 111, 34 N. E. 768.

7. *Fuller v. Cason*, 26 Fla. 476, 7 So. 870.

8. *Planters', etc., Bank v. Lauchheimer*, 102 Ala. 454, 14 So. 776, per Haralson, J.: "The bill in this case contains all the necessary averments to give it equity. It is not distinguishable in principle from the case of *Cartwright v. Bamberger*, 90 Ala. 405, 8 So. 264, where the merits of a bill of this character are fully discussed and passed on, and we deem it unnecessary to repeat here what was said there. See, also, *Bamberger v. Voorhees* (Ala.), 13 So. 305. There is no merit in the special plea filed, that the names of the individuals composing the several complainant firms were not properly set out in the bill. In each instance the names of the individuals composing the respective firms were given, and in a manner fully meeting the requirements of the rules of chancery pleading. *Reid v. McLeod*, 20 Ala. 577; *Ortez v. Jewett*, 23 Ala. 662; *Couch v. Atkinson*, 32 Ala. 633; *Lanford v. Patton*, 44 Ala. 584; *Sims v. Jacobson*, 51 Ala. 186; *Moore v.*

Watts, 81 Ala. 265, 2 So. 278; *Foreman v. Weil*, 98 Ala. 495, 12 So. 815. The answers very fully denied the allegations on which the equities of the bill rested; but there were several *ex parte* affidavits read on the trial of the motion, without objection, in support of the allegations of the bill. Whether they were properly admissible or not, if they had been objected to, it is unnecessary to decide. We are not satisfied that the chancellor erred in denying the motion to dissolve. We apprehend he chose the wiser course in not granting the motion. We have repeatedly held that on a motion to dissolve an injunction, when the answer contains a full and complete denial of the material allegations of the bill, the court is invested with wide discretion in passing on the question, in the exercise of which it will consider and balance the probable resulting damages to the respective parties, and if it appear that greater injury may thereby result to the complainant than to the defendant, from continuing the writ until the final hearing, it will be retained. Such seems to have been the case here. *Harrison*

§ 975. Enjoining assignments for creditors; preferences.—

Where, in proceedings on motion for an injunction and a receiver by general creditors of an insolvent against his assignee and preferred creditors, it appears that a final judgment setting aside the assignment and preferences is probable, and where it also appears that the assignee is a bank president, and that after he was informed of the intention to assign to him the assignment was held back to enable the insolvent firm to transfer to the bank its book accounts, amounting, with the preferences, to more than one-third of the firm's assets, a receiver should be appointed and defendants enjoined from proceeding under the assignment.⁹ The remedy at law by action of replevin or trover is adequate for the recovery of goods which the consignee had fraudulently transferred to his assignee for the benefit of creditors, and injunction will not lie to restrain their sale; but where such goods, or any part of them, have been sold, injunction will lie to restrain the distribution of the proceeds among creditors, replevin and trover being inadequate in such case for plaintiff's redress.¹⁰ A New Jersey corporation, not forbidden by its charter to prefer creditors, may confess judgment by way of preference in a State where that method of

v. Yerby, 87 Ala. 189, 6 So. 3; Kinney v. Ensminger, 87 Ala. 341, 6 So. 72; Whitley v. Lumber Co., 89 Ala. 497, 7 So. 810. By a singular omission the alleged insolvent, fraudulent debtor, D. G. May, was not made a party to the bill. He was a necessary party, and the cause cannot proceed without making him one. Affirmed."

9. People's Bank v. Fancher, 21 N. Y. Supp. 545. And see Babcock v. Jones, 17 N. Y. Supp. 68; Abegg v. Bishop, 20 N. Y. Supp. 819. And as to the appointment of a receiver, see Kitchen v. Lowery, 127 N. Y. 43, 27 N. E. 357. Where an injunction at the suit of creditors, to prevent the entry of a default judgment by a father against

his insolvent son, and alleged to be collusive, was dissolved on the affidavit of the son, and judgment was rendered and execution levied immediately. It was held that the son procured his goods to be taken on legal process within the meaning of the Bankrupt Act, and that the assignee in bankruptcy could maintain a suit in equity to have the levy declared void as a fraud upon the Bankrupt Act. Rogers v. Palmer, 102 U. S. 263, 26 L. Ed. 164. And see Hoover v. Wise, 91 U. S. 308, 23 L. Ed. 392; Wilson v. City Bank, 17 Wall. 473, 21 L. Ed. 723; Little v. Alexander, 21 Wall. 500, 22 L. Ed. 625.

10. McDonald v. Bayne, 12 N. Y. Supp. 772.

preference is permitted, in spite of the New Jersey law forbidding preference by judgment confessed. And the fact that a sale by receivers would be better for all the creditors of a corporation, is not ground to enjoin the execution against it on a lawful judgment.¹²

§ 976. **Fraudulent chattel mortgages.**—Where a debtor has fraudulently mortgaged his chattels a creditors' bill may be maintained and an injunction granted in aid of it, the remedy at law by seizure under execution being inadequate by reason of possible embarrassment in giving the sheriff an indemnity bond and the liability to a subsequent action by the mortgagee.¹³

12. Appeal of Keystone, etc., Co., 161 Pa. St. 17, 28 Atl. 1003, per Fell, J.: "No actual fraud is alleged, and the claim that the judgment is legally fraudulent is based entirely upon the fact that it works a preference in a manner forbidden by the statute of New Jersey. The New Jersey Act does not make unlawful the preference of a creditor by an insolvent corporation except when effected by means of a confessed judgment. *Wilkinson v. Bauerle*, 41 N. J. Eq. 635, 7 Atl. 514; *Vail v. Jameson*, 41 N. J. Eq. 648, 7 Atl. 520. No disability to make a preference is imposed upon this corporation by its charter, and the prohibition by a general enactment can have no extraterritorial effect. Not being forbidden by the organic law of the corporation, the legality of the act must depend upon the law of the State where it is done. In Pennsylvania, an insolvent corporation may prefer a creditor by a confession of judgment. *Banking Co. v. Fuller*, 110 Pa. St. 156, 1 Atl. 731. The confession of judgment to the appellant being lawful, the only remaining rea-

son presented by the petition for interfering with the writ of execution is that a sale can be more advantageously conducted in the interests of all the creditors by the receivers. This is not a sufficient reason. The appellant is pursuing the regular and orderly course for the collection of a judgment lawfully obtained for a debt admittedly due. This is its right. The interest of other creditors may be affected thereby, but until it is shown that their rights are violated, no one has a standing to challenge the appellant's right to use the means provided by law for the enforcement of its claim."

13. *Gullickson v. Madsen*, 87 Wis. 19, 57 N. W. 965, per Pinney, J.: "It was continued that the plaintiff might seize and sell this property on their execution and that their ability to do so amounted to an adequate remedy at law. This in theory may be true, but practically it is not. The creditor in such case encounters at the outset a fraudulent obstruction to his rights placed there to defeat him and under it another claimant to the property appears under an in-

§ 977. **Railroad creditors.**—Under the Minnesota statutes of 1868 and 1878 a railroad with its rolling stock and personal property appertaining to the road is, in favor of mortgagees provided for by those statutes, an entirety, and the remedy of creditors must be against it as an entirety and the mortgagees may have an injunction to prevent a creditor from levying on a part of the property.¹⁴

§ 978. **Attaching creditors.**—Where attaching creditors make a *prima facie* case of fraud and collusion in the entry of a judgment against the debtor, an injunction may be granted impounding the proceeds of a sale on execution issued on such judgment pending the suit to set the judgment aside.¹⁵ So in an action by attaching creditors to have a judgment confessed by their debtor and an assignment by him for the benefit of creditors declared void they are entitled to an injunction *pendente lite* to enjoin the disposition of the proceeds of an execution on such judgment until the rights of the different parties to such proceeds are determined.¹⁶ And in a suit by a judgment creditor to reach the debtor's equitable

instrument ordinarily valid on its face and warns the sheriff not to interfere under peril of an action for damages. He in turn, in the exercise of a just degree of prudence, requires indemnity. This hinders and embarrasses the creditor and indeed he may not be able to give it so that the fraudulent debtor and mortgagee keep time effectually at bay." See, also, *Pierstoff v. Jorge*, 86 Wis. 128, 56 N. W. 735. And see, to the same effect, is *Sweetser v. Silber*, 87 Wis. 102, 58 N. W. 239, where *Gullickson v. Madsen*, *supra*, is followed.

14. *Central Trust Co. v. Moran*, 56 Minn. 188, 57 N. W. 471, per *Gilfillan, C. J.*: "That these mortgagees may maintain a suit for an injunction to prevent acts tending to disperse the property there can be no

doubt. They have no adequate remedy in an action at law. As they are not entitled to the immediate possession of the property, but only to have it kept together, they cannot maintain replevin. To put them to an action for damages would be really requiring them to accept to the extent of the damages recovered, payment of the mortgage before it was due. But a mortgagee may always by injunction restrain any wrongful acts, the effect of which will be to impair his security."

15. *Hendricks v. Morrill*, 6 N. Y. Supp. 254; *Kingsley v. First Nat. Bank*, 31 Hun (N. Y.), 329.

16. *Keller v. Payne*, 16 N. Y. St. Rep. 245; *Bates v. Plonsky*, 28 Hun (N. Y.), 112.

assets an assignee may be restrained by injunction from parting with or disposing of any of the property sought to be reached pending the determination of the rights and equities of the parties.¹⁷ But where bonds of a foreign corporation are in the possession of a trust company for sale and such sale to a third party has been nearly completed a creditor, who has attached such bonds which are worth many times his debt, will not be granted an injunction restraining the trust company from disposing of them where the only ground contained in the papers for asking such relief is the alleged danger that, unless the bonds be kept within the jurisdiction of the court, they may be withdrawn and a judgment so be made valueless as there is no other property of the debtor within the State, and where it is not shown that trust company is doing, or that it threatens to do, any act which would tend to render the creditor's judgment ineffectual.¹⁸ And a debtor has no equity to restrain a creditor from reaching and appropriating the property of an insolvent firm in which the debtor is a partner on the ground that the creditor has obtained an attachment by collusion for the benefit of other creditors, provided he has secured a lien by lawful process; but the debtor must apply to the court issuing the process to prevent any improper use of it by its suitors; and in such a suit in equity the attachment creditors whose claims are distinct are not properly joined as defendants in order to prevent multiplicity of actions.¹⁹

§ 979. **Judgment creditor's right of selection.**—The purchaser from an heir though in possession has no equity to restrain a judgment creditor of the decedent from selling the land purchased by him on the ground that the judgment can be satisfied out of other of the decedent's assets, as the creditor has the right to select what property of his debtor shall be sold under his execution.²⁰

17. *Montreal Bank v. Gleason*, 16 N. Y. St. Rep. 768.

18. *Thompson v. Continental Trust Co.*, 26 Misc. R. (N. Y.) 254, 56 N. Y. Supp. 743.

19. *Fielding v. Lucas*, 87 N. Y. 197.

20. *Latimer v. Ballew*, 41 S. C. 517, 19 S. E. 792, per Gary, J.: "The equity which the plaintiff as-

§ 980. **Wife's creditors' bill.**—Where a wife living apart from her husband has filed a petition in the probate court under the public statutes of Massachusetts, against her husband for support, she cannot maintain a bill in equity, before a decree of the probate court, to hold the husband's property and apply it in satisfaction

serts in her complaint that the sheriff should be enjoined from selling the property because she, the plaintiff, is the purchaser from the devisees of the judgment debtor—is now in possession thereof, and 'that there are other assets of the estate of the said Hewlet Sullivan, both real and personal, amply sufficient to satisfy the said judgment . . . without recourse upon the lots hereinbefore described,' etc., cannot be sustained. The assets are not specially mentioned nor pointed out, nor is it alleged that they are equally available for the payment of the said judgment. It is simply alleged that there are other assets amply sufficient for that purpose. But, waiving all objections to the sufficiency of the allegations of the complaint to set forth the equity for which the plaintiff contends, the relief cannot be granted. It has been settled in this State by an unbroken line of decisions that the relief prayed for by the plaintiff will not be granted. The case of *Wagner v. Pegues*, 10 S. C. 259, uses language as follows: 'The authorities cited abundantly show that a judgment creditor cannot be compelled to resort to any one of several sources to obtain satisfaction, even in favor of purchasers from the debtor subsequent to the judgment. He has the right to select what property shall be sold under his execution;' citing *Longworth v. Screven*, 2 Hill, Law, 298; *McAliley v. Bar-*

ber, 4 S. C. 45; *Moore v. Wright*, 14 Rich. Eq. 132. The case of *McAliley v. Barber*, 4 S. C. 48, in commenting on the case of *Moore v. Wright*, 14 Rich. Eq. 132, says: 'That case holds distinctly that a purchaser under partition among distributees has no equity to restrain a judgment creditor of the ancestor of the distributees from enforcing such judgment against any portion of the estate bound by such judgment on the mere ground that it can be satisfied out of other assets, without prejudice to the plaintiff's right, which would otherwise be defeated, and that an allegation that the party stood by and did nothing to prevent this sale did not give rise to such an equity. The judgment creditor has the right to select as to what property of the judgment debtor shall be sold under his execution. *Longworth v. Screven*, 2 Hill, Law, 298. Unless, therefore, there is a general equity between the parties, or such an abuse of the right of selection as shall amount to a fraud on the right of third persons, that legal right cannot be restrained on equitable grounds.' Chancellor Carroll, in denying the injunction on circuit in the case of *Moore v. Wright*, says: 'It seems only just to require that those who insist on sufficiency of remedy as a means of payment should be obliged to take the risk and delay of enforcing it on themselves. *Aldrich v. Cooper*, 2 White & T. Lead. Cas. Eq. (Am.

of such decree when rendered, as a court of equity cannot decide whether she is living apart from her husband for justifiable reasons; and before such decree she is not a creditor of the husband, within the meaning of the statute providing for creditors' bills.²¹

Notes), 276.' At the end of the notes to *Aldrich v. Cooper*, reported in *White & Tudor's Leading Cases in Equity* (volume 2, pt. 1, p. 238), the following language is used: 'Delay may be often more injurious to the creditor than beneficial to the debtor, and applications to the discretion of a court founded on special equities necessarily tend to delay, whether they are acted on or rejected. On the whole, it would seem that the course which the Supreme Court of Pennsylvania have adopted in holding that those who are liable in property or person for the payment of debts must pay in the first instance, and then look for indemnity afterwards, is more truly equitable in the long run for all parties than any other, and that any good which may result from deviating from it in particular instances will be more than counterbalanced by the injury resulting from its application in general.' The case of *Longworth v. Screven*, 2 Hill, Law, 298, holds that 'a plaintiff having a judgment against several for the same demand may show partiality by levying his execution on the goods of either. Where a defendant has put away his property bound by execution in the hands of several persons, the plaintiff may select the one who shall suffer.'"

21. *Willard v. Briggs*, 161 Mass. 53, 36 N. E. 687, per Field, C. J.: "This is a bill in equity by a wife to reach and apply certain property

of her husband which, it is alleged, cannot be attached or taken on execution in a suit at law. The wife has filed a petition against her husband in the Probate Court under Pub. St., ch. 147, § 33, and an attachment of his property has been ordered by that court, but no property has been found which can be attached. No decree has been rendered under this petition in favor of the wife. The bill was filed for the purpose of reaching certain mortgages and mortgage notes alleged to belong to the husband, and of holding them until the wife can obtain, in the Probate Court, a decree that the husband should pay her a certain sum or sums of money for her support, and then of applying these mortgages and mortgage notes in some way to the satisfaction of such a decree. It is not necessary to decide whether, if such a decree had been rendered before the bill was filed, the plaintiff could have the assistance of a court of equity in enforcing it, or whether her sole remedy would be in the Probate Court, or on appeal in this court, as the Supreme Court of Probate. Pub. St., ch. 147, § 35; *Downs v. Flanders*, 150 Mass. 92, 22 N. E. 585. A court of equity cannot decide whether she is living apart from her husband for justifiable cause, and is entitled to be supported by him, under Pub. St., ch. 147, § 33. Certainly, until this is decided by the Probate Court in her favor, and a decree en-

§ 981. **General creditors without lien.**—Mere general creditors of an insolvent firm, having no lien by attachment or otherwise, cannot maintain an action to set aside, as fraudulent towards creditors, judgments entered against the debtors on offers to allow judgments.²² And judgment creditors cannot enjoin the sale of their debtor's property under void chattel mortgages, in the absence of proof of their levy on such property.²³ And where money has been awarded a debtor in insolvency proceedings, it is held that an injunction against the disposal of such money will not be granted in an action by a general creditor on the ground that the debtor is insolvent and payment of the debt cannot be otherwise obtained.²⁴ And it has been decided that an injunction will not be granted upon the application of a general creditor to impound the assets of his debtor, which have come into the hands of other creditors, until the general creditor can file an involuntary bankruptcy under the National Bankruptcy Law.²⁵ And in New York it is decided that in a common law action brought by a general creditor to recover a sum of money only, he cannot, upon allegations that his defendant debtor fraudulently disposed of his merchandise in bulk to the other defendant with a view to hinder,

tered in her behalf for a definite sum of money, there is no debt due to her from her husband, and she is not a creditor, within the meaning of Pub. St., ch. 151, § 2, cl. 11, or Id., § 3. Decree dismissing the bill affirmed."

22. *Frothingham v. Hodenpyl*, 135 N. Y. 630, 32 N. E. 240, per Gray, J.: "This action differs only from that of *Watch Co. v. Hodenpyl*, 135 N. Y. 430, 32 N. E. 239; in the one respect that here the plaintiffs' firm are general creditors of the firm of Stern & Stern, who demanded similar equitable relief against certain judgment creditors of that firm. It is sufficient to say that, as creditors at large, they have no right to maintain any such action, or to question their debtor's acts. Such right is gained when the

claim of the creditor is established by a judgment and execution returned unsatisfied. Until then, he cannot come into a court of equity for assistance to prevent or redress fraud alleged. *Wiggins v. Armstrong*, 2 Johns. Ch. 144; *Dunlevy v. Tallmadge*, 32 N. Y. 457. The general term have correctly decided the case below, and I see no ground upon which this appeal is maintainable. The judgment appealed from should be affirmed, with costs. All concur."

23. *Glorieux v. Schwartz*, 53 N. J. Eq. 231, 28 Atl. 470, 34 Atl. 474.

24. *Frederick County Nat. Bank v. Shafer*, 87 Md. 54, 39 Atl. 320.

25. *Victor v. Lewis*, 24 Misc. R. (N. Y.) 515, 53 N. Y. Supp. 944, 38 App. Div. (N. Y.) 316, 57 N. Y. Supp. 16.

delay and defraud the debtor's creditors, that that defendant purchased with a like intent, and that the debtor has left the State of New York and cannot be found, procure under section 603 of the Code of Civil Procedure, a continuance of a temporary injunction restraining the said transferee from disposing of the property transferred as that section of the Code applies only to equitable actions or to actions triable by the court.²⁶

§ 982. **Sale of pledged commercial paper.**—While the pledgee himself cannot, without express authority, sell commercial paper pledged as collateral, either at private or public sale, yet a court of equity may, under special circumstances, order a judicial sale of it, and may exercise its equitable jurisdiction even where the pledgee has a right to sell the property.²⁷ And a debtor who has

26. *Veit v. Collins*, 39 Misc. R. (N. Y.) 39, 78 N. Y. Supp. 763.

27. *Cleghorn v. Minnesota Trust Co.*, 57 Minn. 341, 59 N. W. 320, per Mitchell, J.: "The rule of law undoubtedly is that, without express agreement to the contrary, commercial paper pledged as collateral cannot be sold by the pledgee at either public or private sale. The reason for this is that such paper has no market value, and consequently, if exposed for sale, would be liable to be sacrificed. But the question of the right of a pledgee to come into court, and have a decree for a judicial sale of the pledge, is an entirely different question. This was always a well-recognized head of equitable jurisdiction, even where the pledgee or mortgagee had a right to sell the property. The sale being under the direction and control of the court, it has the power, as it is its duty, to see to it that the property shall not be sacrificed; and hence such a sale is not liable to the evils or abuses to which

a sale by a party himself is subject. Just when and under what circumstances a court would or should order a sale of commercial paper or other collateral of similar character it is not necessary to consider. The right, to do so, at least under special circumstances, is undoubted. Pom. Eq., §§ 164, 1231; Daniels, Neg. Inst., § 833; Jones, Pledges, § 655; *Donohoe v. Gamble*, 38 Cal. 340. In the present case the collateral note had some four years to run before it matured. The pledgor had become insolvent, and had made a general assignment for the benefit of all his creditors. The plaintiff had proved his claim in the insolvency proceedings, and had claimed, as he might, the right to participate in the benefits of the assignment in case the pledged property proved insufficient to satisfy his claim in full. Hence, unless the collateral should be sold, the final settlement of the estate of the insolvent would be delayed.

pledged collateral with his creditor may in some cases be enjoined from endeavoring to obtain possession of the same.²⁸

§ 983. **Exemption of pension property.**—Where real estate purchased with pension money of the debtor is exempt from execution, he can maintain a suit in equity to restrain the collection of a judgment out of it, though he has a remedy at law by motion and in such a case resort may be had to a court of equity, in order to prevent a cloud upon the debtor's title.²⁹

§ 984. **Set-offs.**—Though the mere existence of mutual and independent demands between creditor and debtor does not authorize a court of equity to set them off against each other, yet where the judgment creditor is insolvent, and the debtor has just claims against him, a court of equity has jurisdiction to restrain

28. *Barth v. Union Nat. Bank*, 67 Ill. App. 131.

29. *Buffum v. Forster*, 59 N. Y. St. Rep. 833, per Haight, J.: "It must now be regarded as settled that not only pension money, but also property purchased by the pensioner with such money, which is necessary or convenient for the support and maintenance of himself and family, is exempt. Code Civ. Proc., § 1393; *Stockwell v. Nat. Bank*, 36 Hun (N. Y.), 583; *Yates Co. Nat. Bank v. Carpenter*, 119 N. Y. 550, 30 St. Rep. 121. It is contended, however, that this action cannot be maintained, for the reason that the plaintiff had an adequate remedy at law; that he could have moved in the action in which the judgment was obtained to set aside the levy and so enjoin the judgment creditor from taking any proceedings to enforce the execution by the sale of the real estate. Possibly this could be done. It was the practice adopted in *Yates Co. Nat. Bank v. Carpenter*, *supra*, but in that

case this question was not raised or considered. We shall, however, for the purpose of the argument, assume that the plaintiff could have obtained relief by a motion. We are, however, of the opinion that he was not bound to do so, and that he may resort to an action in equity for that purpose. The judgment recovered by the defendant Forster against the plaintiff herein is an apparent lien upon the real estate in question. The right of the plaintiff to exemption is dependent upon facts extrinsic of the record in that action. In order to relieve his real estate from the lien of that judgment he must establish as facts that he was a pensioner, and that the real estate was purchased with his pension money. His claim in this regard may be contraverted, and we think he has the right to have this question tried and determined upon common-law evidence, and that he is not bound to have it disposed of in a motion upon *ex parte* affidavits. In *N. Y. & H. Railroad Co. v. Haws*,

the creditor from execution, and direct a set-off.³⁰ In suitable cases, the adjustment of demands by counterclaim or set-off, rather than by independent suit, is favored by the law to avoid circuity of action and injustice.³¹ And according to the weight of authority, the insolvency of the party against whom the set-off is claimed, is a sufficient ground for equitable interference.³² It is held also

56 N. Y. 175, it was held that equity will restrain proceedings upon a verdict, or the collection of a judgment, where it is made to appear by facts of which the party could not avail himself as a defense that the enforcement thereof would be contrary to equity and good conscience; and that the party is not bound to seek his relief by a motion in the original action, but may institute an action for that purpose. If the proceedings under the execution should result, in a sale of the plaintiff's real estate, an apparent cloud would be placed upon the title of the property. Equity is often resorted to to remove clouds upon title, and, if this may be done, see no reason why a court of equity may not also be resorted to for the purpose of preventing the creation of such cloud. *Butler v. Johnson*, 111 N. Y. 204, 218, 18 N. E. 643, 19 St. Rep. 85."

30. *O'Neill v. Perryman*, 102 Ala. 522, 14 So. 898, per Haralson, J.: "In this case, the bill sets up the insolvency of the plaintiff in the judgment, and that complainant's demand against him would be lost, if he is allowed to enforce said judgment. This is recognized as a distinct equitable ground, entitling the complainant, the defendant in the judgment, to relief. *Tate v. Evans*, 54 Ala. 17; *Martin v. Mohr*, 56 Ala. 221; *Wood v. Steele*, 65 Ala. 436; *Watts v. Sayre*, 76 Ala. 399; *Glover v. Hembree*, 82

Ala. 325, 8 So. 251; 1 Pom. Eq. Jur., § 189. It is also held that when a cross demand, rightfully held, cannot be made available as a set-off, at law, it may be established, as such, in equity, on allegation and proof of the insolvency of the plaintiff in the judgment. *Campbell v. Conner*, 78 Ala. 211; *Farris v. Houston*, 78 Ala. 257. When the appellant, defendant at the suit of complainant in the law court, interposed his plea of recoupment or set-off against plaintiff's demand, the plaintiff could not reply against that plea, a set-off of the claims he files this bill to protect. A set-off against a set-off cannot be pleaded at law. *Hill v. Roberts*, 86 Ala. 526, 527, 6 So. 39; *Whitworth v. Thomas*, 83 Ala. 310, 3 So. 781. The bill was well filed, and the demurrer to it was properly overruled. See, also, §§ 619, 620, *ante*.

31. *North Chicago Mill Co. v. Ore & Steel Co.*, 152 U. S. 596, 14 S. Ct. 710, 38 L. Ed. 565; *Florida R. Co. v. Smith*, 21 Wall. 255, 22 L. Ed. 513.

32. *United States*.—*Leeds v. Marine Ins. Co.*, 6 Wheat. 565, 5 L. Ed. 332; *Schuler v. Israel*, 120 U. S. 506, 30 L. Ed. 707, 7 Sup. Ct. 648.

Alabama.—*Wray v. Furniss*, 27 Ala. 471; *Tuscumbia, etc., R. Co. v. Rhodes*, 8 Ala. 206.

Connecticut.—*Pond v. Smith*, 4 Conn. 297, 302.

Illinois.—*Doane v. Walker*, 101 Ill.

in Illinois and some other States, that the non-residence of the party against whom the set-off is asserted is good ground for equitable relief.³³ And a garnishee, who has a right of set-off in equity against the principal debtor, may exercise it against a garnisheeing creditor of the debtor, on the ground that the debtor is insolvent and a non-resident of the State in which the garnishee resides and the garnishment proceedings are had.³⁴

§ 985. **Debtors in bankruptcy; State jurisdiction.**—A State court has jurisdiction of a bill filed by an assignee in bankruptcy to set aside fraudulent transfers of his property by the bankrupt, but where a claim belonging to the bankrupt has been fraudulently transferred and the transferee has obtained judgment on it which he is about to collect, the court should not enjoin the collection but should enjoin the transferee from receiving the money, and direct the officer charged with the execution to pay it over to the register in bankruptcy.³⁵ But a trustee is not liable to an action in a State court as for trespass, trover or conversion when he follows the order

628; *Chicago, etc., R. Co. v. Field*, 86 Ill. 270; *Hall v. Kimball*, 77 Ill. 161; *Raleigh v. Raleigh*, 35 Ill. 512; *Hinricksen v. Reinback*, 27 Ill. 295.

Indiana.—*Werlschner v. Sells*, 87 Ind. 71; *Keightley v. Walls*, 27 Ind. 384.

Iowa.—*Davis v. Milburn*, 3 Iowa, 163.

Kentucky.—*Robbins v. Holley*, 1 T. B. Mon. 194.

Minnesota.—*Laybourn v. Seymour*, 53 Minn. 105, 54 N. W. 941.

New York.—*Richards v. La Tourette*, 119 N. Y. 54, 23 N. E. 531; *Rothchild v. Mack*, 115 N. Y. 1, 21 N. E. 726; *Gay v. Gay*, 10 Paige, 369; *Lindsay v. Jackson*, 2 Paige, 581.

33. *Quick v. Lemon*, 105 Ill. 578; *Taylor v. Stowell*, 4 Met. (Ky.) 175; *Forbes v. Cooper*, 88 Ky. 285; *Robbins v. Holley*, 1 T. B. Mon. 191; *Ed-*

munson v. Baxter, 4 Hayw. (Tenn.) 112; *Davis v. Milburn*, 3 Iowa, 163.

34. *North Chicago Mill Co. v. Ore & Steel Co.*, 152 U. S. 596, 14 S. Ct. 710, 38 L. Ed. 565.

35. *Barnard v. Davis*, 54 Ala. 565, per Stone, J.: "The fraud charged in the present bill, if sustained, is a fraud on the common and statute laws of the State of Alabama. Such questions are clearly cognizable before the proper State tribunals. *Ward v. Jenkins*, 10 Met. (Mass.) 583; *Boone v. Hall*, 7 Bush (Ky.), 66; *Cogdell v. Exum*, 69 N. C. 464; *Kemerer v. Tool*, 12 Bank. Reg. 334; *Jordan v. Downey*, 12 Bank. Reg. 427. But see *Reeser v. Johnson*, 76 Pa. St. 313, where a creditor who had obtained judgment before proceedings in bankruptcy was not enjoined from proceeding to execution. And see *Rohrer's Appeal*, 62 Pa. St. 498; *Feh-*

of the Federal court in disposing of the property in his possession and the latter court is held to have jurisdiction to grant an injunction restraining the prosecution of such an action in a State court.³⁶ And an injunction will not be granted to restrain the enforcement of a judgment when it appears that the court in which the judgment was obtained had no jurisdiction of the action in which complainant's creditor obtained the judgment, because at the time it was instituted the complainant was in bankruptcy; for in such a case complainant's remedy at law is complete either by affidavit of illegality or by action of trespass.³⁷ And a creditor of a lessee of premises cannot oust by an *ex parte* State court injunction one occupying the premises by permission of a United States marshal who had the right to occupy under an execution.³⁸ And it has been decided that a bankrupt, after litigating during five years an action in a State court to a final decree, cannot have an injunction in the bankruptcy court against the execution of such decree, on the ground that the assignee in bankruptcy was joined as a party to such action without leave of the bankruptcy court, and such leave was essential.³⁹ In this connection it has been decided that where a State court has appointed a receiver in supplementary proceedings an injunction may be granted restraining one indebted to the judgment creditor from paying such debt to any one except the receiver.⁴⁰

§ 986. **Same subject; Federal jurisdiction.**—In the earlier cases it is decided that the Federal District Courts, sitting in

ley v. Barr, 66 Pa. St. 196; Keller v. Denmead, 68 Pa. St. 449.

36. In re Mertens, 131 Fed. 507, wherein Ray, J., said: "If the authority and jurisdiction of this court in bankruptcy is paramount and superior to that of the State court, and it has jurisdiction to determine conflicting claims to property forming a part of the estate of the bankrupt at the time the petition in bankruptcy is filed, . . . then this action in the State court should not be permitted to proceed further, for a judg-

ment that either the receiver or the trustee has converted this property would be an adjudication by the State court that this court in bankruptcy had no authority or jurisdiction to direct its officers to take possession of and sell the property."

37. Hart v. Lazaron, 46 Ga. 396.

38. State v. King, 46 La. Ann. 163, 15 So. 283.

39. Price v. Price, 48 Fed. 823.

40. Globe Phosphate Co. v. Pinson, 52 S. C. 185, 29 S. E. 549.

bankruptcy, had power to restrain by injunction the sheriff or a State court from proceeding to sell the property of a voluntary bankrupt under an execution issued out of a State court, upon a judgment obtained prior to the bankruptcy proceedings.⁴¹ And as to judgments rendered pending bankruptcy proceedings, the jurisdiction is undoubted.⁴² It has been held in Louisiana, that proceedings to sell property under a State order of seizure and sale, and after its seizure, are not stayed by the mere commencement of proceedings in bankruptcy in the Federal District Court.⁴³ The Federal District Court had jurisdiction to ascertain and liquidate a judgment lien, and while so doing, to enjoin the judgment creditor from enforcing it by execution out of the State court.⁴⁴ And a landlord may be enjoined from distraining the bankrupt's property for suit.⁴⁵ Where a State court has acquired jurisdiction of a creditor's bill, and has the debtor's assets within its custody in the hands of a receiver, and the debtor is then adjudged a bankrupt, the court will not order the assets to be turned over to the assignee in bankruptcy upon his mere petition; but when the Federal court shall enjoin the complainants in the creditors' bill from proceeding to have their claims adjudicated in the State court, the latter court would then turn over the assets to the assignee to be administered by the bankrupt court.⁴⁶ Where a Federal marshal seized certain property as the property of a bankrupt, and put it into the hands

41. In re Mallory, 1 Sawy. 88. And see Shawhan v. Wherritt, 7 How. 626, 12 L. Ed. 847; Jones v. Leach, 1 Bank. Reg. 165; Pennington v. Sale, 1 Bank. Reg. 157; In re Schnapf, Sup. Bank. Reg. 41; In re Bernstein, Sup. Bank. Reg. 43; Irving v. Hughes, 2 Bank. Reg. 20. And see § 88, *ante*.

42. In re Wallace, 2 Bank. Reg. 54. Parties proceeding after bankruptcy to foreclose a mortgage on the bankrupt's property in a State court, may be enjoined. In re Kerosene Oil Co., 24 Bank. Reg. 164.

43. Chase v. New Orleans Gas Co.,

45 La. Ann. 300, 12 So. 308. And see Goddard v. Weaver, 1 Woods, 257; Switzer v. Heinn, 27 La. Ann. 25.

44. In re Fuller, 4 Bank. Reg. 29. And see Matter of Ghirardelli, 4 Bank. Reg. 42; In re Snedaker, 3 Bank. Reg. 155; Beattie v. Gardner, 4 Bank. Reg. 107; *Ex parte Eames*, 2 Story, 322; Matter of Campbell, Sup. Bank. Reg. 36.

45. Brock v. Terrell, 2 Bank. Reg. 190.

46. Freeman v. Fort, 52 Ga. 371, endorsed in Seligman v. Ferst, 57 Ga. 561.

of the bankruptcy assignee, and in consequence was sued in a State court by a person who claimed it as his own, it was held that the assignee and marshal could maintain a suit in the Federal District Court to set aside the transfer under which the third person claimed the property, and to restrain the further prosecution of the action in the State court.⁴⁷

§ 987. **Same subject.**—Where an assignee in bankruptcy brings a suit in equity under the bankruptcy act of 1867, in the Federal District Court against a receiver appointed by the State court who claims adversely a title to property which is in the receiver's possession, to have the question of such title as between the assignee and receiver determined, he must in order to entitle himself to an injunction *pendente lite* to restrain the receiver from intermeddling with the property show an impending injury which cannot otherwise be prevented.⁴⁸ But where an assignee in bankruptcy of a corporation brought a suit in a Federal court against a State court receiver to set aside as in fraud of the bankruptcy act the transfer of the property of the corporation to such receiver the Federal court enjoined the receiver from executing his trust, and appointed its own receiver to take charge of the property *pendente lite*.⁴⁹

§ 987a. **Same subject; act of 1898.**—Under the provisions of the bankruptcy act⁵⁰ that courts of bankruptcy shall have power to make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of the act, the court may, upon proper application and cause shown, restrain not only the debtor, but any other party, from making any transfer or disposition of any part of the debtor's property or from any interference

47. Kellogg v. Russell, 11 Blatchf. 519. And see Freeman v. Howe, 24 How. (U. S.) 450, 16 L. Ed. 749; Buck v. Colbath, 3 Wall. 334, 342, 18 L. Ed. 257.

48. Beecher v. Bining, 7 Blatchf. 170.

49. Platt v. Archer, 9 Blatchf. 559.

50. Act July 1, 1898, c. 541, § 2,

therewith.⁵¹ The provision of the bankruptcy act of 1898 that⁵² “ A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined ” only authorizes the restraining of suits founded upon claims “ from which a discharge would be a release and unless a claim is provable against a bankrupt estate, it is not discharged, and is not therefore subject to the control of the bankruptcy court.”⁵³

§ 987b. **Same subject; power of referee.**—As to the right of a referee to grant an injunction it is decided where an application has been made for such relief and the parties have submitted the question at issue between them to the referee for disposition that, as the court might have referred it to him in the first instance, this action of the parties must be regarded as an equivalent by which they are bound.⁵⁴ In this connection it has been decided that a referee in bankruptcy has no power to restrain a court or officer of the United States or of a State unless there be a pressing necessity to act, to which a certificate of the clerk is the essential prerequisite.⁵⁵

§ 987c. **Same subject; right of appeal.**—An interlocutory decree of the United States District Court by which an injunction is awarded by that court in the exercise of its jurisdiction as a

cl. 15, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3421].

51. In re Jersey Island Packing Co., 138 Fed. 625, 71 C. C. A. 75, citing Beach v. Macon Grocery Co., 116 Fed. 143, 53 C. C. A. 463. See Blake v. Nesbet, 144 Fed. 279.

52. Section 11 of Bankruptcy Law

(Act July 1, 1898, c. 541, 30 Stat. 549; U. S. Comp. St. 1901, p. 3426).

53. In re New York Tunnel Co. (C. C. A. 1908), 159 Fed. 688.

54. In re Benjamin, 140 Fed. 320.

55. In re Berkowitz, 143 Fed. 598. See, also, In re Siebert, 133 Fed. 781.

bankrupt court is one which is appealable under the Court of Appeals Act⁵⁶ and it is no ground for denying an appeal under the provision of such act that the right of the court below to issue the injunction complained of involves the jurisdiction of that court. In such a case it is declared that if the Circuit Court of Appeals would have jurisdiction from a final decree in the cause, it may entertain jurisdiction of an appeal from a decree granting an interlocutory injunction, although the jurisdiction of the court may be involved.⁵⁷

§ 988. **Insolvent corporation; maritime liens.**—In proceedings in a State court, under statutes of the State, to wind up an insolvent corporation, on its own application in which a receiver has been appointed, such court has no power to restrain proceedings in a United States District Court on libels to enforce maritime liens against vessels of the corporation, where the receiver never took possession of such vessels, and they were seized by the marshal under the libels before the receiver qualified, although he was appointed before the libels were filed, for the doctrine of relation has no application in such a case, as between courts where jurisdiction is not concurrent, the subject matter in litigation is one not being within the cognizance of the other; and the winding-up proceeding gives the State court no jurisdiction *in personam* over libelants, as holders of maritime liens, when the libels were filed.⁵⁸

56. Section 7.

57. *O'Dell v. Boyden* (C. C. A. 1906), 150 Fed. 731.

58. *Moran v. Sturges*, 154 U. S. 256, 38 L. Ed. 981, 14 Sup. Ct. 1022, per Fuller, C. J.: "The proceeding in which, upon petition, the injunction under consideration was granted was a proceeding in insolvency, in the State court, to dissolve and wind up the Schuyler Company, on its own application, under the statutes of New York in that behalf; and if it be conceded that that court could protect its exercise of jurisdiction

over that subject-matter by enjoining creditors from prosecuting suits against the company on petition of the receiver in that suit, and without the bringing of a new suit for that purpose, it does not follow that it had power to grant the injunction in question. If the State court could not restrain proceedings in the district court of the United States, if the jurisdiction of the State court over the libelants had not attached, or if the district court obtained jurisdiction over the vessels in priority to the State court, then this judg-

§ 989. **Creditor's action against insolvent in another State, etc.**—If a creditor, pending an action on his claim in another State against his debtor, also resident in the State in which the creditor resides, sells the claim to a non-resident, both seller and purchaser knowing that the debtor is then insolvent and that the

ment must be reversed. It is a rule of general application that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court. This doctrine has been repeatedly affirmed by this court. *Hagan v. Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Peck v. Jenness*, 7 How. 612, 625, 12 L. Ed. 841; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Ellis v. Davis*, 109 U. S. 485, 498, 3 Sup. Ct. 327, 27 L. Ed. 1006; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390; *Borer v. Chapman*, 119 U. S. 587, 600, 7 Sup. Ct. 342, 30 L. Ed. 532. These cases were cited in *Byers v. McAuley*, 149 U. S. 608, 614, 13 Sup. Ct. 906, 37 L. Ed. 867. But the question in the case at bar arises in respect of the State court and a district court of the United States, whose cognizance of all civil causes of admiralty and maritime jurisdiction is, under the Constitution, and by the ninth section of the Judiciary Act of 1789 (reproduced in section 711, Rev. St.), executive. *New Jersey Steam Nav. Co. v. Merchants' Bank of Boston*, 6 How. 390, 12 L. Ed. 465; *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397; *Id.*, 555, 22 L. Ed. 654; *The Lottawanna*, 21 Wall. 558, 580; 22 L. Ed. 654; *Johnson v. El-*

evator Co., 119 U. S. 388, 397, 7 Sup. Ct. 254, 30 L. Ed. 447; *The J. E. Rumbell*, 148 U. S. 1, 12, 13 Sup. Ct. 498, 37 L. Ed. 345. As said by Mr. Justice Miller: 'It must be taken as the settled law of this court that wherever the district courts of the United States have original cognizance of admiralty causes, by virtue of the act of 1789, that cognizance is exclusive, and no other court, State or national, can exercise it, with the exception, always, of such concurrent remedy as is given by the common law.' *The Hine*, 4 Wall. 568, 18 L. Ed. 451. The act saves to suitors, in all cases, 'the right of a common-law remedy, where the common law is competent to give it;' that is, not a remedy in common-law courts, but a common-law remedy. Suitors are not compelled to seek such remedy, if it exists, nor can they, if entitled, be deprived of their right to proceed in a court of admiralty; and the State courts have no authority to hear and determine a suit *in rem* to enforce a maritime lien. *The Belfast*, 7 Wall. 624, 644, 19 L. Ed. 266; *The Josephine*, 39 N. Y. 19, 27. A statutory proceeding to wind up a corporation is not a common-law remedy, and a maritime lien cannot be enforced by any proceeding at common law. These libellants were entitled to have their causes tried in the court of admiralty, according to the rules and practice of admiralty: and that right

sale is made to obtain a preference, the debtor's assignee in insolvency afterwards appointed cannot recover of the creditor the proceeds of the sale, and an agreement of the creditor made with the purchaser at the time of the sale to pay the expense of col-

could not be taken away from them, nor would the decree or judgment of the State court be pleadable in bar to their libels. If, then, the receiver had first taken actual possession of these vessels, and sold them, such sale would not have cut off maritime liens, and the right to have them enforced; and while it may be true that the State courts, exercising equitable jurisdiction, might undertake, in the distribution of property, to save the rights of holders of maritime liens, yet it is certain that those courts would have no power, by a sale under statute, to destroy their liens, unless they had voluntarily submitted themselves to that jurisdiction.' And see *Providence, etc., Co. v. Hill Mfg. Co.*, 109 U. S. 578, 27 S. Ct. 1038, 27 L. Ed. 1038; *Gaylord v. Railroad Co.*, 6 Biss. 286. As already pointed out, it was held in *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257, that whenever the litigation in the court where the property is first seized has ended, or the possession of such court or its officers is discharged, then other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not. This view is illustrated by many decisions in the district courts, and was applied by Mr. Justice Blatchford (then district judge) in *The Sailor Prince*, 1 Ben. 234. That was a case of a libel by seamen to recover wages against a ship and

freight money, wherein the marshal made return to the process that he had not attached the vessel, but had attached the freight money in the hands of the parties who held it. Prior to the service of process, suit had been brought in the State court against the owners of the vessel, in which warrants of attachment had been issued, under which the sheriff had seized and was holding her when the marshal came to seize her. He had also served copies of the warrants on the parties who held the freight money, with notice that he attached it. But Judge Blatchford held that the seamen had a paramount lien for their wages upon the freight money, and that such lien was to be administered by the court of admiralty by the service of its process. A similar question arose in *The Caroline*, 1 Low. 173, and it was held that it was not a good defense to a petition that freight might be brought into the admiralty court to answer the exigency of suits for mariners' wages and materials, and that the consignee, before the libels were filed, was summoned as trustee or garnishee of the shipowner in a court of common law; that the courts of common law of Massachusetts had no power to adjust maritime liens upon a fund attached under the foreign attachment law of that State, and the consequence of giving priority to such an attachment might be the destruction of the liens; that a court of common law would be bound to

lecting the claim and to make up any deficit therein is collateral merely and does not affect the purchaser's title to the claim or his absolute right to control and prosecute the pending action, and therefore the selling creditor will not be restrained by injunction

guard against this consequence by discharging the supposed trustee, or by waiting till the liens were adjusted; and that the district court might proceed to adjust the liens, and might order the freight to be brought in for that purpose. And see *Clifton v. Foster*, 103 Mass. 233; *Eddy v. O'Hara*, 132 Mass. 56. In *The E. L. Cain*, 45 Fed. 367, the sheriff had attached a tug, and turned it over to a receiver appointed by the State court. After that the marshal, under process upon libels filed for seamen's wages and supplies, seized the vessel; but the district court held that, the tug, 'having been taken possession of by process of a State court, and by that court placed in the custody of the receiver, it could not be held by any process out of this court until discharged by order of the State court.' And *Simonton, J.*, said: 'So, for the present, this court can proceed no further. But the liens set up in this court are maritime liens, which cannot be adjudicated or passed upon in the State court. Over these liens the jurisdiction of this court is exclusive. They will be protected in this court.' The cause was continued until the State court had ordered a sale, or in any other mode released its custody, of the tug. To the same effect, *Brown, J.*, in *The James Roy*, 59 Fed. 784. In *The Elxena*, 53 Fed. 359, section 2186 of the Code of Virginia, providing that the sale of a vessel forfeited by proceedings in a State court for violating the oyster laws of the State

'shall vest in the purchaser a clear and absolute title,' was held by *Hughes, J.*, inoperative to divest maritime liens of innocent parties attaching before the arrest of the vessel, and that the vessel might be subsequently seized in the hands of the purchaser, and subjected to such liens, by proceedings in the admiralty courts. A maritime lien is not divested by a forfeiture for a breach of municipal law (*St. Jago de Cuba*, 9 Wheat. 409, 6 L. Ed. 122); nor by a sale to a *bona fide* purchaser without notice (*The Chusan*, 2 Story, 456); *The Bold Buccleugh*, 3 W. Rob. Adm. 229, 7 Moore, P. C. 267). It is *jus in re*; and 'it has been settled, so long that we know not its beginning, that a suit in the admiralty to enforce and execute a lien is not an action against any particular person to compel him to do or forbear anything, but a claim against all mankind—a suit *in rem*, asserting the claim of the libellant to the thing, as against all the world.' *The Young Mechanic*, 2 Curt. 404, 412; Fed. Cas. No. 18, 180. See, also, *The Rock Island Bridge*, 6 Wall. 213, 18 L. Ed. 753; *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345. We think it entirely clear that, as a State court is without jurisdiction to enforce maritime liens, so it is incapable of displacing them, and therefore, though, under the rule laid down in *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028, the possession by the State court of property subject to such liens will not be dis-

from the prosecution of such action.⁵⁹ And a creditor, who is a citizen and resident of the same State as his debtor, against whom insolvent proceedings have been instituted in such State, is bound by the assignment of the debtor's property in such proceedings, and if he attempts to seize or attach the personal property of the debtor situated in another State, and embraced in the assignment, he may be restrained by injunction by the courts of the State in which he and the debtor reside.⁶⁰ So an injunction will lie to

turbed, yet that court can only deal with the property subject thereto, and when its jurisdiction has determined the admiralty courts may proceed."

59. *Proctor v. National Bank*, 152 Mass. 223, 25 N. E. 81, per Field, C. J.: "When this bill was brought an injunction against the defendant's prosecuting the action in Ohio would have been ineffectual because the defendant had no control over the action. It has been held in *Lawrence v. Batcheller*, 131 Mass. 504, that if the defendant had prosecuted the suit in Ohio to judgment and the judgment had been satisfied out of the funds there garnisheed the plaintiffs could not recover of the defendant the amount of the judgment. It is also settled that if the defendant after *Batcheller and Company* had been adjudged insolvent had retained control of the suit the plaintiffs could have obtained an injunction against the further prosecution by defendant. *Dehon v. Foster*, 4 Allen (Mass.), 545; *Cunningham v. Butler*, 142 Mass. 47; *Cole v. Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 33 L. Ed. 538. If there seems to be any inconsistency in principle between these two classes of cases it arises in part at least from the limitations imposed by the U. S. Constitution upon the

power of the commonwealth to pass laws which relate to bankruptcies and laws which will impair the obligations of contracts and from a want of jurisdiction over citizens of other States. . . . If by a transaction in another State a Massachusetts creditor of a Massachusetts insolvent debtor acquires under the laws of that State an absolute title to property situated there and this title under the laws of that is paramount there to that of the assignee in insolvency, the property or its value cannot under existing laws be recovered here of the assignee. The case at bar falls within the principles declared in *Lawrence v. Batcheller*, 131 Mass. 504. The defendant sold the notes and received the proceeds of the sale in New York before the assignment in insolvency took effect and thereafter retained no control over the suit in Ohio; an injunction against the defendants prosecuting that suit cannot be issued because the Continental Bank of New York has acquired the right to prosecute it for its own benefit; and the proceeds of the sale or of the suit cannot be recovered of the defendant."

60. *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538. See *Kendall v. McClure Coke Co.*, 182 Pa. St. 1, 37 Atl. 823.

restrain a resident of Indiana from prosecuting an attachment against another resident, in the courts of another State in violation of a statute of the former State making it an offense to send a claim against a debtor out of the State for collection in order to evade the exemption laws.⁶¹ But a creditor who is not a citizen or resident of the same State with his debtor may proceed in another State against property there, unaffected by insolvency proceedings in the State of the debtor's residence, if in accordance with the law of such other State.⁶²

§ 989a. Injunction as excusing failure to sue stockholders.—A failure to bring an action against stockholders as required by a Code provision that “No stockholder shall be personally liable for any debt of the corporation not payable within two years from the time it is contracted, nor unless an action for its collection shall be brought against the corporation within two years after the debt becomes due,” is excused when on the appointment of a receiver an injunction was granted restraining all creditors from bringing any suits.⁶³

§ 989b. Injunction granted at chambers.—In a case in South Carolina it is held that where a judge at chambers appointed a receiver for a partnership and enjoined an intervening and other creditors from taking any steps to collect their claims except in that cause, the injunction was not open to the objection that it was a permanent injunction granted at chambers and decisive of the case but that it was to be construed as a temporary injunction pending the hearing of the cause on the merits.⁶⁴

61. Georgia.—*Engel v. Scheuerman*, 40 Ga. 206.

Indiana.—*Wilson v. Joseph*, 107 Ind. 490, 8 N. E. 616; *Bethel v. Bethel*, 92 Ind. 318.

Kansas.—*Zimmerman v. Frank*, 34 Kan. 650.

Maryland.—*Keyser v. Rice*, 47 Md. 203.

Massachusetts.—*Cunningham v. Butler*, 142 Mass. 47, 6 N. E. 782.

Ohio.—*Snook v. Snetzer*, 25 Ohio St. 516. See, also, § 412 herein.

62. *Reynolds v. Adden*, 136 U. S. 348, 10 Sup. Ct. 843, 34 L. Ed. 360.

63. *Ford v. Chase*, 118 App. Div. (N. Y.) 605.

64. *Whilden v. Chapman* (S. C. 1908), 61 S. E. 249.

As to jurisdiction to grant injunctions at chambers, see § 71 herein.

CHAPTER XXXV.

RELATING TO PRINCIPAL AND SURETY AND AGENT.

SECTION 990. General considerations.

- 991. Compelling creditor to proceed against principal debtor.
- 992. Pursuing principal debtor first.
- 993. Applying security for surety's benefit.
- 994. Where surety an apparent principal.
- 995. Sheriff's surety.
- 996. Set-off in favor of surety
- 997. Principal and agent.

Section 990. **General considerations.**—The considerations which move a court of equity to protect sureties from judgments obtained against the principal debtor have already been noticed.¹ A surety will not receive such protection, even where the judgment was obtained by fraud and collusion, except upon a showing of actual injury to himself.² And a surety will not be allowed to enjoin proceedings in a court of law, where that court has jurisdiction to afford him complete relief. Thus, where a surety sought to enjoin the judgment creditor from issuing execution against him, because the creditor might, by due diligence, have satisfied his judgment out of the property of the principal debtor, the injunction was refused, as the surety had an adequate defense at law.³ And a surety cannot, as a ground for staying a judgment against him, rely on his ignorance of a substantial defense, arising out of transactions between the plaintiff in the suit at law and the principal debtor, unless he alleges and proves that he took proper means to ascertain the facts.⁴ A court of equity will interfere by

1. Sections 658, 659, *ante*.
 2. Taylor v. Mallory, 76 Md. 1.
 3. Martin v. Orr, 96 Ind. 27. And see Palmer v. Hayes, 93 Ind. 189; Hartman v. Hedy, 57 Ind. 545; Smith v. Phinizy, 71 Ga. 641.
 4. Smith v. McLain, 11 W. Va.

654; Harvey v. Seashol, 4 W. Va. 115; McGrew v. Tombeckbee Bank, 5 Porter (Ala.), 547; Lee v. Insurance Bank, 2 Ala. 21; Meem v. Rucker, 10 Gratt. 506; Floyd v. Jayne, 6 Johns. Ch. 479; Slack v. Wood, 9 Gratt. 40.

injunction in favor of a surety to restrain the prosecution of an action at law against him, where his defense, being an equitable one, would not be cognizable in a law court; as where, for instance, his defense is inconsistent with the terms of a bond or deed of trust which is in issue, and he would be estopped from setting up that defense in a common law court.⁵ Where a judgment obtained against the maker of a note and his sureties is enjoined by the maker, he giving other sureties on the injunction bond, and upon dissolution of the injunction judgment is rendered on the bond and execution issued and satisfied only in part, the original judgment is not merged in the judgment on the bond, and therefore the sureties on the note cannot enjoin the execution against them upon the original judgment.⁶

§ 991. **Compelling creditor to proceed against principal debtor.**—In an ordinary case of suretyship for the payment of a debt, the surety, after the debt has become due, may institute a suit in equity to compel the debtor to pay the debt and the creditor to receive it, and thus relieve himself from further responsibility.⁷ And the rule has long existed in New York that if a surety request the creditor to collect the debt from the principal, and the creditor neglect to do so when it is collectible, and from a subsequent change of circumstances it becomes uncollectible, the surety is thereby exonerated from liability.⁸ But the surety cannot maintain such a suit in equity, either against the creditor or the principal debtor, until after the debt is due.⁹ A court of equity has jurisdiction to enjoin the collection of a note, at the instance of a surety, where the payee or his agent has made a valid extension of the time of payment with the principal debtor, without the surety's consent; and in such a suit against the ad-

5. *Penn v. Ingles*, 82 Va. 65.

6. *Gowan v. Graves*, 10 Heisk. (Tenn.) 579.

7. *Gibbs v. Mennard*, 6 Paige (N. Y.), 258; *Warner v. Beardsley*, 8 Wend. (N. Y.) 199; *King v. Baldwin*, 2 Johns. Ch. 561. And see

Sealy v. Laird, 3 Swans. 368; *Mack v. Kitsell*, 20 Abb. N. C. 293; *Harris v. Newell*, 42 Wis. 687; *Bishop v. Day*, 13 Vt. 81.

8. *Remsen v. Beekman*, 25 N. Y. 552; *Pain v. Packard*, 13 Johns. 174.

9. *Hinckley v. Pfister*, 83 Wis. 64.

ministrator of the payee, the principal is a competent witness to prove such extension of payment.¹⁰

§ 992. **Pursuing principal debtor first.**—A creditor may proceed at law against the principal debtor and sureties in the first instance and obtain judgment and execution against them jointly. In such a case equity will not interfere by injunction, except under peculiar circumstances, the general rule being that the creditor is under no obligation to look to the principal debtor and his property and exhaust his remedies against them before resorting to the surety.¹¹ Where a vendor's lien is retained to secure the payment of bonds given for the purchase money of lands, and a judgment is obtained against the principal on the bond and his surety, the surety cannot have an injunction to compel the assignee to exhaust his vendor's lien before enforcing the collection of his judgment against the surety, though it is shown that the principal is insolvent.¹² But where a resort to equity is necessary to obtain payment of a debt, and both principal and surety are parties to the suit, the court will compel the creditor to pursue the principal debtor first and exhaust his estate before selling the property of the surety, unless to do so will, in the judgment of the court, unduly delay the creditor in the collection of his debt.¹³ Where the creditor is fully indemnified, is exposed to no risk, and subjected to no delay, he may be compelled by injunction to resort to the property of the principal in satisfaction of his claim, before coming upon the surety's, where the property of both is under execution.¹⁴

10. *Bradshaw v. Combs*, 102 Ill. 428. And see *Boulton v. Stubbs*, 18 Ves. 20, 26.

11. *Meade v. Griggsby*, 26 Gratt. (Va.) 612.

12. *Armstrong v. Poole*, 30 W. Va. 666, where the court cites and comments on *Poole v. Dilworth*, 26 W. Va. 583, *Tingle v. Fisher*, 20 W. Va. 497; *Gordon v. Fitzhugh*, 27 Gratt. (Va.) 835. And see section 562, *ante*.

13. *Shenandoah Nat. Bank v.*

Bates, 20 W. Va. 210; *Horton v. Bond*, 28 Gratt. 815, 825; *Mayo v. Tomkies*, 6 Munf. (Va.) 520; *Muse v. Friedenwald*, 77 Va. 57.

14. *Irick v. Black*, 17 N. J. Eq. 189. In *Applewhite v. Nelms*, 71 Miss. 482, 14 So. 443, one occupying the position of surety to tenants obtained an injunction to restrain a distress until final hearing; chancellor dissolved the injunction, but was reversed on appeal. *Casper, J.*, said: "Dunson and Rodgers, who had, by

§ 993. **Applying security for surety's benefit.**—It is a settled principle that a surety is entitled to enforce every security for the debt which the creditor has against the principal debtor, and therefore a mortgage or other security taken by the creditor must be dealt with by him in good faith and held in trust not only for

contract, bound themselves for the payment of the rent, were, and continued to be, the debtors, and complainant, by reason of the liability of his crops, occupied the relation of surety for them. Obviously, these relationships existed between the parties in the view of a court of equity, and, this being the case, the consideration of a few controlling principles will lead to a correct solution of the controversy. Nelms had, as security for his rent, not only a lien upon the property of the appellant, but also upon the crops of Dunson, one of the principal debtors. It is well settled that a surety may, by resort to a court of equity, compel the creditors first to exhaust the estate of the principal (*Bowen v. Hoskins*, 45 Miss. 183); and that a creditor having security from the principal debtor must preserve it for the benefit of the surety, who, upon paying the debt of his principal, has a right of subrogation to the securities held by the creditor. *Geo. Dig., tit. 'Principal and Surety,' p. 21 et seq.* The lien of Nelms, the landlord, extended to the whole crop grown on the premises by Dunson, and by reason of the equity of the appellant it was the duty of the landlord to exhaust that security, or to preserve it unimpaired by any positive act on his part for appellant's benefit. As between Nelms on the one hand, and Dunson and Rodgers on the other, it would be but just that Nelms should maintain the equities of Dunson and

Rodgers as between themselves by securing, if practicable, an equal payment of the rent from each; but there is no obligation, legal, equitable, or moral, on the appellant, to save Dunson harmless from the default of his codebtor, Rodgers. If Nelms had raised his lien upon the cotton of Dunson, and consented that he might sell it to Hawkins & McConnico, he could not go against them for its value, but to the extent of that value the appellant, the surety, would have been released. It does not appear that Nelms waived his lien upon Dunson's cotton, and Hawkins & McConnico are therefore liable to him for the value of the cotton they bought from Dunson (*Eason v. Johnson*, 69 Miss. 371, 12 So. 446; *Warren v. Jones*, 70 Miss. 202, 14 So. 25); and this liability of theirs is a security which will be preserved to appellant, the surety of Dunson. All the parties being now before the court, complete relief may be granted in the present suit. The court should have decreed that, out of the proceeds of appellant's property that has been seized, the balance due by him to Rodgers should be paid to Nelms; then that the property of Dunson seized under the distress should be exhausted in payment of the rent; after this, Hawkins & McConnico should have been required to pay the value of the cotton bought by them from Dunson; and, if a balance then remained due to Nelms, the crops of appellant should have been sold for

his own security, but for the surety's indemnity.¹⁵ Where, on the sale of goods, the purchaser mortgaged them to one of two sureties on a promissory note made by the purchaser, to secure such security from liability, and the goods were attached in a suit against the seller of the goods, and the secured surety sued the officer for conversion, but agreed to discontinue the suit and discharge the mortgage on the officer's undertaking to pay part of the note and collect the balance from the cosurety, it was held that the latter could maintain a bill for an injunction to restrain the discharge of the mortgage and the discontinuance of the suit, and for leave to prosecute the suit for conversion in his own behalf.¹⁶ For in such a case the mortgage given to secure one surety from liability, enures also to the benefit of the other, and its avails must go to pay the debt for which he is surety, and which it was given to secure.¹⁷ A surety who pays the debt is subrogated to the specific liens and securities which the creditor has against the principal debtor, but has no equity to follow the specific property which the principal bought with the borrowed money. And where the debtor borrowed money and deposited it in a bank, which soon afterwards became insolvent, and the surety had to pay the debt, it was held that he could not enjoin the principal debtor from collecting the dividends from the bank, pending his own recovery of judgment.¹⁸

§ 994. **Where surety an apparent principal.**—Where it was alleged by one seeking an injunction against execution, in which he represented he was only surety, but that fact did not appear in the judgment, that a contest was pending between the judgment creditors and the principal debtor as to the allotment of his homestead, it was held that this was not sufficient to authorize the court to grant an injunction to restrain the execution against the surety.¹⁹

its payment. The decree will be reversed and cause remanded."

15. *Penn v. Ingles*, 82 Va. 65; *Meade v. Grigsby*, 26 Gratt. 612; *Stephenson v. Taverners*, 9 Gratt. 398; *Hayes v. Ward*, 4 Johns. Ch. 123.

16. *Sheehan v. Taft*, 110 Mass. 331.

17. *Eastman v. Foster*, 8 Met. 19; *New Bedford Institution v. Fairhaven Bank*, 9 Allen, 175.

18. *Carlton v. Simonton*, 94 N. C. 401; *Miller v. Miller*, Phil. Eq. 85.

19. *Gatewood v. Burns*, 99 N. C. 357, per Merrimon, J.: "It did not appear from the judgment or the ex-

§ 995. **Sheriff's surety.**—Where a defaulting, insolvent ex-sheriff, with the proceeds of taxes collected by him, has taken up a large number of county orders, and, instead of having them credited as payments on his arrearage, is engaged in secretly selling and transferring them to various persons, who are trying to collect them again from the county, at the instance of the sureties of such ex-sheriff a court of equity will interfere, and compel the application of such orders to the relief of such sureties.²⁰ Where the principal debtor in a judgment is insolvent, and sells his prop-

ecutions that the plaintiff was such surety. As it did not, he was as to the appellant a principal debtor, and so to be treated. As to the appellant the judgment debtors were both principals, and he might, through the sheriff, charged with proper executions, collect his debt from both or either of them, in his discretion. It is well settled that all defendants charged by the judgment without distinction are equally principal debtors, and in legal effect are one debtor as to the judgment creditor. In *Eason v. Petway*, 1 Dev. & Bat. 44, it is said 'no difference in the order of their liability is recognized at law in respect to any proceedings upon process on the judgment.' *Ex parte King*, 2 Dev. 341; *Binford v. Alston*, 4 Dev. 351. The relation between principal and surety creates rights and duties among defendants, as between themselves, but it does not affect third persons. The sheriff may levy the debt from either defendant, or in such proportions as he chooses. The cases of *Shaw v. McFarlane*, 1 Ired. 216; *Davis v. Sanderlin*, 1 Ired. 389; *Stewart v. Ray*, 4 Ired. 269; *Shufford v. Cline*, 13 Ired. 463, are all to the same effect. If the appellant was surety he might, as allowed by the statute, have shown on the trial that he was such surety, and

the jury or the justice would have distinguished him as surety, and the executions would have been issued with proper endorsements to that effect, and the sheriff would have levied the sum required to be collected first out of the property of the principal, if he had sufficient for that purpose. But so far as appears, it was not even suggested at the proper time that he was surety."

20. *Maxwell v. Miller*, 38 W. Va. 261, 18 S. E. 449, per Dent, J.: "It has been well said: 'There are a great variety of circumstances where equity steps in for the reason that the law affords no adequate redress, and prevents impending or threatened injury;' that a 'surety occupies ground peculiar to his own relation, and is favored in both legal and equitable tribunals;' that 'there is no adequate remedy at law, when the principal debtor is insolvent, by which his effects and credits in the hands of others can be made to be applied for the benefit of the surety.' *McConnell v. Scott*, 15 Ohio, 403; *Brandt, Sur.*, §§ 223, 224. The appellant, being the creditor, was a proper party to any bill filed by the surety regarding the indebtedness; and the court, having once assumed jurisdiction for any just cause, should proceed to do exact justice between

erty after the judgment is rendered against him, his surety, even without paying the debt, may enjoin the purchaser who knew of the judgment from removing the property from the county.²¹

§ 996. **Set-off in favor of surety.**—Where the principal has a valid claim against the creditor, the surety will be allowed in equity to show the principal's insolvency, and set off such claim against the creditor, and as auxiliary to such set-off will be allowed an injunction. And where, in such case, if defendant's allegations are true, the injunction granted plaintiff will not harm defendant, and, if plaintiff's allegations are true, a dissolution will do him irreparable injury, the injunction will not be dissolved.²²

the parties. The staying of the proceedings at law could not injure the appellant, and was not done for the purpose of delay, but to secure as credit payments made by the principal, who was endeavoring to secretly dispose of them, and get them beyond the reach of his sureties, and securing some of his sureties to the prejudice of others. If the sureties as well as the principal had been insolvent, the appellant would have been insisting that these orders, having once been taken up by the sheriff with public funds, were paid in the manner the law contemplates their payment, and therefore should be canceled. The sureties have the right to make the same claim, and the appellant has no reason to complain; on the contrary, it should have joined hands with the sureties, and endeavored to have them harmless, as far as possible, instead of lending its aid to sustain the wrongful designs of the defaulter."

21. *Anderson v. Walton*, 35 Ga. 202.

22. *Scholze v. Steiner*, 100 Ala. 148, 14 So. 552, per Stone, C. J.: "The bill

seeks to set off the Allen & Taylor judgment *pro tanto* against the Herman Scholze judgment, and, as to the balance of the last-named judgment, to require an interpleader between Robert Scholze and the French-Chenoweth Hardware Company. A temporary injunction was granted restraining the collection of the judgment by Herman and Robert Scholze until the determination of the rights of the parties. Ordinarily a surety when sued upon his obligation cannot avail himself of an independent cause of action existing against the plaintiff in favor of his principal as a defense or counterclaim. It is for the principal to determine what use he will make of such cause of action, and the surety cannot control his discretion. *Lasher v. Williamson*, 55 N. Y. 619; *Morgan v. Smith*, 7 Hun, 244. By statute in this State (Code, § 2681), it is provided that a co-maker or surety, sued alone, may, with the consent of his co-maker or principal, avail himself, by way of set-off, of a debt or liquidated demand due from the plaintiff at the commencement of the suit to such co-

§ 997. **Principal and agent.**—While an agent may be enjoined from disposing of property in his possession which, on a clear array of facts may fairly be presumed to belong to his principal, yet a decree which restrains him generally from disposing of any of his

maker of principal. But this statute by its terms is confined to cases where the surety is sued alone, and where he has the consent of the principal to avail himself of the set-off, and, consequently, gives no support to the bill in this case. Appellees' right of set-off is independent of the statute, and is referable to the jurisdiction in courts of equity arising in such cases from the insolvency of the principal. The doctrine generally recognized is that, where the principal has a valid claim against the creditor, the surety will not be compelled to pay the claim, and seek a doubtful remedy against the insolvent principal, but, on being sued on his contract, will be allowed in equity to show the insolvency of his principal and set off the claim against the creditor. *Morgan v. Smith, supra*; *Gillespie v. Torrance*, 25 N. Y. 306. According to this rule, the insolvency of Lesser, the principal, furnishes a special ground of equity, giving to the court jurisdiction of the question of set-off presented by the bill, and sufficiently establishes the right of the appellees, in equity, to set off *pro tanto*, the judgment of Allen & Taylor against Herman Scholze, which was purchased by Lesser, unless that right is defeated by the prior transfer by Herman Scholze to Robert Scholze of his judgment against Lesser and appellees. *Watts v. Sayre*, 76 Ala. 397, 400. If that transfer was valid, the right of set-off would thereby be defeated. But the bill attempts to show its invalidity by attacking it

for fraud, and this, as hereinabove shown, is done by simply averring that 'said transfer was not made in good faith, but for the purpose of hindering, delaying, or defrauding the creditors of said Herman Scholze, Allen & Taylor among the number, to whose rights the said Emil Lesser has succeeded.' We have often held that an averment substantially in this language is nothing more than the averment of a conclusion, and therefore insufficient, when challenged by special demurrer. *Flewellen v. Crane*, 58 Ala. 629; *Lipscomb v. McLellan*, 72 Ala. 158. The question is different when raised by a motion to dismiss the bill for want of equity, as it now comes before us. In *Seals v. Robinson*, 75 Ala. 363, we said: 'A motion to dismiss for want of equity is not the equivalent of a demurrer; nor is it appropriate to reach mere defects or insufficiencies of pleading curable by amendment, which is matter of right at any time before final decree. It should be entertained only when, admitting the facts apparent on the face of the bill, whether well or illy pleaded, the complainant is without right to equitable relief.' To the same effect are the following authorities: *Glover v. Hembree*, 82 Ala. 324, 8 So. 251; *Haynes v. Short*, 88 Ala. 562, 7 So. 157. We must, therefore on this motion, treat the defects in this averment as amended, and, consequently, regard the bill as showing the invalidity of the transfer. It may be the same conclusion results

real or personal property without tracing the money of the principal into their acquisition, would often be an instrument of oppression, and cannot be sustained.²³ An agent may be restrained by injunction from fraudulently disposing of goods and chattels entrusted to him by his principal, and in such a case the pretended purchaser from the agent may also be made a party.²⁴ And a

from the fact that the Allen & Taylor judgment is shown to have been in existence when the transfer of the judgment was made by Herman Scholze, and that the latter was insolvent, upon the principle that the transfer of property by an insolvent is presumptively fraudulent as against existing creditors, which presumption is only overcome by proof of a sufficient, valuable consideration paid for the transfer. Again, it is expressly denied in the bill that Lesser had knowledge or notice, when he bought the Allen & Taylor judgment, that the judgment of Herman Scholze against Lesser had been transferred; and there is nothing in the bill showing that the latter transfer was entered of record. This last fact only appears from the answer. *Carroll v. Malone*, 28 Ala. 521. Looking to the allegations of the bill alone, the alleged transfer by Herman Scholze of his judgment against Lesser to Robert Scholze interposes no obstacle to the right of set-off sought by the bill, and that ground of equitable relief is, as against the motion to dismiss the bill for want of equity, made out by its averments. *Wood v. Steele*, 65 Ala. 436. Having reached the conclusion that the bill contains equity in one aspect, in which it is filed, it is unnecessary to decide whether it is also maintainable in its second aspect or alternative, viz., as a bill of interpleader.

That question has not been raised by demurrer, and may not be. We will not anticipate it. Inasmuch as the bill contains equity, it was not a matter of absolute right in the defendants to the bill to have the injunction dissolved upon the denials of the answer. The rule in such cases has been well expressed as follows: 'Where, if the defendant's allegations are true, the injunction will do him no harm, and, if the plaintiff's allegations are true, a dissolution will involve him in irreparable injury, the injunction will not be dissolved.' *McBrayer v. Hardin*, 7 Ired. Eq. 1; *Purnell v. Daniel*, 8 Ired. Eq. 9. We discover no error in the record and proceedings of the chancery court. Its decree is affirmed."

23. *Ervin's Appeal*, 82 Pa. St. 188. In *Chedworth v. Edwards*, 8 Ves. 46, an injunction was granted until answer, restraining a transfer of stock standing in the name of a steward, on a strong showing by affidavit that it was the produce of his master's property, but the injunction was refused as to money in bank, standing in the steward's name and had been on deposit there for more than two years. As to the effect of an agent's mingling his principal's property with his own, see *Hart v. Ten Eyck*, 2 Johns. Ch. 62.

24. *Wood v. Rowcliffe*, 3 Hare, 304. And see *Smith v. McElwain*, 57 Ga. 247, as to relief by injunction

principal may restrain by injunction the enforcement of an inequitable judgment against his agent, on the ground of his liability to refund to the agent, as this will prevent litigation by having all the equities between the parties settled by one suit.²⁵

and a receiver, where there is a fraudulent combination between an agent and others to defraud the principal.

25. Webster v. Skipwith, 26 Miss. 341, 350. As to making agents and servants parties to injunction suits, see §§ 257, 360, *ante*.

CHAPTER XXXVI.

RELATING TO REALTY.

- SECTION** 998. If title in dispute.
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Section 998. If title in dispute.—The general rule is that where the title to land is fairly in dispute, an injunction will not be granted to prevent the use and enjoyment of it by either party who happens to be in possession.¹ And still more will an injunction not be granted to quiet title in favor of a complainant who shows no right to the premises in dispute.² And an injunction will not be granted to restrain the issuance of a grant of land by the State Secretary, upon the ground of irregularity in the entries upon which it is to be based, upon the application of one who has

1. *Beacham v. Wrightsville & T. R. Co.*, 125 Ga. 362, 54 S. E. 157; *Erie R. Co. v. Delaware, etc., R. Co.*, 21 N. J. Eq. 283. Compare *Boyd v. Des-*
rozier, 20 Mont. 444, 52 Pac. 53.
 2. *McGee v. Smith*, 16 N. J. Eq. 462.

not himself title to the premises, especially where it appears that whatever interests the parties may have may be presented and determined in an ordinary action to try title. Thus, an injunction will not be granted to one making a junior entry on land to restrain one making a senior entry from receiving, and the Secretary of State from issuing, a grant, where the application is based solely upon alleged void irregularities in the senior entry.³ Where a party has been put out of possession of land by an abuse of legal process, there must be restitution as a matter of course, unless some new matter has intervened, and until such restitution is made an application for injunction will not be entertained.⁴ But the fact that the title is in dispute will not prevent the granting of an injunction where irreparable injury is threatened.⁵

§ 999. **Showing of title.**—To entitle a party to an injunction against a sale of property claimed by him, which, if the sale occurred, would be a cloud upon his title, he must show title in himself.⁶ And where plaintiff is in possession of land under a claim of title, he is not entitled to an injunction to restrain another

3. *Brem v. Houck*, 101 N. C. 627, 8 S. E. 365, per Merrimon, J.: "If the grant that may be issued to the defendant Houck shall be founded upon insufficient entries, or such as are affected with fraud, the plaintiff, if he obtain a grant to the same land, will at the proper time have his remedy." *Patterson v. Miller*, 4 Jones Eq. 451; *Harris v. Norman*, 96 N. C. 59, 2 S. E. 72; *Pearson v. Powell*, 100 N. C. 86, 6 S. E. 188.

4. *Perry v. Tupper*, 71 N. C. 387.

5. *Bettman v. Harness*, 42 W. Va. 433, 26 S. E. 271, 36 L. R. A. 566. See, also, *Johnson v. Hughes*, 58 N. J. Eq. 406, 43 Atl. 901.

6. *Benner v. Kendall*, 21 Fla. 584.

Plaintiff, alleging title to a mill, obtained an injunction to restrain defendant from removing certain machinery therefrom. Defendant denied

plaintiff's title, and alleged that he had conveyed the mill in question to his granddaughter, reserving the right to carry away the machinery. Plaintiff insisted that the machinery, being fixtures, was real estate, and passed in the conveyance to the granddaughter, and that defendant had no right to remove the same. It was held, whether or not the fixtures were real estate, the granddaughter not choosing to assert title thereto, that defendant's title was good as against plaintiff, and that defendant, on dissolution of the injunction, was entitled to damages sustained by reason of the injunction, the measure of which would be the value of the granddaughter's consent to the removal. *Church v. Barkman* (Sup.), 16 N. Y. Supp. 624.

A plaintiff must rely upon the

from selling the land as trustee, where the right of the latter to make such sale, and also plaintiff's title, depend entirely on the construction of recorded instruments, as plaintiff's defenses will be equally available against a purchaser at such sale, and he cannot be prejudiced by delay.⁷ But the children of one of the grantors in a deed which recites that a small portion of the land has been laid off for burial purposes, and which excepts and reserves to the grantors and their heirs the right of future interment, who have succeeded to their father's rights, may maintain an action to restrain the spoliation of the graveyard without alleging that they have succeeded to the interests of the other grantors; but they cannot recover damages for injuries already committed, unless it appears at the trial that they are also the heirs of such other grantors.⁸ And where one had taken possession of and made improvements of land under a contract to sell it to him, it was held he was entitled to enjoin a subsequent grantee from interfering with his possession, and from further prosecuting an action of trespass against him, until the determination of his own action against his vendor for specific performance.⁹ And an allegation in a complaint that a decedent died seized of certain realty, leaving three named children, is a sufficient allegation of title, and if established by evidence makes a *prima facie* case of ownership of the realty by the three children; for as to realty, intestacy not testacy is presumed.¹⁰

§ 1000. **Securing possession by injunction.**—Where a person obtains a decree in a Federal court sitting in another State estab-

strength of his title. Desoris Pond Co. v. Campbell, 25 App. Div. (N. Y.) 179, 50 N. Y. Supp. 819.

7. Browning v. Lavender, 104 N. C. 69, 10 S. E. 77; Byerly v. Humphrey, 95 N. C. 151.

8. Mitchell v. Thorne, 134 N. Y. 536, 32 N. E. 10.

9. Hadfield v. Bartlett, 66 Wis. 634, 29 N. W. 639. And see Smith v. Finch, 8 Wis. 251. In Horton v.

White, 84 N. C. 297, where the plaintiff sued *in forma pauperis*, to recover land, and during the pendency of the action took possession of a part and resisted reoccupation by defendant, it was held that defendant was entitled to an injunction and a receiver to take control of the premises and secure the rents and profits.

10. Cumberland v. Graves, 9 Barb. (N. Y.) 576; Delafield v. Par-

lishing his title to real estate there as against a resident of the latter State, and directing a conveyance to him which defendant refuses to make, and complainant transfers his interest and title to a citizen of such State, it is decided that the latter is entitled to an injunction from the Federal court, restraining the former defendant from asserting his pretended title, and from occupying the premises in dispute, and that a writ of possession should issue to remove such defendant and his tenants and agents from such premises.¹¹ And in such a case the defendant can not assert his

ish, 25 N. Y. 9, 35; *Baxter v. Bradbury*, 20 Me. 260; *Lyon v. Kain*, 36 Ill. 368.

11. *Root v. Woolworth*, 150 U. S. 401, 14 S. Ct. 136, 37 L. Ed. 1123, per *Curiam*: "It is undoubtedly true that a court of equity will not ordinarily entertain a bill solely for the purpose of establishing the title of a party to real estate, or for the recovery of possession thereof, as these objects can generally be accomplished by an action of ejectment at law. *Hipp v. Babin*, 19 How. 271, 15 L. Ed. 633; *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 71; *Ellis v. Davis*, 109 U. S. 485, 3 S. Ct. 327, 27 L. Ed. 1006; *Killian v. Ebbinghaus*, 110 U. S. 568, 4 S. Ct. 698, 28 L. Ed. 246; *Fussell v. Gregg*, 113 U. S. 550, 554, 5 S. Ct. 631, 28 L. Ed. 993. If the bill in the present case could be properly considered as an ejectment bill, the objection taken thereto by the defendant would be fatal to the proceeding; but instead of being a bill of this character it is clearly a supplemental and ancillary bill, such as the court had jurisdiction to entertain. *Shields v. Thomas*, 18 How. 253, 262, 15 L. Ed. 368; *Thompson v. Maxwell*, 95 U. S. 391, 399, 24 L. Ed. 481; *Story's Eq. Plead.*, §§ 335, 338, 339,

429. The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance in order to avoid the relitigation of questions once settled between the same parties, is well settled. *Story's Eq. Jur.*, § 959; *Kershaw v. Thompson*, 4 Johns. Ch. 609, 612; *Schenck v. Conover*, 13 N. J. Eq. (2 Beasley), 220; *Buffum's Case*, 13 N. H. 14; *Shepherd v. Towgood*, Turn. & Rus. 379; *Davis v. Bluck*, 6 Beav. 393. In *Kershaw v. Thompson*, the authorities are fully reviewed by Chancellor Kent, and need not be re-examined here. It is said, however, on behalf of the appellant, that the original decree only undertook to remove the cloud upon the title, and did not deal with the subject of possession of the premises, and that the present bill, in seeking to have possession delivered up, proposes to deal with what was not concluded by the former decree. This is manifestly a misconception of the force of the original decree, which established and concluded Morton's title as against any claim of the appellant, and thereby necessarily included and carried with it the right of possession to the premises as effectually as if the defendant had himself conveyed the same. The decree in its legal effect and operation en-

adverse possession after the decree without bringing express notice of it to complainant or his vendees.¹²

§ 1001. **Possession protected.**—Where the right of the complainant is clear and he is in possession of the land in controversy, a court of equity will, in a proper case, protect that possession by injunction; and where the complainant's right to the use and enjoyment of water is obstructed, he may have an injunction without

titled Morton to the possession of the property, and that right passed to the appellee as privy in estate. In *Montgomery v. Tutt*, 11 Cal. 190, there was a decree of sale, which did not require or provide for the delivery of possession of the premises to the purchaser. Subsequently the defendant refused to surrender possession, and a writ of assistance was sought by the purchaser to place him in possession of the premises under the master's deed. Field, J., delivering the opinion of the court, said: "The power of the court to issue the judicial writ, or to make the order and enforce the same by a writ of assistance, rests upon the obvious principle that the power of the court to afford a remedy must be co-extensive with its jurisdiction over the subject-matter. Where the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution. The bill being ancillary to the original proceeding of Morton against Root, and supplementary to the decree rendered therein, can be maintained without reference to the citizenship or residence of the parties. There is consequently no force in the objection that the court below had no jurisdiction in this case because the appellee and the appellant were both citizens of Nebraska. *Krippendorf v. Hyde*, 110 U. S. 276, 4 S. Ct. 27, 28

L. Ed. 145; *Pacific Railroad v. Missouri Pacific Railway*, 111 U. S. 505, 4 S. Ct. 583, 28 L. Ed. 498."

12. *Root v. Woolworth*, 150 U. S. 401, 415, 14 S. Ct. 136, 37 L. Ed. 1123, per *Curiam*: "If, since that decree, he has enclosed a part of the land, cut wood from it, or cultivated it, he would be treated and considered as holding it in subordination to the title of Morton and his privy in estate, until he gave notice that his holding was adverse, and in the assertion of actual ownership in himself. In his position he could not have asserted adverse possession after the decree against him, without bringing express notice to Morton or his vendees that he was claiming adversely. Without such notice the length of time intervening between the decree and the institution of the present suit would give him no better right than he previously possessed, and his holding possession would, under the authorities, be treated as in subordination to the title of the real owner. This is a well-established rule. *Jackson v. Burton*, 1 Wend. 341; *Burhans v. Van Zandt*, 7 Barb. 91; *Ronan v. Meyer*, 84 Ind. 390; *Jeffery v. Hursh*, 45 Mich. 59; *Jackson v. Sternbergh*, 1 Johns. Cas. 153; *Doyle v. Mellen*, 15 R. I. 523; *Zeller's Lessee v. Eckert*, 4 How. 289."

showing irreparable injury.¹³ And where the owner of a beach hotel, in possession of a beach under title derived from the aborigines, was interfered with by defendants, who attempted to oust him and his tenants, and there was a prospect of successive litigations and defendants were not pecuniarily responsible, it was held that a case was established authorizing the intervention of equity to quiet plaintiff's title, and to enjoin defendants from interfering with his possession.¹⁴ Again, where defendant, upon the foreclosure of a contract for the purchase of land was removed from the land under a writ of assistance, but returned again and took possession in defiance of the court's mandate, it was held that an injunction was properly granted to prevent the continu-

13. California.—Mott v. Ewing, 90 Cal. 231, 27 Pac. 194; Conkling v. Improvement Co., 87 Cal. 296, 25 Pac. 399.

New Jersey.—Carlisle v. Cooper, 21 N. J. Eq. 576.

North Dakota.—Zimmerman v. McCurdy (N. D. 1906), 106 N. W. 125.

Oklahoma.—Reaves v. Oliver, 3 Okla. 62, 41 Pac. 353.

Oregon.—Weiss v. Oregon Iron & S. Co., 13 Ore. 496, 11 Pac. 255.

One in whose favor litigation in respect to property has been decided and who is in possession will be granted an injunction against an interference until such possession by the unsuccessful claimant. Calhoun v. McCormack, 7 Okla. 347, 54 Pac. 493; Potts v. Hollon, 6 Okla. 696, 52 Pac. 917; Barnes v. Newton, 5 Okla. 428, 48 Pac. 190, 49 Pac. 1074; Woodruff v. Wallace, 3 Okla. 355, 41 Pac. 357.

A party in possession will not be removed by mandatory injunction and possession given to one contesting his title. Paschal v. Tillman, 105 Ga. 494, 30 S. E. 870; Proctor v. Stuart, 4 Okla. 679, 46 Pac. 501;

Catholicon Hot Springs Co. v. Ferguson, 7 S. D. 503, 64 N. W. 539. See Laughlin v. Fariss, 7 Okla. 1, 50 Pac. 254. Compare State v. District Court (Minn. 1906), 107 N. W. 963; United States v. Flournoy Livestock & R. E. Co., 69 Fed. 686, especially if he has an adequate remedy at law. Wehmer v. Fokenga, 57 Neb. 510, 75 N. W. 28.

It should appear in an action to enjoin an entry upon land by one claiming title thereto that there is an intention to make such entry or that the defendant is unable to respond in damages. Puryear v. Sanford, 124 N. C. 276, 32 S. E. 685.

14. Mulry v. Norton, 100 N. Y. 424; Watson v. Sutherland, 5 Wall. 74, 18 L. Ed. 580; Livingston v. Livingston, 6 Johns. Ch. 497.

A land-grant railroad company sued to recover a large quantity of lands, divided into three classes, and by agreement of the parties a commissioner was appointed to sell the lands pending the suit, and hold the proceeds subject to its final determination. After the sale the bill was dismissed without prejudice as to one class of the lands. It was held

ance of the trespass.¹⁵ And where land, the title to which was in dispute, was in the hands of a receiver, and one of the litigants made an effort to distrain for rent against another, this was held to be an interference with the property which should be restrained by injunction, in order to protect the receiver's possession.¹⁶ But where, in an action of ejectment against a non-resident, he was served by publication only, and had no knowledge of the action and no service was made on his tenant in possession who was a resident, and defendant, during the pendency of the action, conveyed the legal title to the beneficial owner, who also was without notice of the action, it was held that the latter could enjoin the execution of a writ of possession against the non-residing defendant, and mainly on the ground that the Missouri statute required service, in such a case, on the person in actual possession.¹⁷ And where land was possessed by defendants for a number of years, irrigated, cultivated, and improved, a court of equity will not restrain the enjoyment of such improvements before a trial of title is had in a court of law, but will prevent the construction of new dams and ditches for further irrigation.¹⁸ Nor will equity restrain an interference with plaintiff's possession, where defendant's claim is that of a riparian owner. The remedy is at law.¹⁹ Under the Louisiana Code, providing that an injunction must be granted when the defendant disturbs the plaintiff in the actual and real possession which such plaintiff has had for more than one year, either of real estate or of a real right, of which he claims either the ownership, the possession, or the enjoyment, the judge is bound to grant an application by relators for an injunction against the disturbance of an asserted right of drain over the lands of defend-

that, on the bringing of a new suit, it was proper to allow a preliminary injunction restraining the commissioner from paying over the money realized from the lands still in dispute, and appointing him receiver thereof. *St. Paul R. Co. v. Northern Pac. R. Co.*, 49 Fed. 306.

15. *Ten Eyck v. Sjoburg*, 68 Iowa, 625.

16. *Marshall v. Lockett*, 76 Ga. 289.

17. *Charter Oak Ins. Co. v. Cummings*, 90 Mo. 267, citing *Goodnough v. Sheppard*, 28 Ill. 81, and *Banks v. Parker*, 80 N. C. 157.

18. *Waddingham v. Robledo*, 6 N. M. 347, 28 Pac. 663.

19. *Peters v. Hansen*, 55 Mich. 276.

ants, of which relators have been in actual possession for a number of years, and a mandatory order requiring the removal of obstructions to the exercise of such right.²⁰

§ 1002. **Same subject.**—An injunction against a sale of land will be refused, where it appears from the petition that plaintiff is in possession of the land, claiming as owner; that his legal title is of record; that his title is superior to any that can be acquired by a purchaser at the sale; and that plaintiff has an adequate remedy at law against any claims that may be asserted by such purchaser.²¹ And an injunction will not issue to restrain a sale of land conveyed in trust to secure the payment of a note, because an action on the note would be barred by the statute of limitations.²² But a court of equity may take cognizance of a cross-action brought to try the adverse claim to the right of possession of a mineral lode, to quiet the title to it, and enjoin the removal of ore from it, when for these purposes, it becomes necessary to identify the boundaries of the vein, and the apex of the lode, and, in view of the issue involved, and the relief sought, a judgment at law would not meet the exigencies of the case.²³

§ 1003. **Where no title; insolvency.**—A sale of land by the sheriff pending a claim duly interposed under the statute, in con-

20. *State v. Duffel*, 41 La. Ann. 516, 6 So. 512.

21. *Wilcox v. Walker*, 94 Mo. 88, 7 S. W. 115.

22. *Goldfrank v. Young*, 64 Tex. 432. The claimant of title to several contiguous tracts of land cannot enjoin the Secretary of State from issuing grants thereto upon void entries, on the ground that they will prove a cloud upon his title, because he is not entitled to such relief unless in rightful possession, in which case his remedy at law is adequate, as under Code N. C., § 1277, by recording surveys of their outer lines, so as to exhibit their outer boundaries, as if the whole territory were

one tract, his possession of one is possession of all, enabling him to redress an invasion of any of them; in addition to which he may, under Code N. C., § 2786, bring an action in the Superior Court of the county in which the land lies, to repeal and vacate grants issued "against law," or obtained "by false suggestion, surprise, or fraud." *McNamee v. Coke*, 109 N. C. 242, 13 S. E. 777. And see *Carter v. White*, 101 N. C. 31; *Crow v. Holland*, 4 Dev. 417; *Miller v. Twitty*, 3 Dev. & Bat. 14.

23. *Bullion, Beck & C. Min. Co. v. Eureka Hill Min. Co.*, 5 Utah, 3, 11 Pac. 515.

sequence of which no title passed to the purchaser, is not a sufficient ground for enjoining the purchaser from conveying or encumbering the premises pending a suit to set aside his purchase, since the *lis pendens* would charge with notice those who might deal with him on the faith of his title.²⁴ But an insolvent defendant, who had bought a saw mill upon the condition that title should not pass to him until he had paid for it in sawing lumber for plaintiff, was enjoined from removing the mill from the State until the condition was performed.²⁵ A complaint alleging that irreparable damage is threatened, in that a part of a wharf which is real estate, is about to be wrongfully taken away, need not allege insolvency of defendant.²⁶

§ 1004. **To remove cloud on title.**—A court of equity has jurisdiction to grant an injunction against the doing of an act which will cast a cloud upon the title to real property.²⁷ But a bill to remove a cloud on title to real estate must allege possession in the plaintiff at the time it is filed, for if he is not in possession, his remedy is an action of ejectment.²⁸ And a complaint does not show a case for an injunction to prevent a cloud upon title, if it appears only by inference, and not by averment, that acts are threatened or contemplated which will impose a cloud.²⁹ Only

24. *Etheridge v. Slayton*, 94 Ga. 496, 19 S. E. 818.

25. *Coe v. Johnson*, 93 Ind. 418.

26. *Crescent City Wharf Co. v. Simpson*, 77 Cal. 286, 19 Pac. 426; *Richards v. Dower*, 64 Cal. 63, 28 Pac. 113.

27. *Chase v. City Treasurer*, 122 Cal. 540, 55 Pac. 414; *Campbell v. Kent Circuit Judge*, 111 Mich. 575, 70 N. W. 141; *Jones v. Buxton*, 121 N. C. 285, 28 S. E. 545; *Moore v. McNutt*, 41 W. Va. 695, 24 S. E. 682.

28. *Texter v. Shipley*, 77 Md. 473, 26 Atl. 1019, 28 Atl. 1060.

29. *Maloney v. Finnegan*, 38 Minn. 70, 35 N. W. 723. See, also, *Sanders v. Yonkers*, 63 N. Y. 489.

An injunction will not be granted on a petition alleging that complainant is in possession of land, and has a good title, but apprehends that defendant may attempt to sell it, and asking the court before his right is invaded, to adjudge his title good, and restrain defendant from interfering with it. *Gatewood v. Leak*, 99 N. C. 363, 6 S. E. 635.

A suit in equity cannot be maintained by a lot owner in any corporate city against the officers thereof, to restrain proceedings in the improvement of a street on which such lot abuts, upon apprehension that the officer will attempt to charge a part of the expense of the improve-

those who have a clear legal and equitable title to land, connected with possession, can claim the aid of equity to give them peace and dissipate the cloud on their title.³⁰ And a defendant who is in possession under a claim of title, as against the plaintiff, and not connected with him in estate, will not be enjoined from making a lease or conveyance on the ground that it would be a cloud upon the plaintiff's title.³¹ And where the lien for taxes on land existed at the time the plaintiff became the owner of the reversion, the fact that the assignee of the leasehold interest attained to him by the payment of the annual rent accruing under the lease, does not show such title and possession in the plaintiff as will entitle him to maintain a suit in equity to remove a cloud on his title, arising from the proceedings in the tax sale, alleged to have been defective and irregular. His remedy is an action of ejectment.³² Where a tax sale is fatally defective for want of an insufficient notice, the owner in trust of the reversion in fee, and his *cestui que trust*, on filing a bill to have the sale declared void and to remove the cloud upon the title, are entitled to an injunction to restrain the purchaser from taking possession of the premises and receiving the rents of them.³³

§ 1005. **Cloud on title; lien foreclosure, etc.**—As a sale of property belonging to an insolvent's estate on foreclosure of a mechanics' lien would constitute a cloud on the assignee's title, though the assignee as such was not a party to the suit, the as-

ment upon the lot. Such suit can only be maintained where there has been an attempt under the proceedings to sell the lot, or the proceedings are of a character that they necessarily will cast a cloud upon the title of the lot owner. *Sperry v. City of Albina*, 17 Or. 481, 21 Pac. 453.

30. *Polk v. Pendleton*, 31 Md. 124. And see *Crook v. Brown*, 11 Md. 158; *Orton v. Smith*, 18 How. (U. S.) 265, 15 L. Ed. 393.

31. *Spofford v. Bangor, etc., R.*

Co., 66 Me. 51.

32. *Textor v. Shipley*, 77 Md. 473, 26 Atl. 1019, 28 Atl. 1060.

33. *Steuart v. Meyer*, 54 Md. 454, per *Alvey, J.*: "In such cases equity asserts complete jurisdiction to remove the cloud from the title of the property involved, and to prevent unnecessary and vexatious litigation. *Holland v. Baltimore*, 11 Md. 186, 197; *Polk v. Rose*, 25 Md. 153, 161; *Carroll v. Safford*, 3 How. 441, 463, 11 L. Ed. 671; *Thomas v. Gain*, 35

signee may maintain an action to restrain such sale.³⁴ And an injunction will issue to restrain one from entering on another's land against the owner's consent, defacing old land marks, and setting up new ones, and from making out and recording the survey so made, in the register's office, with the view of carrying it into adverse grant; for such acts not only disturb the owner in his possession but also cast a cloud on his title and diminish the market value of his land.³⁵ Plaintiff may also obtain an injunction to maintain the *statu quo* of his rights during the pendency of a suit to quiet title without first obtaining an order in open court authorizing the filing of the petition as a part of the suit, where the supplemental petition does not change the issues.³⁶ An action to remove a cloud on title and for an incidental injunction is not maintainable where the alleged invalidity of the instrument complained of is apparent upon its face.³⁷

§ 1006. Where defect apparent.—Where the illegality or nullity of a deed or record forming part of the adverse chain of

Mich. 155." And see §§ 710-712, *ante*; also *Meyers v. Shields*, 61 Fed. 713.

34. *Quinby v. Slipper*, 7 Wash. 475, 35 Pac. 116, per Hoyt, J.: "By such assignment the jurisdiction of the entire matter of adjusting claims against the estate, whether secured by lien or otherwise, passes to the court, and those having claims must present them in the insolvency proceeding. This is not only necessary for the reason that the property is in the jurisdiction of the court, but it is in the interest of economy, and the proper adjustment of the affairs of the insolvent. Those having preferred claims can in no manner be injured by having thus to present them, for the reason that the court is clothed with ample power to protect the rights of such preferred creditors. The foreclosure proceeding

was therefore wrongfully commenced, and, as the enforcement of the judgment rendered would tend to embarrass a proper administration of the affairs of the insolvent, the lower court properly enjoined any enforcement thereof, and its action in so doing must be affirmed."

35. *Preston v. Preston*, 85 Ky. 16, 2 S. W. 501. And see *Hillman v. Hurley*, 82 Ky. 626.

36. *Craig v. Lambert*, 44 La. Ann. 885, 11 So. 464. And see *King v. Townshend*, 141 N. Y. 358, 36 N. E. 513, as to tax lease as cloud on title.

37. *Maloney v. Finnegan*, 38 Minn. 70; *Weller v. St. Paul*, 5 Minn. 95; *Scribner v. Allen*, 12 Minn. 148; *Conkey v. Dike*, 17 Minn. 457; *Baldwin v. Canfield*, 26 Minn. 43; *Gilman v. Van Brunt*, 29 Minn. 271, 13 N. W. 125.

title which is alleged to be a cloud on complainant's title is apparent on its face or the alleged defect appears of record from one or from many instruments and is in no way dependent upon testimony of witnesses that may be lost by lapse of time there is no danger that irreparable injury will be sustained and no sufficient reason for equitable relief by injunction.³⁸ And this rule should be strictly applied where a verified answer positively denies the equities of the complaint and neither side is supported by evidence outside the pleadings.³⁹ But where a vendee shows that there is a defect in the title of his grantor it is generally decided that he may obtain an injunction restraining the latter from enforcing the payment of the purchase price.⁴⁰

§ 1007. Rights acquired by adverse possession; preventing trespass.—A party who has been in the open, notorious, exclusive, adverse possession of a portion of a town site for a period of time sufficient to bar an action against him to recover possession thereof, thereby acquires an absolute title to the land, and may protect his possession by injunction against unlawful acts of the city authorities in attempting to open streets through his land on the

38. *Browning v. Lavender*, 104 N. C. 69, 10 S. E. 77; *Busbee v. Macy*, 85 N. C. 329; *Busbee v. Lewis*, 85 N. C. 332; *Murray v. Hazell*, 99 N. C. 168, 5 S. E. 428.

39. *California*.—*Real Del Monte Co. v. Pond, etc.*, Min. Co., 23 Ca. 82.

Minnesota.—*Armstrong v. Sanford*, 7 Minn. 49.

New Jersey.—*Holdrege v. Gwynne*, 18 N. J. Eq. 26.

New York.—*Finnegan v. Lee*, 18 How. Pr. 186; *Kuntz v. White Co.*, 8 N. Y. Supp. 505.

Pennsylvania.—*McCartney v. Cassidy*, 141 Pa. St. 453, 21 Atl. 778.

40. *Arkansas*.—*Black v. Bowman*, 9 Ark. 501.

Delaware.—*Houston v. Hurley's Adm'rs*, 2 Del. Ch. 247.

Georgia.—*Williams v. Williams*, 94 Ga. 627, 20 S. E. 108.

Indiana.—*Fehrle v. Turner*, 77 Ind. 530; *Arnold v. Curl*, 18 Ind. 339.

Kentucky.—*Vittitoe v. Jones*, 6 J. J. Marsh, 515; *Rawlins v. Timberlake*, 6 T. B. Mon. 225.

Maryland.—*Buchanan v. Lorman*, 3 Gill. 51.

New Jersey.—*Jacques v. Esler*, 4 N. J. Eq. 461.

North Carolina.—*Brannum v. Ellison*, 58 N. C. 435; *Welch v. Watkins*, 2 N. C. 369.

Tennessee.—*Topp v. White*, 12 Heisk. 165.

strength of a plat made by a former owner.⁴¹ And one who has been in adverse possession as against a trust deed for a period of limitation may enjoin a sale under the deed, as such sale would cast a cloud on his title.⁴² As, by the Arkansas statutes, seven years adverse possession is sufficient to bar an action to recover lands, such possession is sufficient to bar an action to enforce the owner's claim against the land, on an action to enjoin a railroad company which has wrongfully taken land from using it until compensation is made.⁴³ A suit to restrain the defendant from erecting a wall on land to which plaintiff claims title, and which he uses in his business, may be maintained, without first establishing plaintiff's title by an action at law.⁴⁴ In an action to prevent a cloud upon, or to quiet title where plaintiff does not show any threatened or probable injury liable to accrue pending the litigation that might not be fully provided against by filing notice of *lis pendens*, he is not entitled to a temporary injunction.⁴⁵ And

Vermont.—Bowen v. Thrall, 28 Vt. 382.

Virginia.—Clarke v. Hardgrove, 7 Gratt. 399; Keyton's Admr. v. Brawford's Exr., 5 Leigh, 39.

West Virginia.—Harvey v. Ryan (1906), 53 S. E. 7; Richardson v. Donehoo, 16 W. Va. 685.

41. Shock v. Falls City, 31 Neb. 599, 48 N. W. 468, per Maxwell, J.: "An injunction will be issued to restrain a public officer from proceeding illegally under claim of right. Johnson v. Hahn, 4 Neb. 149; Belknap v. Belknap, 2 Johns. Ch. 472; Livingston v. Livingston, 6 Johns. Ch. 497. Where the injury complained of is a continuous one and the remedy at law must therefore be successive suits, and an action for damages be wholly inadequate for plaintiff's protection, he will be granted an injunction to restrain the injury. Bolton v. McShane, 25 N. W. Rep. 135; Shimer v. Canal Co., 27 N. J. Eq. 364."

42. Gardner v. Terry, 99 Mo. 523, 12 S. W. 888.

43. Organ v. Memphis & L. R. R. Co., 51 Ark. 235, 11 S. W. 96.

44. Baron v. Korn, 127 N. Y. 224, 27 N. E. 804. And see Troy, etc., R. Co. v. Boston, etc., R. Co., 86 N. Y. 107, 128.

Plaintiff, on filing a bond, obtained an injunction restraining defendants from boxing trees for turpentine purposes, on land which he claimed to own. Defendants, also claiming to own the land, filed a cross-petition to enjoin plaintiff from boxing the trees for the same purpose. It was held that, on defendants giving bond, plaintiff should be enjoined until the title to the land could be determined. Johnson v. Hall, 83 Ga. 281, 9 S. E. 783.

Removal of a boundary fence may be enjoined.—Bussier v. Weekey, 4 Pa. Super. Ct. 69.

45. Grant County v. Colonial & U. S. Mortgage Co., 3 S. D. 390, 53 N.

in such a suit the defendant to avail himself of the objection that plaintiff has an adequate remedy at law must raise it by answer; after the parties have submitted to the jurisdiction of the court the plaintiff will not be turned out to seek his remedy elsewhere upon objection taken for the first time at the trial.⁴⁶

§ 1008. **Vendor's lien.**—A wife who receives a conveyance of land from her husband in payment of a precedent debt, and does not change her condition on account of the conveyance, is not a *bona fide* purchaser for a valuable consideration in such a sense as to be entitled to an injunction to defeat the vendor's lien of her husband's grantor for the purchase money of the land, though such a precedent debt might be sufficient to support a contract between husband and wife.⁴⁷ And a holder of a vendor's lien on land has no lien on implements of agriculture, such as a cotton gin and grist mill that can be detached without injury to the freehold, and cannot enjoin their removal by purchasers from the vendee.⁴⁸ And where defendant held a deed of trust on land of another to secure a debt and the latter sold to plaintiff, and defendant took plaintiff's bond for less than his debt, which bond defendant accepted to be, when paid, in discharge of his debt, and the title proved defective, and plaintiff had to relieve it of an incumbrance.

W. 746; *Mills v. Mills*, 21 How. Pr. (N. Y.) 437.

46. *Mentz v. Cook*, 108 N. Y. 504; *Cox v. James*, 45 N. Y. 557; *LeRoy v. Platt*, 4 Paige (N. Y.), 77.

47. *Petry v. Ambroscher*, 100 Ind. 510, per Elliott, J.: "It would be gross injustice to permit a man to get another's land without paying for it, and turn it over to his wife in payment of a precedent debt. It is clear that the vendor's is the stronger equity, and it is also prior in point of time. A precedent debt is a consideration sufficient to support a contract. *Boling v. Howell*, 93 Ind. 329; *Hewitt v. Powers*, 84 Ind. 295. It is not, however, such a con-

sideration as will constitute a person a *bona fide* purchaser, with rights superior to those of the unpaid vendor of land. It is not difficult to discriminate and plainly indicate the line between cases where a precedent debt is relied upon to support a contract between the parties, and those where it is relied upon to defeat a prior equity. *Busenbarke v. Ramey*, 53 Ind. 499; *Gilchrist v. Gough*, 63 Ind. 576; *Davis v. Newcomb*, 72 Ind. 413; *Louthain v. Miller*, 85 Ind. 161; *Durham v. Craig*, 79 Ind. 117; *Evans v. Pence*, 78 Ind. 439."

48. *McJunkin v. Dupree*, 44 Tex. 500. And see *Cole v. Roach*, 37 Tex. 413; *Climer v. Wallace*, 28 Mo. 556;

and incur costs in defending the title, and defendant made no representations as to title, and no guaranty thereof, it was held that plaintiff could not enjoin the enforcement of defendant's deed of trust.⁴⁹

§ 1009. Enforcing conditions of deed; forfeitures; warranty.

—While equity does not aid in enforcing forfeitures,⁵⁰ yet if the remedy sought is the enforcement of a condition in a deed, equity will interfere by injunction to restrain the breach thereof. And it will so interfere as against assignees of the persons originally bound by the condition, and notwithstanding the fact that forfeiture is prescribed as the penalty of the breach.⁵¹ It is sustained by respectable authority that the fact that a penalty or forfeiture is imposed for doing a prohibited act, is no obstacle to the interposition of equity by injunction.⁵² One who has con-

Walker v. Sherman, 20 Wend. (N. Y.) 636; *Brennan v. Whitaker*, 15 Ohio St. 440.

49. *Stimpson v. Bishop*, 82 Va. 190. And see *Hanna v. Wilson*, 3 Gratt. (Va.) 242; *Knisely v. Williams*, 3 Gratt. (Va.) 265; *Yancey v. Mauck*, 15 Gratt. (Va.) 300. As to enforcement of vendor's lien against assignee for creditors, see *Janney v. Habbeler*, 101 Ala. 577, 14 So. 624.

50. *United States*.—*Horsburg v. Baker*, 1 Pet. 232, 7 L. Ed. 125.

Connecticut.—*Warner v. Bennett*, 31 Conn. 468.

Michigan.—*Wing v. Railey*, 14 Mich. 83; *White v. Port Huron R. Co.*, 13 Mich. 356; *Crane v. Dwyer*, 9 Mich. 350.

New Hampshire.—*Smith v. Jewett*, 40 N. H. 530.

New York.—*Livingston v. Tompkins*, 4 Johns. Ch. 415.

As to enforcing restrictive covenants, see chap. XV herein.

51. *Watrous v. Allen*, 57 Mich. 362, 24 N. W. 104, per Cooley, C. J.:

"Injunction, then, to restrain a breach of a condition if the condition is legal, is perfectly reasonable. It was so disclosed in *Clark v. Martin*, 49 Pa. St. 289, where, as in this case, the remedy was sought by a grantee of the party in whose favor the condition had been reserved. He had become purchaser of a lot adjoining that which the defendant had bought subject to the condition, and was entitled to a perpetual injunction, upon the ground that the condition was imposed for the benefit of such adjoining lot." See, also, *Whitney v. Union R. Co.*, 11 Gray (Mass.), 359.

52. *French v. Macale*, 2 Dr. & W. 269; *Coles v. Sims*, Kay, 56; *Barret v. Blagrove*, 5 Ves. 555; *Hardy v. Martin*, 1 Cox, 26. And see *Fox v. Scard*, 33 Beav. 327; *Howard v. Woodward*, 10 Jur. (N. S.) 1123. Plaintiff sold and conveyed a certain tract of land with the express stipulation and restriction that the vendee, his heirs and assigns, would not make, sell, or permit to be made

vayed by warranty deed may be enjoined from selling under a prior mortgage, and so may his assignee of the mortgage.⁵³

§ 1010. **Prescription; perpresture; accretions.**—The New York laws of 1786 gave the commissioners of the land office authority to dispose of lands lying between high and low watermark along the navigable rivers, but provided that no grant of such lands should be made except to the owners of the adjacent shore. Plaintiff, an ice company, and defendant were owners of adjoining uplands along such a river, and at different dates were granted the lands under water adjoining their respective tracts, defendants' grant being the later. For many years plaintiff had during the winter months, floated ice along defendants' water front to its ice houses. It was held that, as plaintiff could not, by grant, acquire the lands under water adjoining defendants' uplands, it could acquire no prescriptive rights thereto, and injunction would not lie to restrain defendants from building a dyke on such lands, on the ground that it interfered with plaintiff's right to float ice over them.⁵⁴ And assuming the erection of such a dyke to be a purpresture or invasion of the people's right of property in the soil, it could be enjoined only at the suit of the people.⁵⁵ And where the bill averred that defendant illegally maintained a dam, by means of which back-water was thrown upon plaintiff's mill-

or sold thereon, any intoxicating liquors on pain of forfeiting the title thereto, and that on breach of the condition the vendor might re-enter. The vendee sold and conveyed a portion of the tract to the defendant, and other lots in the tract to other parties, who built houses thereon. The defendant commenced to sell intoxicating liquors on his lot, and plaintiff brought suit to enjoin him. It was held, that the court would not refuse relief on the ground that the plaintiff had his remedy at law by forfeiture under the condition. *Richards v. Burdsall* (N. J.), 10 Atl. 274, per Bird, V. C.: "It has been de-

cided in many cases that although there is a remedy by way of forfeiture, the complaint is not obliged to insist upon it. *Hodson v. Coppard*, 29 Beav. 4; *Tulk v. Moxhay*, 11 Beav. 577." Compare *Woodruff v. Water Power Co.*, 10 N. J. Eq. 489.

53. *Martin v. Martin*, 24 S. C. 446, distinguishing *Wilson v. Hyatt*, 4 S. C. 369.

54. *Knickerbocker Ice Co. v. Shultz*, 116 N. Y. 382, 22 N. E. 564. And see *Burbank v. Fay*, 65 N. Y. 57.

55. *People v. New York, etc., Ferry Co.*, 68 N. Y. 71; *People v. Vanderbilt*, 26 N. Y. 293; *Lansing v. Smith*, 8 Cow. (N. Y.) 151.

wheel above, and prayed an injunction, and the answer set up a prescriptive right to maintain the dam, and denied that the dam was the cause of the interference with the wheel, it was held, that the issues thus presented were not within the jurisdiction of the court of chancery.⁵⁶ Again where plaintiffs, owners of lands adjacent to the lake shore, sued to enjoin defendants from dredging and removing the sand from the bed of the lake opposite their property, on the ground that these acts caused erosions on the shore-line, and diminished the material accretions to which plaintiffs were entitled, it was held that, as plaintiffs did not show by their evidence either an actual injury incurred, or that it was certainly impending, the injunction would not be granted.⁵⁷

§ 1011. **Protecting homesteads; Wyoming statute.**—Under the Wyoming statute which provides that every householder being the head of a family shall be entitled to a homestead exempt from execution while occupied as such by the owner or his or her family, and that when any person dies seised of a homestead leaving a widow or husband or minor children, such widow or husband or minor children shall be entitled to the homestead, it is held that one who has acquired a homestead does not lose his right to the exemption by the death of his wife childless, if he continues to occupy the premises as a home, and that he may enjoin a sale of the homestead under execution.⁵⁸ The exemption and protection of homesteads has already been considered.⁵⁹

56. *Outcalt v. Helme Co.*, 42 N. J. Eq. 665, 4 Atl. 669, 9 Atl. 683.

57. *Blatchford v. Chicago Dredging Co.*, 22 Ill. App. 376.

58. *Towne v. Rumsey*, 5 Wyo. 11, 35 Pac. 1025, per *Curiam*: "The serious question in the case is whether or not the right of homestead continued after the death of the wife to the childless widower; and upon this proposition, although the weight of authority is in favor of the continuance of the right to the surviving owner, who is no longer

the head of a family, there are many well-written and well-considered opinions to the contrary. The Supreme Court of Arkansas, 'interpreting the law according to its spirit, and following the current adjudications,' held with some hesitation that when the association of persons which constitutes the family is broken up, whether by separation or the death of some of its members, the right of homestead continues in the former head of the family, provided he resides at his old home. *Stanley v.*

§ 1012. **Party walls.**—In an action to restrain defendant from using a party wall except on payment of half its costs, “and for

Snyder, 43 Ark. 429. So, also, is the decision of the Supreme Court of Illinois under enactments similar to our statutes. *Kimbrel v. Willis*, 97 Ill. 494. While admitting that there was much force in the observation that the homestead act has respect to the family of the debtor, and is for its benefit, and that in any case where this family relation is not found to exist, the homestead exemption does not subsist, there being then no cause for the application of the law, yet the court held that—looking at another section of the act, providing that, upon the death of the original owner of the homestead the exemption shall continue after the death for the benefit of the surviving spouse, so long as he or she continues to occupy the homestead—the original owner, the meritorious cause of the exemption, must be regarded with equal favor as the survivor of such a one after his death. The court asks this pertinent question: ‘If, then, the homestead exemption may continue in such surviving husband or wife so long as he or she continues to occupy the homestead, without the condition of being a householder having a family, why, in the case of the original owner of the homestead before his death, after the homestead estate has been once vested in him, should not the homestead exemption continue for him so long as he occupies the homestead premises, although he may have ceased to be a householder having a family?’ To the same effect is the opinion of the Supreme Court of Kentucky in *Stults v. Sale*, 17 S. W. 148. The right was held to continue, as the debtor had

done nothing to release or forfeit the right, and he therefore could not be deprived of the right by the loss of his family by misfortune. We think our statute, construed, as it must be, so as to render every part of it effective, bestows the homestead right to the debtor, as well as to his family; and where once this right is acquired by the head of a family, and is maintained by occupancy of the exempted homestead by either the owner or his or her family, the right continues. In other words, the homestead exemption can only be divested by the voluntary act of the head of the family, by abandonment or direct renunciation of the right. The right exists to the surviving spouse of the owner after his or her death, and such a survivor may be a childless widow or a childless widower; and there being in that case no family, and consequently no head of a family, upon whom the original right of homestead is conferred, it must be held that the right once acquired is not lost to the survivor because there is no family to protect, or in need of the shelter and sanctuary of the home. The continuance of the right, then, is not dependent upon the continuance of family relations; and, this being so, it must be conceded that the right, once acquired by the head of a family, may continue after his family relations are dissolved. So the right exists also during the life of the owner, the head of a family at the time the right accrued, so long as he occupies the homestead, whether he has been deprived of his family by death or by other circumstances.”

such other and further relief" as may seem just, it appearing that relief by way of injunction was not proper, but that plaintiff was entitled to such amount, and that defendant's premises were charged therewith, it was proper to decree that, unless payment be made, the premises should be sold therefor, in accordance with the general rule that a court obtaining jurisdiction for the purpose of an injunction, may retain the suit in order to do complete justice between the parties, though injunctive relief cannot properly be granted.⁶⁰ And where a party wall built by defendant extended upon plaintiff's land further than it ought, but was accepted and paid for by plaintiff's builder, and the bill for an injunction was not filed until it was completed, a mandatory injunction requiring it to be pulled down, the court, in the exercise of its discretion, refused to grant, but intimated that if the plaintiff had been more prompt he might have had injunctive relief.⁶¹ But where the original agreement, under which a party wall is built, resting equally on the ground of the adjacent owners, provides for a wall without windows, either party may be enjoined from subsequently carrying up the wall another story with windows opening on that part of the wall belonging to the other, and may be compelled to close up such windows.⁶³ And an injunc-

59. Sections 708, 709, *ante*.

60. *Mott v. Oppenheimer*, 135 N. Y. 312, 31 N. E. 1097.

61. *Mayer's Appeal*, 73 Pa. St. 164. And see *Clark v. Martin*, 49 Pa. St. 289; *Senior v. Pawson*, L. R. 3 Eq. 330.

63. *Dauenhauer v. Devine*, 51 Tex. 480, per Gould, J.: "In cities one important consideration in building is danger of fire, and the construction of substantial dividing walls without openings is one of the safeguards against fire. In England and in some of the cities of the United States, the regulations in regard to division walls are largely controlled with reference to fire. See *Vollmer's Appeal*, 61 Pa. St. 118, for a valu-

able history of the legislation in England and in Pennsylvania on that subject. Under the legislation in Pennsylvania, a party-wall in Philadelphia must be a solid wall of brick or stone without openings, and the erection of a wall with windows is held a case for the restraining power of equity. *Vollmer's Appeal*, 61 Pa. St. 118; *Sullivan v. Graffort*, 35 Iowa, 532. The code Napoleon contains similar provisions. *Washburn on Easements*, citing Code Nap., arts. 660, 662."

Compare *Cagney v. Sweet*, 67 Ill. App. 641, as to right where the agreement between the parties permitted the height of a wall to be increased.

tion will be granted to restrain the owner of one-half of an ancient solid party wall from cutting away a portion of its face and erecting a new wall upon his own land at a short distance from the portion left standing and connected with it by occasional projecting bricks and ties.⁶⁵ In accordance with the principle that he who seeks equity must do it, if plaintiff builds his wall so as to project upon defendant's land, he cannot have an injunction to prevent defendant from using it as a party wall,⁶⁶ though in such a case where the question whether the wall in fact projects upon the adjoining land is in dispute, it is decided that the use of such wall as a party wall by the adjoining owner may be restrained until his right thereto has been established in a proper action.⁶⁷

§ 1012a. **Same subject continued.**—A party wall is intended to serve the purpose of a complete division between adjoining houses or buildings and where the owner of adjoining property has made openings in such a wall for windows, doors or other purpose he may be compelled by a mandatory injunction to restore the wall to its original condition by closing up such openings as have been made. And the right to an injunction will not be affected by the fact that the defendant is ready and willing to close up the openings whenever the plaintiff desires to make use of the wall for the purposes originally intended.⁶⁸ But in a recent case in Pennsylvania it is held that the action of the court under the prayer for general relief must be consistent with the allegations of the bill and that a mandatory injunction requiring a defendant to remove a projecting foundation wall is properly refused where such relief would be entirely inconsistent with the allegations of the complaint

65. *Phillips v. Bordman*, 4 Allen (Mass.), 147, per Bigelow, C. J.: "Plaintiffs are entitled to a decree that the wall in controversy was an ancient party-wall, and that the injunction heretofore granted in this case should be made perpetual. *Matts v. Hawkins*, 5 Taunt. 20, 23; *Cubitt v. Porter*, 8 Barn. & C. 263; *Partidge v. Gilbert*, 3 Duer, 184."

66. *Guttenberger v. Woods*, 51 Cal. 523. See, also, *Bank of Escondido v. Thomas* (Cal.), 41 Pac. 462.

67. *Mathis v. Strunk* (Kan. 1906), 85 Pac. 590.

68. *Coggins v. Carey* (Md. 1907), 66 Atl. 673. Compare *Dawson v. Kemper*, 11 Ohio C. C. 180, 1 Ohio C. D. 130.

that the wall was a party wall and hence the builder had a right to encroach on the plaintiff's premises in erecting it, and there being no special prayer requiring the removal of the encroaching part of the wall and the plaintiff having an adequate remedy at law.⁶⁹ The fact that one party in seeking to enjoin an adjacent owner from closing a chimney in a party wall, is proceeding on the theory that his use of the wall has not been such as to render him liable for a proportionate value thereof, does not affect his right to rely on the statute of limitations as a defense to a claim against him for contribution.⁷⁰

§ 1013. **Eminent domain; equity jurisdiction.**—Courts of equity have a special jurisdiction to prevent the abuse of the right of eminent domain, and to keep those who are invested with the right within the limits of their powers.⁷¹ This jurisdiction rests

69. *Mercantile Library Co. v. University of Pennsylvania* (Pa. 1908), 69 Atl. 861.

70. *Pier v. Salot*, 134 Iowa, 357, 111 N. W. 989.

71. *United States*.—*Colorado Eastern R. Co. v. Chicago, B. & Q. R. Co.*, 141 Fed. 898, 73 C. C. A. 132; *Crapo v. Hazelgreen*, 93 Fed. 316.

Alabama.—*Birmingham Traction Co. v. Birmingham Ry. & E. Co.*, 119 Ala. 129, 24 So. 368.

Minnesota.—*Johnson v. Town of Cloutarf* (1906), 108 N. W. 521.

New Jersey.—*Ocean City R. Co. v. Bray*, 55 N. J. Eq. 101, 35 Atl. 839.

Pennsylvania.—*Semple v. Cleveland & P. R. Co.*, 172 Pa. St. 369, 33 Atl. 564; *Biddle v. Wayne Waterworks Co.*, 7 Del. Co. Rep. 161.

Where notice of proceedings is required by statute and no notice is given proceedings will be enjoined. *Crapo v. Hazelgreen*, 93 Fed. 316.

The exercise of the right must not be inequitable.—*Semple v.*

Cleveland & P. R. Co., 172 Pa. St. 369, 33 Atl. 564.

The taking of land not reasonably necessary will be enjoined. *Biddle v. Wayne Waterworks Co.*, 7 Del. Co. Rep. 161.

Permissive statute as to becoming a party.—A statute providing that a person may become a party to condemnation proceedings who has not been made a party thereto is only permissive and does not deprive him of his right to an injunction restraining the taking of his land except in compliance with the law. *Colorado Eastern R. Co. v. Chicago, B. & Q. R. Co.*, 141 Fed. 878, 73 C. C. A. 132.

An injunction will not be granted enjoining the construction of a railroad across the plaintiff's land where the value of his interest in the land used by the company is nominal and the object of the suit is merely to aid another company. *Bray v. Ocean City R. Co.*, 57 N. J. Eq. 164, 37 Atl. 164.

upon a different principle from that which governs in cases of trespass, nuisance or waste, and is exercised without reference to the insufficiency of legal remedies or considerations of irreparable injury.⁷² But if the complainant's title is not clear, the whole controversy resolving itself into a naked dispute as to the strength of the legal title, and if it be not shown that an action of trespass or ejectment will afford all necessary relief, the court will not interfere by injunction, and the parties will be remitted to their respective remedies at law.⁷³ In the application of the general rule that notice of condemnation proceedings must be given in accordance with the provisions of the statute requiring it, it is decided that where a notice was given by the president's direction, without lawful authority, and the time expired, under its terms, for the appointment of an assessor by the landowner, the directors can not, by ratifying the act of the president, cause such ratification to relate back and give such notice the same effect as it would have had if it had been legal when given. And in such a case the landowner is entitled to an injunction.⁷⁴

§ 1014. Taking under eminent domain; compensation.—A temporary injunction is properly granted to restrain a railroad company from taking land under the right of eminent domain without first making compensation to the *prima facie* owners.⁷⁵

Where a bond has been deposited sufficient for the payment of such damages as may be awarded and the complainant owns only a small interest in the land, which is of little or no value, and the other owners have consented to the proposed use, an injunction will not be granted. *Davis v. Port Arthur C. & D. Co.*, 87 Fed. 512, 31 C. C. A. 99, 59 U. S. App. 155.

72. *Western Railway v. Alabama G. T. R. Co.*, 96 Ala. 272, 276, 11 So. 483; *Highland Ave. R. Co. v. Birm. U. R. Co.*, 93 Ala. 505, 9 So. 568; *East, etc., R. Co. v. East Tenn. R. Co.*, 75 Ala. 275.

73. *Highland Ave. R. Co. v. Birm. U. R. Co.*, 93 Ala. 505, 9 So. 568; *Schurmeier v. St. Paul, etc., R. Co.*, 8 Minn. 113; *Zabriskie v. Jersey City R. Co.*, 13 N. J. Eq. 314; *Spencer v. Point Pleasant R. Co.*, 23 W. Va. 406.

74. *Bridwell v. Gate City Term. Co.*, 127 Ga. 520, 56 S. E. 624; *Volberg v. Gate City Term. Co.*, 127 Ga. 537, 56 S. E. 991.

75. *Bass v. Metropolitan West S. E. R. Co.*, 82 Fed. 857, 27 C. C. A. 147, 53 U. S. App. 542, 39 L. R. A. 711; *Montgomery v. Lemle*, 121 Ala. 609, 25 So. 919; *Birmingham Traction Co. v. Birmingham Ry. & E.*

And this general rule is applicable to a county which proposes to appropriate land for a public road.⁷⁶ And where a railroad company has constructed and is operating its road without the consent of the owner of the land who also used every effort to prevent the company from so doing, an injunction against the further operation and compelling the removal of the tracks will be granted unless compensation is made.⁷⁷ And in a recent case in West Virginia it is declared that where there is a constitutional provision forbidding the taking of land for public use until compensation shall have been paid therefor or secured, it is plain that no remedy that allows the land to be used for such purpose before payment of compensation is adequate and that in order to enforce this mandate a court of equity has jurisdiction to grant an injunction securing to the citizen the possession and use of his lands until compensation is paid or the payment thereof secured.⁷⁹ The New York Code of Procedure, providing that at any stage of the proceeding the court may authorize the plaintiff, if in possession of the premises, to continue therein, and may stay all actions and proceedings against him on account thereof upon giving security for payment of the compensation which may finally be awarded to the owner, does not authorize the court, after an order of confirmation had been entered, to grant an order restraining defend-

Co., 119 Ala. 129, 24 So. 368; Georgia C. & N. R. Co. v. Archer, 87 Ga. 237, 13 S. E. 636; Butterworth-Judson Co. v. Central R. Co. (N. J. Eq. 1907), 66 Atl. 198.

76. Zimmerman v. Kearney County, 33 Neb. 620, 50 N. W. 1126.

77. Butterworth-Judson Co. v. Central R. Co. (N. J. 1907), 66 Atl. 198.

In a recent case in New Jersey it is said: "The general principle is well settled that a railway corporation will not be permitted to take property for the uses of its railway without making just compensation first, and that the remedy of the property owner where constitutional

right is invaded, or threatened to be invaded, is by an injunction, and that the injunction will issue, as the authorities hold, not upon the same principles which apply to the issuing of an injunction to restrain an ordinary trespass. The injunction will issue to enforce the constitutional right of the property owner against dangerous aggression and in order to keep corporations within the limits of their powers." Menge v. Morris & E. R. Co. (N. J. Eq. 1907), 67 Atl. 1028, 1029. Per Stevenson, V. C., citing Pratt v. Roseland Ry. Co., 50 N. J. Eq. 154, 24 Atl. 1027.

79. Jackson v. Big Sand, E. L. & G. R. Co. (N. C. 1907), 59 S. E. 749.

ants from maintaining actions in respect to the property, but is merely designed to protect plaintiff's possession pending the condemnation proceedings.⁸⁰ Where the injury to property amounts to a total destruction of its value, it is equivalent to an actual taking or appropriation of it, and an injunction may be granted to restrain such an injury until compensation is paid.⁸¹ But there is no error in refusing to enjoin a city from constructing a sewer through plaintiff's residence lot, where he refused to submit the question of compensation to arbitrators, and it appeared from the affidavits that the sewer was imperatively required by the public health and would be so constructed as not to injure plaintiff's property.⁸² And a lot owner cannot have a city enjoined from erecting a fire engine house on an adjacent lot, until compensation is made for the anticipated depreciation of his property in value, in consequence of the noise incident to such structures, where no direct and special damage is shown.⁸³

§ 1014a. **Same subject; relating to streets.**—The preventive jurisdiction of courts of equity by the writ of injunction is frequently invoked to restrain the opening of streets and highways because of the refusal or omission of the public authorities to make proper compensation to property owners for damages incurred in taking their land for public use.⁸⁴ So where a statute prescribes the mode in which land may be acquired for the purpose of widening a road, it is held to be error to refuse to enjoin the appropriation of a person's land for such purpose until the mode prescribed by statute has been followed.⁸⁵ Under the constitution of New York, which provides that no one shall be deprived of life, liberty, or property without due process of law, and that private property

80. *Manhattan R. Co. v. Taber*, 29 N. Y. Supp. 220.

81. *Ward v. Ohio Riv. R. Co.*, 35 W. Va. 481, 14 S. E. 142. And see *Spencer v. Railroad Co.*, 23 W. Va. 407; *Mason v. Bridge Co.*, 17 W. Va. 396; *Arbenz v. Wheeling & H. R. Co.*, 33 W. Va. 1, 10 S. E. 14; *Ohio River R. Co. v. Gibbens*, 35 W. Va. 57, 12 S. E. 1093.

82. *McDaniel v. Columbus*, 87 Ga. 440, 13 S. E. 745.

83. *Van de Vere v. Kansas City*, 107 Mo. 83, 17 S. W. 695; *Gates v. Kansas City Bridge & T. R. Co.*, 111 Mo. 28, 19 S. W. 957.

84. *Johnson v. Town of Cloutarf* (Minn. 1906), 108 N. W. 521.

85. *Buchanan v. Jones* (Ga. 1908), 61 S. E. 125.

shall not be taken for public use without just compensation, an elevated railroad company will be enjoined from constructing an additional track in front of plaintiff's premises, unless it has acquired the right to impose such additional burden on plaintiff's property by condemnation proceedings as provided by the laws of 1875.⁸⁶ And in this State it is also decided that when a contractor for the purpose of improving the Erie canal intends to enter upon and appropriate a street upon which is a surface railroad, without the filing of the map and certificate and without the notice as required by law, the railroad is entitled to an injunction restraining the contractor from entering, excavating or in any way interfering with its structures or rights.⁸⁷ But where the use of a street by a railway company is not an additional servitude, entitling abutters to compensation, the latter cannot maintain a bill to enjoin the operation of the railway on the ground that the company has transcended its authorized powers, since it is amenable for an excessive exercise of power only to the State.⁸⁸ And if the plaintiff be the owner of a lot abutting on a public street it will not require the proceeding to condemn such lot for railroad purposes to be enjoined on the ground that the company has not condemned such interest as she may have in the street, or acquired the right to cross it.⁸⁹ The question whether a property owner is entitled to compensation for a line of pipes laid in the highway abutting his property is one to be tried on appeal from the assessment of damages, and cannot be raised in injunction proceedings.⁹⁰ In an action to restrain condemnation proceedings for widening a public alley, where the verified answer denies the allegations of the com-

86. *Stroub v. Manhattan R. Co.*, 15 N. Y. Supp. 135.

87. *United Traction Co. v. Ferguson Contracting Co.*, 117 App. Div. (N. Y.) 305, holding, also, that such an action may be brought by the lessee of the railroad.

88. *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 23 Atl. 884. And see *Lockhart v. Craig St. R.*

Co., 139 Pa. St. 419, 21 Atl. 26; *Halsey v. Rapid Transit S. R. Co.*, 47 N. J. Eq. 380, 20 Atl. 859; *Williams v. Railroad Co.*, 41 Fed. 556.

89. *Bridwell v. Gate City Term. Co.*, 127 Ga. 520, 56 S. E. 624, followed in *Volberg v. Gate City Term. Co.*, 127 Ga. 537, 56 S. E. 991.

90. *Bass v. Fort Wayne*, 121 Ind. 389, 23 N. E. 259.

plaint and shows compliance with the statute authorizing the proceedings, the temporary injunction should be dissolved.⁹¹

§ 1014b. **Same subject; pleading.**—In an action to enjoin the taking and occupation of land by a corporation seeking to exercise the right of eminent domain, it is sufficient to allege such taking and occupation by the corporation in the exercise of such right without having first complied with the constitutional or statutory provisions in respect thereto. And it is not necessary to allege either that irreparable injury will be sustained or that the trespasser is insolvent.⁹² And where a plaintiff in an action to restrain a railroad company from entering upon his land and constructing a railroad, pleads that the defendant company has instituted condemnation proceedings and deposited the damages as required by law, and that the road is being constructed across his land pursuant to such proceedings, and that the proceedings are void because the road is in fact being constructed by and for another company, the burden is upon him to prove the latter allegation.⁹³ Under a Code provision that an injunction cannot be granted “To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings,”⁹⁴ an application for an injunction to restrain condemnation proceedings will not be granted unless it appears that such restraint is necessary⁹⁵ within the requirement of the Code provision.

§ 1015. **Where property only damaged.**—A bill was filed against a railroad company in Missouri by the owner of a building on a public street in St. Louis, on which the company was about, under competent municipal authority, to lay down tracks at grade

91. *Knoblauch v. Minneapolis*, 56 Minn. 321, 57 N. W. 928.

92. *State v. Caretta Ry. Co.* (W. Va. 1907), 56 S. E. 520.

93. *Beckman v. Lincoln & N. W. R. Co.* (Neb. 1907), 112 N. W. 348.

94. Mont. Civ. Code, § 4463.

95. *Spratt v. Helena Power Trans. Co.* (Mont. 1908), 94 Pac. 631.

96. *Osborne v. Missouri Pac. R. Co.*, 147 U. S. 248, 13 S. Ct. 299, 37 L. Ed. 155, per Fuller, C. J.: “In *Chicago v. Taylor*, 125 U. S. 161, 8 S. Ct. 820, 31 L. Ed. 638, which was

for use in running cars drawn by steam power. The bill prayed to restrain and enjoin the company from commencing or carrying out the proposed construction, or from taking possession of the street for that purpose. The injuries to result to the complainant's

an action in trespass on the case, the provision of the Constitution of the State of Illinois, adopted in 1870, that 'private property shall not be taken or damaged for public use without just compensation,' came under consideration in this court, and it was ruled, in concurrence with the interpretation placed upon that language by the Supreme Court of the State, that a recovery might be had wherever private property has sustained a substantial injury from the making and use of an improvement that was public in its character, whether the damage was the direct result of a physical invasion of the thing owned, or of the injurious disturbance of its use and enjoyment, as in a diminution of its market value. The same conclusion was reached in *Rigney v. City of Chicago*, 102 Ill. 64, where, among other things, it was said: 'In all cases, to warrant a recovery, it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally.' Many decisions under similar constitutional provisions are to the same effect. *Reading v. Althouse*, 93 Pa. St. 400; *Pittsburgh, etc., Ry. v. Vance*, 115 Pa. St. 325; *Auman v. Philadelphia, etc., R. R.*,

133 Pa. St. 93; *Hot Springs R. R. v. Williamson*, 45 Ark. 429; *Columbus & Western Ry. v. Witherow*, 82 Ala. 195; *Gottschalk v. Chicago, Burlington, etc., R. R.*, 14 Neb. 550; *Spencer v. Point Pleasant R. R.*, 23 W. Va. 406. It is insisted, however, that the settled rule of decision of the highest tribunal of Missouri is that the construction and operation of a steam railroad track in the ordinary way upon the streets of a municipality is a legitimate use of the street, and does not impose a new burden or servitude, and that the injury which owners of abutting property may suffer, by reason of such construction and operation, is not of a nature for which compensation is demandable under the constitutional provision in question. In *Julia Building Assn. v. Bell Telephone Co.*, 88 Mo. 258, a bill for an injunction was filed by an abutting land owner to restrain the erection and maintenance of telephone poles and wires on the sidewalk. The bill was dismissed and the judgment affirmed at October term, 1885, of the Supreme Court, the court holding that when the public acquires a street in a city, either by condemnation, grant or dedication, it may be applied to all purposes consistent with the proper use of a street; that it is only when the street is subjected to a new servitude, inconsistent with and subversive of its proper use, that the abutting land owner can complain; that the erection and maintenance of de-

building from the proposed construction were set forth, but without any demand for compensation other than that contained in the prayer for general relief. The statutes of Missouri provide for the assessment of compensation for the taking of property for

fencibles' poles were a proper use of the street; that it seemed that the owner of adjoining premises could not claim compensation for damages resulting from such use; and in no event would compensation be allowed for speculative or contingent damages, although recovery could be had for injuries resulting from the unskillful and negligent conduct of the work. And it was observed in the prevailing opinion that 'railroads operated by steam are permissible, because such methods of transportation and travel are among those to which the street may be properly applied, as not being inconsistent with its free and unrestricted use.' The court was not unanimous, and it is said by counsel that the dissenting opinion is the better law, and that the allusion to railroads in streets was an *obiter dictum*; but in the recent case of *Henry Gauss & Sons M'fg Co. v. St. Louis, Keokuk & Northwestern Ry.*, decided December 13, 1892, 20 S. W. 658, the precise question was passed upon. This was a suit to enjoin the defendant from laying a track and operating a railroad laterally along Main street, in the city of St. Louis, in front of plaintiff's property, until compensation for damage thereto should be ascertained and paid. A preliminary injunction, which was granted at the commencement of the suit, was dissolved, and the road had been built and was in use when the cause was tried. There has been great diversity of opinion among the courts as to whether,

though under proper authority, laying a track on the established grade and operating a steam railroad along a street is subjecting a street to a public use not contemplated in a general grant or dedication. Whatever the rule may be elsewhere, this court (Missouri) has been uniform in holding that such a use is not a perversion of the highway from its original purposes. *Lackland v. Railroad*, 31 Mo. 180; *Porter v. Railroad*, 33 Mo. 128; *Cross v. Railroad*, 77 Mo. 321; *Smith v. Railroad*, 93 Mo. 20. Whenever the power of eminent domain is about to be exercised without compliance with the conditions upon which the authority for its exercise depends, courts of equity are not curious in analyzing the grounds upon which they rest their interposition. Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the injury is destructive or of a continuous character or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiæ*. But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial and the remedy at law in fact inade-

public use, but not for such assessment where property is merely damaged. It was held that the complainant had an adequate remedy at law for the injuries complained of, and was not entitled to the relief prayed for.⁹⁶

quate before restraint will be laid upon the progress of a public work. And if the case made discloses only a legal right to recover damages rather than to demand compensation, the court will decline to interfere. In *McElroy v. Kansas City*, 21 Fed. 257, which was an application for an injunction to restrain the grading of a street in front of complainant's lot, Mr. Justice Brewer, then circuit judge, considered under what circumstances a chancellor could grant such relief. It was ruled that, if the injury which the complainant would sustain from the act sought to be enjoined could be fully and easily compensated at law, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer large inconvenience, if the contemplated act were restrained, the injunction should be

refused, and the complainant remitted to his action for damages. If the defendant had an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but if the means of complying with the condition were not at defendant's command, then the court would adjust its order so as to give complainant the substantial benefit of the condition, while not restraining defendant from the exercise of its ultimate rights."

See, also, *De Lucca v. City of North Rock*, 142 Fed. 597; *Chicago & W. I. R. Co. v. General Elec. R. Co.*, 79 Ill. App. 569.

CHAPTER XXXVII.

RELATING TO EASEMENTS.

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Section 1016. **Protecting visible easements.**—The general rule is that a man who owns land subject to an easement has a right to use his land in any way not inconsistent with the easement, and the extent of the easement is to be determined by a true construction of the grant creating it, aided by such circumstances surrounding the estate and parties as have a legitimate tendency to show

the intention of the parties.¹ And one who is entitled to the enjoyment of an easement will be granted an injunction against any interference with his right thereto.² And when the owner of land sells a part of it he impliedly grants to the grantee all those apparent and visible easements which are necessary for the reasonable use of the property granted, and which are at the time of the grant used by the owner of the entirety for the benefit of the part granted.³ So where defendant, the owner of two adjoining farms, conveyed one of them, with its appurtenances, to plaintiff, and

1. *Onthank v. Railroad Co.*, 71 N. Y. 194. Under this rule the rights of the owner of the easement are paramount to the extent of his grant.

2. *California*.—*Stallard v. Cushing*, 76 Cal. 472, 18 Pac. 427.

Colorado.—*Gyra v. Windler* (Colo. 1907), 91 Pac. 37.

Connecticut.—*Legg v. Horn*, 45 Conn. 409.

Georgia.—*Russell v. Napier*, 80 Ga. 77, 4 S. E. 857.

Illinois.—*Carpenter v. Capital Electric Co.*, 178 Ill. 29, 52 N. E. 973, 43 L. R. A. 645; *Smith v. Young*, 160 Ill. 163, 43 N. E. 486.

Iowa.—*Swan v. Burlington, C. R. & N. R. Co.*, 72 Iowa, 650, 34 N. W. 457.

Kentucky.—*Henry v. Koch*, 80 Ky. 391, 44 Am. Rep. 484.

Maryland.—*White v. Flannigain*, 1 Md. 525, 54 Am. Dec. 668.

Massachusetts.—*Boland v. St. John School*, 163 Mass. 229, 39 N. E. 1035.

Michigan.—*Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. 791.

Montana.—*Sankey v. St. Mary's Female Academy*, 8 Mont. 265, 21 Pac. 23.

Nebraska.—*Agnew v. Pawnee City* (Neb. 1907), 113 N. W. 236.

New Hampshire.—*Webber v. Gage*, 39 N. H. 182.

New Jersey.—*Greer v. Van Meter*,

54 N. J. Eq. 270, 33 Atl. 794; *De Luze v. Bradbury*, 25 N. J. Eq. 70.

New York.—*Herman v. Roberts*, 119 N. Y. 37, 23 N. E. 442, 16 Am. St. R. 800, 7 L. R. A. 226; *Haight v. Littlefield*, 71 Hun, 285, 24 N. Y. Supp. 1097; *Baron v. Korn*, 51 Hun, 401, 4 N. Y. Supp. 334, *aff'd* 127 N. Y. 224, 27 N. E. 804.

Pennsylvania.—*Appeal of Hack*, 101 Pa. St. 245.

Virginia.—*Sanderlin v. Baxter*, 76 Va. 299, 44 Am. Rep. 165.

West Virginia.—*Rogerson v. Shepherd*, 33 W. Va. 307, 10 S. E. 632.

Obstruction of private way.—It is well settled that an obstruction to a private way forms one of the class of cases in which an injunction may be sought. *Dewire v. Hauley* (Conn. 1907), 65 Atl. 573.

Where it is sought to enjoin the obstruction of an alleyway on the ground that it has become a public highway and there is evidence tending to show that it has, but there is a serious question as to the existence of facts which are sufficient to establish such claim a preliminary restraining order will be continued to the hearing. *Tise v. Whitaker-Harvey Co.*, 144 N. C. 507, 57 S. E. 210.

3. *Lampman v. Milks*, 21 N. Y. 505.

for many years there had been a spring on the farm retained by defendant, which was walled up so as to hold the water, and from which the water flowed, through wooden logs and iron pipes, to plaintiff's premises, after the conveyance defendant dug a well near the spring, and by means of a ditch diverted the water from the spring to the well, and deprived plaintiff of its use, and the spring was not mentioned in the deed to plaintiff, it was held that a right to the supply of water from the spring passed with the deed as an open and visible appurtenance to the land, and necessary to its full enjoyment, and that plaintiff was entitled to an injunction to compel defendant to restore the stream of water flowing from defendant's premises upon the premises of plaintiff, and to restrain further interference with it.⁴ In this connection it is

4. *Paine v. Chandler*, 134 N. Y. 385, 32 N. E. 18, per Brown, J.: "The learned counsel for the appellant does not attack the principle, but his contention is that the easement involved in this controversy is of the class known as 'discontinuous,' and such an easement passes by implication only when absolutely necessary to the enjoyment of the property conveyed. To use his own language, 'the rule contended for has been confined to cases where the easement claimed was something, without the use of which the premises would be practically worthless.' The rule is not confined in its application to continuous easements, but applies to those artificial arrangements which openly exist, and affect materially the value of the respective parts of the estate at the time of the sale. *Lampman v. Milks*, *supra*; *Curtiss v. Ayrault*, 47 N. Y. 73, 79. To support his argument upon the claim of absolute necessity the appellant in part relies upon Massachusetts cases. It was said in the opinion in *Buss v. Dyer*, 125 Mass. 287, that if an easement existed by implication it was

because it was absolutely necessary to the enjoyment of the estate. But that remark was not necessary to the decision, as the verdict of the jury was in the defendant's favor, under a charge that there was no easement unless there was a reasonable necessity therefor. The learned judge who delivered the opinion in that case conceded that his statement of the rule was in conflict with the decisions of the courts of England and of the State. In this State the rule of strict necessity is applied to implied reservations, but not to implied grants. In the recent case of *Wells v. Garbutt*, 132 N. Y. 430, 30 N. E. 978, it was said: 'As a grantor cannot derogate from his own grant, while a grantor may take the language of the deed most strongly in his favor, the law will imply an easement in favor of a grantee more readily than it will in favor of a grantor.' This distinction between implied reservations and implied grants, there pointed out, is well founded in the law, although in some of the reported cases it has apparently been overlooked. In *Johnson*

decided that it is not necessary in order to justify the interposition of a court of chancery, that the easement claimed by the complainant is absolutely necessary for the enjoyment of the estate granted but that it is sufficient if it is highly convenient and beneficial therefor.⁵

§ 1017. Easement and nuisance; general considerations.—

The protection of easements and the prevention of nuisances often require the application of the same principles, and to entitle com-

v. Jordan, 2 Metc. (Mass.) 234, Chief Justice Shaw, after stating the rules applicable to the construction of a grant, said: 'If a man owning two tenements has built a house on one and annexed thereto a drain through the other, if he sell and convey the house, with the appurtenances, such a drain may be construed to be *de facto* annexed as an appurtenance, and pass with it, because such a construction would be most beneficial to the grantee; whereas, if he were to sell and convey the lower tenement, still owning the upper, it might reasonably be considered that, as the right of drainage was not reserved in terms, it could not be claimed by the grantor. The grantee of the lower tenement, taking the language of the deed most strongly in his favor, and against the grantor, might reasonably claim to hold his granted estate free of the incumbrance.' See, also, *Wheeldon v. Burrows*, 12 Ch. Div. 31, 49; *Washb. Easem.* (4th Ed.) pp. 105, 106; *Burr v. Mills*, 21 Wend. (N. Y.) 290. In *Johnson v. Jordan*, *supra*, to which appellant refers, the conveyances of the dominant and servient tenements were simultaneous, and the right to the easement was denied upon a construction given to the deeds and the circumstances attending their deliv-

ery. In *Buss v. Dyer*, 125 Mass. 287, the chimney in which an easement was claimed had worn out, and had been taken down, and the jury found as a fact that the plaintiff at a reasonable cost could have built one on his own property; and the facts of the case amply justify the decision without reference to the rule of strict necessity. Undoubtedly, an easement to pass by implication must be necessary to the enjoyment of the estate granted, but the necessity required is a reasonable, not an absolute, one. Mere convenience would not be sufficient to create or convey the right. The privilege or right implied must be of value to the estate granted, which the grantee has estimated as an advantage to the estate and paid for in his purchase. In *Curtiss v. Ayrault*, 47 N. Y. 73, the essential question of fact there involved was stated to be whether the grantor of the plaintiff, in arriving at the price he would pay, considered, and had a right to consider, as an element of value of the land he was buying, the ditch across the tract giving the supply of water through it." See, also, *Simmons v. Cloonan*, 81 N. Y. 557; *Root v. Wadhams*, 107 N. Y. 384, 14 N. E. 281; *O'Rorke v. Smith*, 11 R. I. 259.

5. *Smith v. Young*, 160 Ill. 163,

plainant to equitable relief in either case, his rights must be free from any substantial doubt.⁶ Thus, the owner of an easement for the discharge of surface water drained from his land, by open ditch, may change the ditch to a tile drain, and is entitled to perpetual injunction against obstructions to the discharge on the adjoining land, where the flow of water has not been increased by the change.⁷ But a court of equity will not interfere to prevent the obstruction of a private right of way created by express grant, where it appears that the easement has been extinguished by an apparently valid tax sale of the servient estate, and also that the owner of the dominant estate has other and equally convenient means of access to it, and therefore will not suffer any substantial damage by the alleged obstruction.⁸ And it has been decided that while a court of equity can interfere in behalf of a person whose right to the use of a passway already in existence has been obstructed, it has no jurisdiction in a case where the establishment of a passway is claimed on the mere ground of necessity and that if a private passway over the lands of other persons is necessary to a plaintiff he must apply to another forum for its establishment.⁹ Again, plaintiff, being entitled, by deed from their common grantor, to take gravel from defendant's land, cannot be confined

43 N. E. 486, citing *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176; *Cihak v. Klekr*, 117 Ill. 643, 7 N. E. 111.

6. *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839. The proposition in the text is well illustrated by the opinion of Bailey, J., who begins by saying: "The deed under which the complainant claims title. conveyed to him not only the west one-third of the tract in question, but also the right to a private way over the remaining two-thirds of said tract, from the land so conveyed to Halsted street. He now claims that said private way has been and is being obstructed by the defendant, and he therefore seeks the aid of a court of equity to remove the obstruction, and

to confirm him in the use of his easement over the defendant's land." The rest of the long opinion is devoted sometimes to the easement and sometimes to the remedy for the nuisance which obstructed the easement.

7. *Davison v. Hutchinson*, 44 N. J. Eq. 474, 18 Atl. 977.

8. *Oswald v. Wolf*, 129 Ill. 200, 21 N. E. 839. And see *Burnham v. Kempton*, 44 N. H. 78; *Rhea v. Forsyth*, 37 Pa. St. 503; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282.

9. *Hall v. McLeod*, 2 Mete. (Ky.) 98, 74 Am. Dec. 400.

to such places as defendant may select, and be prevented from using a gravel pit established over ten years, and the most convenient for the purpose, on the ground that he is causing some caving of the surface.¹⁰

§ 1018. **Plaintiff's right to be clear.**—A bill to enjoin an owner adjoining a highway from filling up an artificial ditch without the highway limits, does not lie, unless the public has by deed, prescription or condemnation, acquired a right to its use as an easement. Thus it was so held, although the ditch had existed thirteen years, had been kept open by the highway commissioners, and, under a contract with them, the occupant had been paid from public funds for improving it.¹¹ Where a petition for an injunction against interfering with plaintiff's right of way alleged that plaintiff owned the right across the original survey before defendant acquired title to a subdivision, that in the deed to defendant's vendor the right was expressly reserved, and that plaintiff had been in continued possession for more than twenty-one years, it was held that the petition set out an absolute title to the easement independent of prescription, and that the allegations in reference to the long possession must be construed simply as intended to negative the idea of forfeiture from abandonment or non-user.¹² There being nothing in plaintiff's deed or elsewhere

10. *Corliss v. Dunning*, 8 Wash. 332, 35 Pac. 1074.

11. *Simpson v. Wright*, 21 Ill. App. 67.

Where an injunction is sought against certain acts interfering with the development of plaintiff's mining claim, it is no objection that it does not appear how valuable plaintiff's claims are, it being impossible to estimate their value until their character has been demonstrated by development. *Fuller v. Swan River Placer Min. Co.*, 12 Colo. 12, 19 Pac. 836.

A suit to enjoin a city from changing the width of certain

sidewalks, which alleges that plaintiffs were abutting owners on the street; that the change in the width of the street from 45 to 50 feet, according to an alleged old ordinance of the city, would reduce their sidewalk to five feet, and that the object of the city was to compel the plaintiffs to give five feet off their lots to widen the sidewalk, is properly dismissed for want of an allegation that the lawful width of the street was but 45 feet. *Strauss v. City of Dallas*, 73 Tex. 649 11 S. W. 872.

12. *Chance v. East Texas R. Co.*, 63 Tex. 152.

to import notice of plaintiff's claim to an easement in a certain alley, it is held that he is properly refused an injunction against its appropriation by those acting under a claim of right.¹³ Where complainant's right, as an abutting lot owner, to prevent the defendant from stretching its lines over the land in the street in front of his lot is debatable, defendant claiming to act under statutory and municipal authority, a preliminary injunction to restrain defendant's proceeding will not be allowed.¹⁴

§ 1019. **Establishing right at law.**—Where the complainant's right is clear and its violation palpable, and he has not slept on his rights, equity will ordinarily interfere, though the right has not been established at law, and in such a case a preliminary mandatory injunction will often be granted, so framed as to compel defendant to undo what he has done.¹⁵ So the existence of an easement need not be established in an action at law to entitle one to an injunction restraining the obstruction of a right of way across the land of another where the existence of such right clearly appears.¹⁶ And a riparian proprietor is entitled to an injunction to restrain the threatened unlawful diversion of the waters of a stream flowing through his land, without first establishing his right at law by recovering a judgment in damages.¹⁷

13. *Kicklighter v. Rosenthal*, 74 Ga. 151.

14. *Roake v. American Telephone Co.*, 41 N. J. Eq. 35, 2 Atl. 618. And see *Citizens Coach Co. v. Camden*, etc., R. Co., 29 N. J. Eq. 299.

15. *Carpenter v. Gold*, 88 Va. 551, 14 S. E. 329; *Hanna v. Clarke*, 31 Gratt. (Va.) 36; *Parker v. Mfg. Co.*, 2 Black, 545; *Switzer v. McCulloch*, 76 Va. 777. In *Perkins v. Foye*, 60 N. H. 496, where an injunction was sought to enable plaintiff to draw water from defendant's reservoir without the latter's interference, Clark, J., said: "To authorize the interposition of equity in such a case the mischief

must be imminent, the remedy at law clearly inadequate to afford redress, and the right supposed to be invaded must be clear or long enjoyed by the plaintiff. *Webber v. Gage*, 39 N. H. 182; *Coe v. Lake Co.*, 37 N. H. 254; *Lake Co. v. Worster*, 29 N. H. 433; *Jordan v. Woodward*, 38 Me. 423; *Morse v. Machias Water Co.*, 42 Me. 119; *Wason v. Sanborn*, 45 N. H. 169."

See, also, *Lambert v. Huber*, 22 Misc. R. (N. Y.) 462, 50 N. Y. Supp. 793.

16. *Manbeck v. Jones*, 190 Pa. St. 171, 42 Atl. 536.

17. *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674. And see *Burden v.*

§ 1020. **Injury to be shown; adequate remedy.**—Where the evidence fails to show that the taking of ice from the mill-pond, under license from the owner of the land beneath it, results in real and substantial injury to the plaintiff in respect of a water privilege by him derived beforehand from the same grantor, an injunction to restrain defendants from taking the ice will be refused.¹⁸ And where the rental value of complainant's property has greatly increased since the construction of the road, and such increase is due chiefly, if not exclusively, to the operation of the road in the immediate proximity of the property, no injury has resulted to him entitling him to relief by injunction against the continued appropriation of his easements in the street.¹⁹ Where

Stein, 27 Ala. 104; Burnham v. Kempton, 44 N. H. 78; Bliss v. Kennedy, 43 Ill. 67.

18. Lathrop v. Haley, 81 Iowa, 649, 47 N. W. 878.

Plaintiff alleged that by adverse user he had acquired the right to the water in defendant's mill-race for irrigation and domestic purposes, when the mill was not running; that defendant had deprived him of the use of the water at such times, and threatened to continue the deprivation; and he prayed that defendant be deprived therefrom. The court found that on a certain day defendant did so deprive plaintiff of the use of the water. It was held insufficient to sustain an injunction, in the absence of any finding as to how long such deprivation lasted, or as to whether defendant threatened to continue it. Ball v. Kehl, 87 Cal. 505, 25 Pac. 679.

The fact that defendants, mill-owners on the opposite side of the stream, had within ten days commenced to use, and were continuing to use, and threatening to use in future, more water than they were lawfully entitled to, thereby de-

priving plaintiffs of sufficient water to run their mill and obliging them to shut down portions of it. It was held not to show such a permanent or irreparable injury as to justify an injunction. Westbrook Mfg. Co. v. Warren, 77 Me. 437, 1 Atl. 246.

19. Brush v. Manhattan Ry. Co., 26 Abb. N. C. (N. Y.) 73, 13 N. Y. Supp. 908.

The owner of a business stand abutting on a public alley sustains special damage when a railroad company illegally obstructs the alley by building a depot across the same, and customers are thereby prevented from using it as a means of access to the stand, for the purposes of trade, and in a suit to enjoin such obstruction it is no defence that new and increased custom will result by reason of the erection of the depot and other improvements which are to be built by the company near the depot nor can any increase in the value of plaintiff's property, anticipated as a probable effect of the company's improvements, be set off against the injury. Harvey v. Georgia, etc., R. Co., 15 S. E. 783, 90 Ga. 66.

it is probable that, by city improvements and the construction of sewers in adjacent streets, the water from complainant's lot, which now has its only outlet through a drain on defendant's lot, may be diverted into the public sewers, a perpetual injunction restraining defendant from obstructing the drain will be so modified as to give him leave to apply for the discharge of the injunction, when, by means of public sewers, the servitude on his land is no longer necessary for the enjoyment of complainant's property.²⁰

§ 1021. **Same subject.**—The owner of a right to draw water from a dam and pond to maintain his mill, has no right of injunction to prevent the repair of the dam and pond in a manner which omits to provide for the waste-gate and flume, as formerly existing for the use of the owner of the right, when it appears that the manner of repair sought to be enjoined will not practically diminish

Complainant purchased a lot of ground embraced in a plot which his grantor had mapped and laid out into blocks, lots, and streets, which were dedicated and accepted to the public use by Jersey City, which, subsequently under its charter, vacated a portion of the streets adjacent to complainant's lot to the defendant who commenced to construct an embankment thereon for the purpose of straightening its main track, which by its weight caused upheaval of the surface of complainant's lot and the destruction of the buildings thereon. It was held that an injunction to compel the removal of the embankment, or to restrain its completion, would not lie; it not appearing with any certainty that further injury would result to complainant, nor that an action to recover damages would lead to interminable litigation, and complainant's rights to the streets vacated being doubtful. *Herbert v. Pennsylvania R. Co.*, 43 N. J. Eq. 21, 10 Atl. 872, per McGill, Ch.: "A

mandatory injunction should be issued interlocutorily with hesitation and caution. *Railroad Co. v. Baker*, 27 N. J. Eq. 166; *Whitecar v. Michenor*, 37 N. J. Eq. 14; *Lord v. Manufacturing Co.*, 38 N. J. Eq. 459.

20. *Dunning v. Kelly*, 46 N. J. Eq. 605, 22 Atl. 128. In an action by a telephone company to restrain an electric light company from erecting its poles and wires on the same occupied by the telephone wires, where it appears that defendant first occupied the street in pursuance of prior authority, but it is shown that the erection of the telephone wires near the electric light wires will not injure the usefulness of the electric light wires, and no affirmative relief is demanded by the answer or sought at the trial, a decree restraining the telephone company from placing its line of wires near the wires of the electric light company will be reversed. *Nebraska Tel. Co. v. York Gas & Electric Light Co.*, 27 Neb. 284, 43 N. W. 126.

the privilege hitherto enjoyed.²¹ And where plaintiffs, claiming to own a certain alley, brought a bill in equity to enjoin defendants from using it, and defendants alleged that the alley was a common alley, and that they had a right to use it, it was held that equity had no jurisdiction of the matter, and the plaintiff's remedy was at law.²² And where plaintiff alleged that he was engaged in the butchering business, and that defendant had constructed a building on the public road, wholly obstructing the road, which was plaintiff's only means of going to and from his slaughter house, and that his business would be thus entirely destroyed, to his damage of five thousand dollars, and he did not allege that defendant was not responsible for such sum, or that there would be any impediment to recovery of such sum by an action at law, it was held that he was not entitled to a preliminary injunction enjoining defendant from maintaining any obstruction on such road.²³ And in a suit to restrain the diversion of a running stream, when no especial damage is shown, the complainant, having satisfactorily established his title, is entitled to an injunction in vindication of his rights, only so far as to prevent defendant from acquiring an adverse right to the diversion of the water by prescription.²⁴ And where plaintiff petitioned for an injunction restraining defendant from the use of a stream, whereby a large part of the water was diverted, and the facts showed the use to be one of great importance to defendant and others, and that plaintiff was making no special use of the stream, and suffering no more than nominal damages, it was held that an order denying an injunction restraining defendant from consuming the water which plaintiff could not and did not use, but perpetually restraining defendant from using the water to the sensible damage of plaintiff for any purpose for which he might then or in future use such water, should be sustained.²⁵ If, however, the remedy at law for the obstruction of an easement, such as a right of way, is clearly inadequate, an injunction should

21. *Webb v. Laird*, 59 Vt. 108, 7 Atl. 465. And see *Hill v. Shorey*, 42 Vt. 614.

22. *Appeal of Quinn* (Pa.), 11 Atl. 649; *Washburn's Appeal*, 105 Pa. St. 480.

23. *Gardner v. Stroeveer*, 81 Cal. 148, 22 Pac. 483.

24. *Franklin v. Pollard Mill Co.* (Ala.), 6 So. 685.

25. *Ulbricht v. Eufaula Water Co.*, 86 Ala. 587, 6 So. 78, per *Somerville*,

be granted to restrain such obstruction.²⁶ Thus it was so held in an action to enjoin the maintenance of gates across a private alley.²⁷

§ 1021a. **Enjoining excessive use of easement.**—An unlawful or excessive use of an easement may be enjoined. The fact that the nature and extent of the use of an easement is unrestricted, while it may permit of the enlargement or changing of the use of the dominant tenement yet the owner of such tenement can not subject the servient tenement to a use in connection with other premises to which the easement is not appurtenant and an attempt to do so may be enjoined. So where a deed of property contained a covenant in respect to an alley that such alley should “forever be left open to the present height of the same, as a means of ingress and egress for the advantage of all the property hereinbefore conveyed,” it was decided that a company which purchased a lot dominant to the easement and several other lots which had no right or interest therein and erected an office building on the entire plot, would be enjoined from enlarging the use of the easement for the benefit of those parts of the office building which were upon premises other than the dominant tenement.²⁸ And where an easement is granted by one to construct and lay a water pipe over his lands the grantee will be enjoined from laying an additional pipe over such lands where such act is in excess of the right

J.: “A court of equity will use its discretion in such case not to interfere by injunction but leave the complainant to his remedy at law. *Smith v. Rochester*, 92 N. Y. 463; *Corning v. Troy Nail Factory*, 40 N. Y. 220; *Clinton v. Myers*, 7 Am. Rep. 373, 379.”

26. *Weidner v. Deith*, 21 Pa. Co. Ct. R. 440.

27. *Smith v. Young*, 160 Ill. 163, 43 N. E. 486. But see *Berg v. Neal* (Ind. A. C. 1907), 82 N. E. 802, wherein it is declared that where, in an action to enjoin the defendant from removing a gate erected by the complainant upon his land at a point

where a certain easement of passage entered upon a highway, the complaint admitted that the defendant had a right, it was held that such admission did not carry with it the necessary implication that it was an open right of way and that the rule was settled that gates could be maintained by the owner of the servient estate in a reasonable way at the termini of the easement of a passage over the land. Per *Hadley, J.*, in affirming a judgment for plaintiff.

28. *McCullough v. Broad Exchange Co.*, 101 App. Div. (N. Y.), 567, 92 N. Y. Supp. 533, affirmed 184 N. Y. 592.

granted.²⁹ And where an owner of land has granted another an easement therein with the privilege of selecting the place where such easement shall be enjoyed, the selection made at the time, followed by the exercise of the right by the grantee cannot be subsequently altered by him. So where a company was granted the right to dig and build a reservoir on a person's land and to lay its pipes from such reservoir over the land of the grantor to the company's main pipes, it was enjoined about ten years after from entering upon the land for the purpose of sinking in order to acquire an additional supply of water.³⁰

§ 1022. **No injunction where compensation paid.**—An injunction restraining defendant from using or appropriating plaintiff's easement with its elevated railway will be permanently suspended where it appears that, since the rendition of the judgment granting the injunction, plaintiff has been awarded compensation for his easement in condemnation proceedings instituted by defendant and the amount has been paid into court.³¹

29. *Winslow v. City of Vallejo*, 148 Cal. 723, 84 Pac. 191.

30. *Sked v. Pennington Spring Water Co.* (N. J. Eq. 1907), 65 Atl. 713.

31. *Watson v. Metropolitan El. R. Co.*, 8 N. Y. Supp. 533, 57 N. Y. Super. Ct. 364. Damages were assessed for a right of way of a railroad across lands divided by a public road, which was intersected by the right of way. The owner accepted the assessed damages pending suit by her to restrain the construction of an embankment on such right of way across the road, on the ground that such embankment was a public inconvenience, and also prevented free passage between her lands divided by the road. It was held that as she accepted the damages, presumed to cover her inconvenience, she had no cause of action for private incon-

venience; and for public injury, only public officers could sue. Appeal of *Campbell* (Pa.), 12 Atl. 843. In an action, the judgment in which awarded an injunction against the maintenance of defendant's railroad in the highway in front of plaintiff's property, with a condition that it should be inoperative on payment of a certain sum, and also awarded damages for past injury to the property, the admission of proof of an offer for the property, as evidence of the value of the fee, is not ground for reversal, as affecting the recovery of damages, that being merely incidental to the right to relief by injunction, or as affecting the amount to be paid to arrest the injunction, that condition not being open to attack by defendant. *Lawrence v. Metropolitan El. Ry. Co.*, 12 N. Y. Supp. 546.

§ 1023. **Delay and acquiescence.**—A party may by reason of his delay or acquiescence lose his right to an injunction. So where defendants purchased a lot, with buildings on it, which had been erected years before in violation of a restriction in the deed and the grantor and his successors in interest were at all times in possession of the adjoining lot, but made no objections to the buildings, it was held that after such delay equity would not restrain the further maintenance of the buildings, but that plaintiff, who had succeeded to the grantor's interests in the adjoining lot, would be left to his remedy at law.³² And where one having an easement of way permits, without objection, the building of an expensive embankment across it by a railroad company which has no knowledge of the existence of the easement, will not be entitled to a decree requiring the removal of such embankment until the company may exercise its right to condemn the same.³³ But it has been decided that equity will enjoin the obstruction of an alley to the destruction of plaintiff's right of way; and the fact that plaintiff himself had previously made an encroachment, will not estop him from seeking relief in equity against the defendant.³⁴

§ 1024. **Protecting public privileges; lateral support.**—Where privileges of a public nature are also beneficial to private property, as in the case of land upon a public square, the enjoyment of them will be protected from encroachments by injunction; and the owner of such private property may apply for such injunction. Thus, the owner of a residence fronting on a town common is entitled to an injunction against one who seeks to inclose a part of it for his private use, though he could apply to the town authorities whose duty it is to remove nuisances and encroachments.³⁵ And where the evidence shows that on a sale of lots a certain plot of ground was sufficiently dedicated as a park the pur-

32. Orne v. Fridenberg, 143 Pa. St. 487, 22 Atl. 832. And see Lux v. Haggin, 69 Cal. 255; Fuller v. Swan, etc., Min. Co., 12 Col. 12.

33. Manning v. Port Reading R. Co., 54 N. J. Eq. 46, 33 Atl. 802.

34. Schaidt v. Blaul, 66 Md. 141, 6 Atl. 669.

35. Wheeler v. Bedford, 54 Conn. 244, 7 Atl. 22, where the court cites Brown v. Manning, 6 Ohio, 298; Hills v. Miller, 3 Paige (N. Y.), 254; Corn-

chasers of such lots may maintain a bill to enjoin an interference with the public use of such park or an attempt to devote it to any other purpose than that to which it was dedicated.³⁶ And the right to lateral support of soil will be protected by injunction, although the pecuniary damage threatened is slight, and may be easily compensated in damages.³⁷ Where this incidental right to the ownership of land is invaded, equity assumes jurisdiction, on account of the nature of the injury rather than of the magnitude of the damage.³⁸ But where the fundamental question in a controversy over the removal of lateral support is the true line between the parties and the title to a disputed strip of land, the case is not properly cognizable in equity.³⁹ Where two city lots adjoin, the lower owes a servitude to the higher so far as to receive the water which naturally runs from it, but if the owner of the upper frequently pumps out his well in order to injure the complainant's wall by running the water against it, the chancellor may, in his discretion, restrain him by injunction.⁴⁰

§ 1025. **Grantor's reserved right of way.**—A landowner may be enjoined from interfering with a private right of way through his land lawfully used by another landowner in reaching the highway. Thus, a reservation in a deed of a tract of land of a perpetual right of way through it to enable the grantor to reach the highway from a parcel of land in rear of that conveyed, creates

ing v. Lowerre, 6 Johns. Ch. (N. Y.) 439; Watertown Trustees v. Cowen, 4 Paige (N. Y.), 510. See, also, Avondale Land Co. v. Avondale, 111 Ala. 523, 21 So. 318.

Where a lot is dedicated to church purposes on a town plat its proposed use for other purposes will not be enjoined at the suit of a property owner who has sustained no pecuniary injury. *Armstrong v. Portsmouth Bldg. Co.*, 57 Kan. 62, 45 Pac. 67.

36. *Morrow v. Highland Grove Traction Co.* (Pa. 1908), 69 Atl. 41.

37. *Trowbridge v. True*, 52 Conn.

190, 52 Am. Rep. 579. See, also, *Victor Min. Co. v. Morning Star Min. Co.*, 50 Mo. App. 525; *Finegan v. Eckerson*, 32 App. Div. (N. Y.) 233, 52 N. Y. Supp. 993.

May enjoin removal of retaining wall.—*Bullard v. Kempff*, 119 Cal. 9, 50 Pac. 780.

38. *Davis v. Londgreen*, 8 Neb. 47.

39. *Wykes v. Ringleberg*, 49 Mich. 567, 14 N. W. 498. And see *Devaux v. Detroit*, Har. Ch. (Mich.) 98; *Blackwood v. Van Vleet*, 11 Mich. 252.

40. *Goldsmith v. Elsas*, 53 Ga. 186.

an easement appurtenant to the unconveyed parcel which will be protected by injunction, as in such a case damages would not be an adequate remedy to one who could have no peaceable egress from his land to the highway.⁴¹ And an injunction to restrain the shutting up of a private way, which furnishes the only convenient egress from plaintiff's land to the public highway, may be granted, even though the act sought to be restrained has been committed.⁴² And mere non-user for twenty years does not extinguish an easement. If such non-user is not accompanied by acts which show an intention of abandonment, adverse possession as well as non-user is necessary to effect the extinguishment.⁴³ Again, equity will enjoin a railroad company, the grantee of a

41. *Lathrop v. Elsner*, 93 Mich. 599, 53 N. W. 791; *Nye v. Clark*, 55 Mich. 599, 601.

See, also, following cases:

District of Columbia.—*Richardson v. Mushake*, 36 Wash. Law Rep. 748.

Iowa.—*Karmuller v. Krotz*, 18 Iowa, 352.

Maine.—*Winthrop v. Fairbanks*, 41 Me. 307; *Smith v. Ladd*, 41 Me. 314.

Massachusetts.—*Dennis v. Wilson*, 107 Mass. 591.

Michigan.—*Wilmarth v. Woodcock*, 66 Mich. 331; *Morgan v. Meuth*, 60 Mich. 238.

New York.—*Borst v. Empie*, 5 N. Y. 33; *Burr v. Mills*, 21 Wend. 290; *Welch v. Taylor*, 2 N. Y. Supp. 815; *Longendyck v. Anderson*, 59 How. Pr. 1.

England.—*Cook v. Mayor*, L. R. 6 Eq. 177.

A grantor, contending that he had reserved a strip 30 feet wide over the granted land, as a way to his other premises, but that the reservation had been omitted from the deed by mistake, tore down a fence erected by the grantee across the 30-foot strip. The grantee then filed her peti-

tion, alleging the insolvency of the grantor, and praying for an injunction. The grantor answered, setting up the mistake in the deed, and the insolvency of the grantee, and praying for a reformation of the deed, and for an order restraining the grantee from interfering with the 30-foot strip. On the hearing, the evidence was conflicting, both as to the alleged mistake in the deed and the insolvency of the grantor; but no evidence was offered as to the solvency or insolvency of the grantee. It was held that the trial judge did not abuse his discretion in issuing a temporary injunction against the grantor, not to take effect if he executed a bond for the payment of all damages that the grantee might subsequently recover, and in issuing an unconditional temporary injunction against the grantee. *Rubsam v. Cobb*, 84 Ga. 552, 11 S. E. 138.

42. *Lakenan v. Hannibal, etc., R. Co.*, 36 Mo. App. 363.

43. *Veghte v. Water Power Co.*, 19 N. J. Eq. 142; *Pratt v. Sweetser*, 68 Me. 344; *Eddy v. Chace*, 140 Mass. 471, 5 N. E. 306.

right of way across another company's land, from forcibly preventing its grantor from using its own property as a freight yard, as permitted by the contract granting the easement, on the ground that it would interfere with the grantee's use of its tracks, the damages which would result from such interference by the grantee being wholly uncertain.⁴⁴

§ 1026. **Easement in street by purchaser of lot.**—When an owner of land lays it out into lots with intersecting streets and sells the lots with reference to such streets each grantee of a lot bounded on a street and his successors have an easement in the street as a public highway which is a property right.⁴⁵ This easement as soon as created is an incorporeal hereditament which becomes at once appurtenant to the lot and constitutes a perpetual incumbrance upon the land burdened with it, and from the moment it attaches the lot becomes the dominant and the open way or street the servient tenement.⁴⁶ The same rule applies to the

44. *Chicago R. Co. v. Lake Shore R. Co.*, 30 Ill. App. 129.

45. *Lord v. Atkins*, 138 N. Y. 184, 33 N. E. 1035; *White's Bank v. Nichols*, 64 N. Y. 65; *Taylor v. Hopper*, 62 N. Y. 649; *Huttemeier v. Albro*, 18 N. Y. 48; *Wyman v. Mayor*, 11 Wend. (N. Y.) 487; *Trustees v. Cowen*, 4 Paige (N. Y.), 510.

Under covenants in deeds to both parties that the land in question was to be used only as an alley, and that it was to be kept open for the mutual benefit of the owners of the property on each side, defendants have no right to obstruct the alley by building a wooden frame entirely across it, and putting up hooks and slides of metal to hang and slide meat on, and an injunction will issue in plaintiff's favor, though they were not using the alley at the time. *Swift v. Coker*, 83 Ga. 789, 10 S. E.

442. See, also, *Richardson v. Mushake*, 36 Wash. Law Rep. 748.

46. *Child v. Chappell*, 9 N. Y. 246; *Hills v. Miller*, 3 Paige (N. Y.), 256; *Trustees, etc., v. Cowen*, 4 Paige (N. Y.), 514. On application for injunction, plaintiffs alleged that defendant was about to close an alley, and thereby deprive them of a valuable easement to their property. Defendant answered that the alleged alley was her private property, was closed at the time of plaintiffs' purchases, and that they bought with a full knowledge of these facts. The answer was supported by corroborating affidavits. It was held that the judge did not abuse his discretion in granting a temporary injunction till the case could be heard. *Hughes v. McIntosh*, 83 Ga. 431, 9 S. E. 1110.

The purchaser of a lot from an owner of land who has made and ex-

State or a municipal corporation when it deals with its lands as owner.⁴⁷ In such cases the person having the easement is entitled to an injunction to compel the street to be kept open and to compel the removal of obstructions.⁴⁸ But the use of a street for the purpose of an electric railway does not impose a new servitude upon the streets so as to entitle abutting lot owners to additional compensation and a court of equity will not restrain the construction of such a road especially in view of the fact that by statute a remedy is given to the abutting owner in an action at law to recover for any injury done to him by the construction or operation of the road.⁴⁹ A claim to an easement for the purposes of light and air over a yard attached to a building may be upheld in favor of a lessee of part of the building and for that purpose he may enjoin the erection of a building upon the yard, upon the ground that the assessment was appurtenant to the premises demised.⁵⁰

§ 1027. **Granted right of way; user.**—One who has purchased and acquired by grant a right of way across the lands of another for the purpose of a carriage road from the public highway to the grantee's residence, can enjoin the grantor from making such use of the land granted as will render the road impassable, or otherwise interfere with its use by the grantee for the purposes of a carriage road.⁵¹ The conveyance of such a right of way also gives to the grantee such rights as are incident and necessary to the enjoyment of the right of way, as, for instance, the right to enter upon the land and construct a road and keep it in repair.⁵² And

hibited a plot thereof showing streets and alleys acquires a right not only to the use of the streets and alleys, but that such streets and alleys shall remain open to the use of the public. *Swedish Evangelist L. Church v. Jackson*, 229 Ill. 506, 82 N. E. 348.

47. *Oswego City v. Oswego Canal Co.*, 6 N. Y. 257; *Story v. N. Y. El. R. Co.*, 90 N. Y. 122, 165.

48. *Taylor v. Hopper*, 62 N. Y.

649; *Badeau v. Mead*, 14 Barb. 328. And see *Fonda v. Borst*, 2 Keyes (N. Y.), 48, which is distinguished.

49. *Jeffries v. Mayor of Annapolis* (Md. 1907), 68 Atl. 361.

50. *Doyle v. Lord*, 64 N. Y. 432.

51. *Herman v. Roberts*, 119 N. Y. 37, 23 N. E. 442.

52. *Bliss v. Greeley*, 45 N. Y. 671; *Maxwell v. McAtee*, 9 B. Mon. (Ky.)

21.

where a party has acquired an open and unobstructed right of way over land by publicly using the same in that manner, without objection, for more than twenty years, he can enjoin its obstruction.⁵³

§ 1027a. **Granted right of way; rights as to light and air.**—Where a deed gives a right of passage over land but contains no express grant of an easement of light and air there is no implied grant of a right to have light and air pass over such way to any greater extent than is necessary for the reasonable enjoyment of the right of passage granted. So in an action to enjoin the construction of a bay window which extended a short distance over such a passage way at a considerable height from the ground, a ruling that the plaintiff was entitled not only to unrestricted right of way over the strip for the purpose of passage but also “to the right of an uninterrupted access of light and air over and across the same” was held erroneous on the ground that the court clearly intended to hold that any material interference by the defendant with the “access of light and air over and across” the strip of land was an obstruction of plaintiff’s right even though it did not interfere with the reasonable and ordinary use of the right of way.⁵⁴

§ 1028. **Right of way; grant uncertain.**—Where, in an action to enjoin the obstruction of an alley granted by defendant to plaintiff’s grantor, it appeared that the description in the deed of the alley was so indefinite that its identity could not be ascertained, but that after the grant it was definitely located by the

53. Rogerson v. Shepherd, 33 W. Va. 307, 10 S. E. 632. And see Collins v. Prentice, 15 Conn. 39; Ashley v. Ashley, 4 Gray, 197; Arbuckle v. Ward, 29 Vt. 44; Miller v. Garlock, 8 Barb. 153; Williams v. Nelson, 23 Pick. 141; Ricard v. Williams, 7 Wheat. 59; Hammond v. Zehner, 21 N. Y. 118; Stearns v. Janes, 12 Allen, 582; Garrett v. Jackson, 20 Pa.

St. 331; Nichols v. Luce, 24 Pick. 103.

54. Bitello v. Lipson (Conn. 1908), 69 Atl. 21, wherein Hall, J., said: “In inquiring whether an injunction ought to be granted upon the ground that the bay window may directly interfere with the plaintiff’s use of the driveway, the proper question is not what use the plaintiff might pos-

parties, and passed to the possession of the grantee, who continued its use for nine years, it was held that evidence of oral statements of the parties, made prior to the grant, indicating a purpose by the grantor, at some time, to acquire other land and locate the alley over it, was incompetent, and that plaintiff must allege in his bill that such alley was located by the parties after the grant, since the deed alone was void for uncertainty.⁵⁵

sibly attempt to make of it, but what uses can he reasonably be expected to have occasion to make of it."

55. *Wharton v. Hannon*, 101 Ala. 554, 14 So. 630, per Head, J.: "It is observed that the deed is indefinite as to the particular location of the 12-foot way—so much so that the identity of the way intended to be granted could not be ascertained from it alone. The evidence, however, very clearly discloses that immediately after the grant the way intended to be conveyed was definitely located and marked by the parties, and passed to the actual possession and enjoyment of the grantees, who continued therein unmolested until the happening of the grievances complained of in the present bill—a period of some nine years. Such a location and delivery of possession aids the deed, and secures to the grantee a good title and right to the possession of the way so located, as fixed and irrevocable as if the deed itself were perfect. *Bannon v. Angier*, 2 Allen, 128; *Osborn v. Wise*, 7 Car. & P. 761; *Kraut's Appeal*, 71 Pa. St. 64; *Jennison v. Walker*, 11 Gray, 426; *Jones v. Percival*, 5 Pick. 485; *Wynkoop v. Burger*, 12 Johns. 222. The right of way being thus secured and defined by the deed and location, and the possession and enjoyment of the grantees thereunder, it is not permissible to introduce prior oral state-

ments of the parties indicating a purpose on the part of the grantor, at some time in the future, to acquire other adjacent land, and make a location of the way different from that which was made, and over the land so to be acquired. Nor is it material that a better way of ingress and egress has been opened by the grantor, and offered to the grantee. The latter's rights are such as he acquired by his contract, and it is for him to determine whether he will surrender them, and accept some other benefit in their stead. It is very clear that the fact that the use of complainant's alleyway involves the crossing with his teams, etc., of the sidewalk on Commerce street, does not make a case of such public detriment or inconvenience as justified defendant in closing the alley, or will induce the court to withhold the exercise of its remedial powers, otherwise properly invoked, to secure to the grantee the enjoyment of his easement. Upon the evidence, therefore, as we find it in the record, we would have no hesitation in affirming the decree of the city court, but there is an omission in the bill which must work a reversal. As we have seen, the deed, in itself, is imperfect, in that it fails to identify the particular land intended to be covered by the easement. It required location under it. In order to obtain relief,

§ 1029. **Pleadings; prescription.**—Where land is so situated with reference to a public highway that it is necessary to ingress and egress to and from such land, the owner has a private easement in the highway and may maintain an action to prevent its obstruction.⁵⁶ In such a case the public highway must be described as such in the complaint.⁵⁷ Though a right of way for a toll-road is a mere incorporeal hereditament, yet a complaint which shows that the plaintiff is the owner of the right of way for a toll-road, and entitled to collect tolls thereon, and that defendant county interferes with his enjoyment of his property by depriving him of his tolls, presents a sufficient case for an injunction, under the California Code, which provides that anything which is an obstruction to the free use of property may be enjoined.⁵⁸ In a suit to enjoin obstruction of a right of way, the cause of action rests upon the threatened obstruction, and the complaint, in basing complainant's right to the way both on necessity and on a right by prescription, does not state two causes of action. And where the complaint seeks to enjoin the obstruction of a right of way, based both on necessity and prescription, an answer pleaded as a defense to all the matters set up in the complaint, but which is no defense to the claim of the right by prescription, is demurrable.⁵⁹ In such suit, the complaint, in stating that fifty years before complainants' and defendants' lands were owned by a person named, who then conveyed the land owned by complainants to another, through whom they claim; that the person named afterwards conveyed the land owned by defendants; and that for more than twenty years complainants and their grantors have enjoyed the right of way over defendants' land,—alleges a right of way by prescription.⁶⁰

the complainant was required to allege, as well as prove, that the location was made, and describe the way so located. Proof without allegations is not sufficient. *McDonald v. Insurance Co.*, 56 Ala. 468; *Goldsby v. Goldsby*, 67 Ala. 560. The bill fails to show the location. For this omission, the decree is reversed, and the cause remanded."

56. *Ross v. Thompson*, 78 Ind. 90.

57. *Harding v. Cowgar*, 127 Ind. 245, 26 N. E. 799.

58. *Welsh v. Plumas County*, 80 Cal. 338, 22 Pac. 254.

59. *Harding v. Cowgar*, 127 Ind. 245, 26 N. E. 799.

60. *Harding v. Cowgar*, 127 Ind. 245, 26 N. E. 799. And see *Parish*

§ 1030. **Abandoning easement to railroad company.**—Where by a written instrument, not under seal, owners of land bounded on certain streets, to which they had no title, gave unconditional “consent to the construction and operation of an elevated railroad over and through and along such streets,” by a designated company, which, with others, afterwards build and operated the road, it was held that such consent, after being acted on by the company, operated as an abandonment by such owners of their easement in the streets so far as was reasonably necessary for the construction and operation of such road, and that they or their successors in title could not revoke their consent, and recover damages already sustained, and enjoin the further operation of the road.⁶¹

v. Kaspere, 109 Ind. 586, 10 N. E. 109; Hill v. Hagaman, 84 Ind. 287.

61. *White v. Manhattan R. Co.*, 139 N. Y. 19, 34 N. E. 887, per Peckham, J.: “The plaintiffs insist that the paper was of no more effect than a parol license to do work on the land of the licensor would have been, and that it was revocable at the pleasure of the licensor, and that a revocation was effected by the conveyance of the land, and by the commencement of this action by the devisees of the former owner, James H. White. There is no finding or proof that the plaintiffs have any title to that portion of the street or square upon which their building fronts, but there is a finding that they acquired with their title to the premises the right to have Chatham Square kept open as a public street, ‘and to have a free and unobstructed right of way, access, and passage to and from said premises, and over and upon said street, together with all the use and benefit of the light and air coming in and upon said lot and premises

through and from said street, free and unobstructed.’ I think the proof shows, without contradiction, that all the rights in the street they had were what has been termed property rights in the nature of easements of light, air, and access. *Story’s Case*, 90 N. Y. 122; *Kane’s Case*, 125 N. Y. 164, 26 N. E. 278, and cases cited. The defendants therefore insist that, as the plaintiffs or their predecessors had no title to any portion of the street, the consent of their predecessors, while in the possession and ownership of the abutting land, that the defendants might construct and operate the railroad in the square in front of their land, was more than a mere license to do an act on the land of the licensor, and that it amounted in law and in fact to an abandonment of their rights or easements in the street, so far as was necessary for the construction and operation of the railroad, and that, the consent to such construction having been acted on, and large amounts of money expended on the faith thereof, the plain-

§ 1031. **Reserved light easement; ancient lights.**—A grantor, who has reserved an easement of light and air from the sold premises, may enjoin building thereon, on showing that it would

tiffs, as the successors of those who gave the consent, are themselves estopped from making any claim for damages arising from such construction and operation. It has been the law in this State for a number of years that an easement to do some act of a permanent nature on the land of another can be created only by a deed or conveyance in writing, operating as a grant, and that a consent in writing on the part of the landowner is no more valid than if it were by parol. Thus a parol agreement by the owner of the land that a person may abut and erect a dam on such land, not for a temporary purpose, but for a permanent use, such as the creation of a water power for the use of mills, is void, and the agreement, being a mere license, may be revoked even after it has been acted upon by the other party. Also a permanent easement to drain through the land of another is not created by a license so to do, even when in writing, and made upon a good consideration. *Mumford v. Whitney*, 15 Wend. (N. Y.) 381; *Wiseman v. Lucksinger*, 84 N. Y. 31; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Babcock v. Utter*, 1 Abb. Dec. 27, and cases cited; *Eckerson v. Crippen*, 110 N. Y. 585, 18 N. E. 443. The question of the establishment of an easement by adverse user, which may authorize the presumption of a grant, is not involved, nor is the ability to thus prove its existence denied. *Hammond v. Zehner*, 21 N. Y. 118. It is, however, held (what would otherwise seem to be plain enough) that there can be no adverse user where the

right to use exists and is exercised under a license. *Wiseman v. Lucksinger*, *supra*. The reasoning upon which these decisions as to the insufficiency of a license are based is that the right which is claimed under a license amounts to an interest in land, and that such interest cannot be created and cannot pass to another, without a proper conveyance or grant of such interest in writing and under seal, as required by our statute. The easements of abutting owners in New York city, who are without title to any portion of the streets upon which their lands abut, differ somewhat in their origin from ordinary easements. They have not been created by grant or covenant, but it is said of them that it is easier to realize their existence than to trace their origin; that they arise from the situation, the course of legislation, the trust created by statute, the acting upon the faith of public pledges and upon a contract between the public and the property owner, implied from all the circumstances, that the street shall be kept open as a public street, and shall not be devoted to other and inconsistent uses. *Kane's Case*, *supra*. Whatever the means by which the easements were created, they are in their nature the same as if they had been created by grant. The owners thereof cannot be divested of them without their consent, unless they are compensated therefor. Although it may generally be said, under the authority of the cases already cited, that an easement in the nature of an interest in the land of another can only be

result in substantial loss of light and air to his windows; but in such a case a preliminary injunction will not stand where the complainant's right is in doubt or the injury which may result from

created by a grant, yet after it has been created, and while it is in existence, it may be abandoned, and thus extinguished, by acts showing an intention to abandon and extinguish the same. This has been many times decided, and by many different courts. A cesser to use, accompanied by an act clearly indicating an intention to abandon the right, would have the same effect as a release without reference to time. *Snell v. Levitt*, 110 N. Y. 595, 18 N. E. 370, and cases cited in opinion of Earl, J., at page 603, 110 N. Y., and page 372, 18 N. E. The intention to abandon is the material question, and it may be proved by an infinite variety of acts. If a third party interested in the servient estate has acted upon such abandonment, and in regard to whom it would operate unjustly if the exercise of the easement should be resumed in favor of the dominant estate, added force is given to the claim of abandonment. *Id.* The railroad company having procured the consent of the authorities of the city to the construction of the railroad in the street or square in question upon the terms agreed upon, such company obtained an interest in, and to a certain extent a title to, the street, for the purpose of the construction and operation of its railroad, which was in the nature of property, and which was sufficient to enable it to treat with abutting property owners in the character of one who had an interest in the servient estate. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692. The case before us is therefore dif-

ferent from those cases where an easement has been claimed to have been created in the land of a third person, by reason of his mere license to enter upon his land and do some act of a permanent nature which would amount, if the right should continue, to an interest in the land of such person. This interest in land, the cases hold, requires a grant. In this case the owners of the abutting land had no title to the street. They had an easement in it only, and their consent purported to carry no title to land. There can be no question that they had the right to release, abandon, or otherwise extinguish that easement, and upon such terms as they should think fit. The question before us is whether they have done so, and to what extent, by the execution of the paper proved upon the trial. Assuming that it was executed by each of the parties who owned an interest in the abutting land at that time, what was its effect? The parties were under no obligation of a legal or moral nature to give this consent. There was nothing in the law, nor, so far as appears, in the circumstances surrounding the parties, which called upon the owners to give their consent upon any condition other than that which operates in all strictly and purely business transactions—the consideration of benefit to themselves. These owners occupied no public position with regard to their property; they were in no sense trustees, either for the public or for any human being. They represented only themselves and their own inter-

its invasion is not irreparable.⁶² And where, on a bill to restrain the erection of a building three feet from complainant's, because it would interfere with his ancient lights, it appeared that complainant's building had been standing for more than twenty years, but it had not been used as a dwelling house for many years, and it was not shown that the darkening of the lights would cause material and irreparable injury to the business then conducted in it, it was held that an injunction would not be granted.⁶³ But where in an action to restrain defendant from building so as to interfere with plaintiff's ancient lights and for a mandatory injunction to compel him to pull down a building already erected, it appeared that the premises of plaintiff and defendant were both leaseholds held under the same lessor who had consented to the erection of defendant's building, it was held on appeal that as

ests, and in deciding whether to consent to the building of the road or not they had legally or morally no possible reason for consulting any but their own interests. When, therefore, an abutting owner consents in writing to the construction and operation of an elevated railroad in the street fronting his property, what other possible meaning can be placed upon such an act than that he voluntarily abandons his easement of light, etc., in the street, to the extent to which it will necessarily be affected by the building of the road? The act is capable of but one construction, as it seems to me. He might have consented conditionally, as, for instance, that a majority should also execute such consent, or upon payment of a certain sum, or upon condition of the payment of such damages as he might prove he would sustain from the existence of the road. In this case, however, there is absolutely no condition stated or claimed. There is the unconditional consent to the building of the road, and, upon the as-

sumption that it was signed by all the owners or duly authorized by them, it must be regarded as an abandonment *pro tanto* of the easement in that street as already described, especially after the consent has been acted upon by the company."

62. *Hagerty v. Lee*, 45 N. J. Eq. 255, 17 Atl. 826.

In an action against an elevated railroad company to recover damages caused by the construction of defendants' road in the street on which plaintiff's property abuts, without having made compensation for the appurtenant easement of light, air, and access, and to enjoin the maintenance of the road, it is proper to include in the injunction a clause forbidding the running of trains on defendant's road, since the running of trains is one of the incidents to the maintenance of the road. *Suarez v. Manhattan Ry. Co.*, 60 Hun, 584, 15 N. Y. Supp. 222.

63. *Hulley v. Security Deposit Co.*, 5 Del. Ch. 578.

plaintiff had proved his legal right to the light and that the defendant's building would seriously impair it that he was entitled to an injunction as to the threatened building and to damages only as to the completed building.⁶⁴ And where a person entitled to an easement of light and air has given notice to one erecting a building that he intends to bring an action to enjoin its erection and the builder evades service of the writ until a substituted service is had and continues with the construction of the building, it is decided that he may be compelled by mandatory injunction to tear down that part of the building which was erected after he received the warning.⁶⁵ And the only remedy whereby just compensation for the invasion of the easements of light, air, etc., by an elevated railroad may be had, is held to be an action in equity to restrain the continuous trespasses, in which an injunction *nisi* is awarded.⁶⁶ And where complainant sued to enjoin the erection of a building on an area or space which the complainant's deed entitled him to have left open, and before the building was commenced defendant was notified that the complainant insisted upon the area being left open and tendered to the defendant a sum of money required by the deed and contract to be paid to entitle him to have such area left open, which the defendant refused to take and proceeded to erect its building, it was held that the defendant acted at its peril and that the fact that the granting of the injunction would cause more damage to the defendant than its refusal would to the complainant would

64. *Martin v. Price* (1894), 1 C. A. 276. The cases of *Holland v. Worley*, L. R. 26 Ch. D. 578, and *Aynsley v. Glover*, L. R. 18 Eq. 544, were considered.

65. *Von Joel v. Hornsey* (C. A.) [1895], 2 Ch. 774, 73 Law T. Rep. 372.

66. *Knox v. Metropolitan El. Ry. Co.*, 58 Hun, 517, 12 N. Y. Supp. 848. Compare *Krone v. Kings County El. R. Co.*, 50 Hun (N. Y.), 431, 3 N. Y. Supp. 149, holding that

for an interruption of light, air, and access to property, caused by building a stairway in front of plaintiff's property by an elevated railroad company, to enable passengers to ascend to its road, plaintiff has a sufficient remedy at law, and an injunction will not issue.

Must be substantial damages to entitle one to injunctive relief. *Borke v. Kings County El. R. Co.*, 22 App. Div. (N. Y.) 511, 48 N. Y. Supp. 42.

not defeat the right of the latter to the injunction.⁶⁷ In order to obtain relief by injunction for an obstruction of light it must cause to plaintiff a practical inconvenience and substantial injury.⁶⁸ And in this connection it is decided that a decree is had for indefiniteness where it enjoins the erection of a building "so near as to exclude the light" from the plaintiff's building.⁶⁹

§ 1032. **View obstruction.**—It is error in a court, on determination of a motion on affidavits for preliminary injunction against defendant for maintaining a fence which obstructs plaintiff's windows to grant an order directing that defendant abate the fence *instantly*, that it be not rebuilt, and that all interference with plaintiff's enjoyment of the premises perpetually cease; such order being a final determination of the rights between the parties.⁷⁰ The occupant of a store is entitled to have the occupant of an adjoining store enjoined from obstructing light and view by a show-case, sign and fence on the sidewalk.⁷¹ But the owner of a building, who occupies it as a store, cannot enjoin the erection of bay windows on an adjoining building extending eighteen inches into the street; the damage which may result from the obstruction of the view being too remote and speculative to constitute the basis of a private action.⁷² And an injunction will not be granted to restrain defendant from building bay windows, which extend beyond the building line, where it does not appear that such windows obstruct passage along the street, though they may interfere with the view.⁷³ And equity will not restrain one from

67. *Tolsma v. Seriffs Corporation* (Mich. 1908), 116 N. W. 622.

68. *Dent v. Auction Mart Co.*, L. R. 2 Eq. 245; *Aynsley v. Glover*, L. R. 18 Eq. 552; *Kino v. Rudkin*, L. R. 6 Ch. D. 165; *Ecclesiastical Com'rs v. Kino*, L. R. 14 Ch. D. 224; *Back v. Stacey*, 2 Carr. & P. 465; *Johnson v. Wyatt*, 2 DeG. J. & S. 26; *Currier's Co. v. Corbett*, 4 DeG. J. & S. 770; *Robson v. Whittingham*, L. R. 1 Ch. App. 442.

See *Greer v. Van Meter*, 54 N. J. Eq. 270, 33 Atl. 794.

69. *Robinson v. Clapp*, 65 Conn. 365, 32 Atl. 939, 29 L. R. A. 582.

70. *Ladd v. Flynn*, 90 Mich. 181, 51 N. W. 203.

71. *Hallock v. Scheyer*, 33 Hun (N. Y.), 111.

72. *Hay v. Weber*, 79 Wis. 587, 48 N. W. 859.

73. *Gray v. Baynard*, 5 Del. Ch. 499.

erecting and using a platform on his own land overlooking a baseball ground to which an admission fee is charged, it not appearing that complainants have any special privileges by law in the exhibition of the ball games to the public.⁷⁴

§ 1033. **Changing natural flow of water.**—Though, where the owner of higher land changes by artificial means the natural flow of water to lower land so that the body of water is increased or discharged on the lower land in a different manner, the owner of the lower land is generally entitled to injunctive relief;⁷⁵ yet, where he has in effect waived the merely nominal damage caused by the change and made no objection while the change was being made, and did not bring his suit for more than three years after the change was completed, an injunction in his favor will not be granted.⁷⁶ The owner of upland through which a stream flows will be restrained from changing the natural course of the stream to protect his meadow, where such change would so increase the current of the stream as to damage the mill-dam of the owner of the lower land by washing the banks and filling the dam with sediment.⁷⁷ But an injunction will not lie to prevent the laying out of a drain for draining a street on which plaintiff's property abuts, if it does not appear that it will cause a greater volume of water to pass over his land than before its erection, or that it will pass over with greater force than before.⁷⁸

74. *Detroit Base-Ball Club v. Depert*, 61 Mich. 63, 27 N. W. 856.

75. *Livingston v. McDonald*, 21 Iowa, 160; *Vannest v. Fleming*, 79 Iowa, 638, 44 N. W. 906; *Wharton v. Stevens*, 84 Iowa, 107, 50 N. W. 562.

76. *Williamson v. Oleson*, 91 Iowa, 290, 59 N. W. 267. Equity will restrain the owner of land from draining a body of surface water collecting naturally in a depression, principally on complainant's land, but covering also a small part of defendant's land, situated higher than complainant's, and which is used by com-

plainant to float logs to his mill, though the water comes from defendant's land, and complainant has increased the size of the body by constructing a dam on his own land, if the natural collection of the water will be prevented thereby. *Alcorn v. Sadler*, 66 Miss. 221, 5 So. 694.

77. *Kay v. Kirk*, 76 Md. 41, 24 Atl. 326, where the court cites and relies on *Embrey v. Owen*, 6 Exch. 353; *Williams v. Gale*, 3 H. & J. (Md.) 231; *Gerrish v. Clough*, 48 N. H. 9.

78. *Collins v. City of Keokuk*, 91

§ 1034. **Natural flow; water-course.**—While as between adjoining owners the owner of the dominant or superior tenement may make ordinary and reasonable improvements to his lands, and if, in so doing, he increases the natural flow of water upon and across the servient tenement, the owner of the latter cannot complain unless he is thereby actually injured;⁷⁹ yet, an injunction will not be granted in favor of a township to restrain the owner of land abutting on a highway from obstructing a culvert located to carry off surface water which would naturally flow over his land if there were no highway, if it appears that the township has materially increased such flow of water by widening and deepening a gutter along the highway so as to more effectually conduct the water from a certain factory.⁸⁰ A natural depression in the soil, down which surface

Iowa, 293, 59 N. W. 200; *Livingston v. McDonald*, 21 Iowa, 160; *Vannest v. Fleming*, 79 Iowa, 644, 44 N. W. 906; *Wharton v. Stevens*, 84 Iowa, 107, 50 N. W. 562; *Dorr v. Simerson*, 73 Iowa, 89, 34 N. W. 752.

79. *Boynnton v. Longley*, 19 Nev. 69; *Rhoads v. Davidheiser*, 133 Pa. St. 226; *Gregory v. Bush*, 64 Mich. 37, 31 N. W. 90; *Rowe v. St. Paul, M. & M. Ry. Co.*, 41 Minn. 384, 43 N. W. 76; *Kauffman v. Griesemer*, 26 Pa. St. 407; *Martin v. Jett*, 12 La. 501.

80. *Hamilton Township v. Wainwright*, 52 N. J. Eq. 419, 29 Atl. 200, per Bird, V. C.. “Many cases may be presented which must be considered one way or the other because of peculiar features or circumstances in connection therewith. And while it may be said that all corporate bodies which have control of streets and highways may construct and repair such streets and highways without regard to the consequences to private individuals resulting from the damming up and precipitation of surface waters, yet I apprehend that almost

every well considered case disproves the right of such authorities to pursue a course of construction or repair which will result in the collection of large quantities of mere surface water, and especially of water which is used by a private individual in manufacturing his wares, and diverting them from the channels or courses in which they would naturally flow, and conducting them to the lands of a private individual. *Soule v. City of Passaic*, 47 N. J. Eq. 28, 20 Atl. 346; *Miller v. City of Morristown*, 47 N. J. Eq. 62, 20 Atl. 61; *Field v. Inhabitants*, 36 N. J. Eq. 118, 37 N. J. Eq. 600; *Noonan v. City of Albany*, 79 N. Y. 470; *Haskell v. City of New Bedford*, 108 Mass. 208; *Brayton v. City of Fall River*, 113 Mass. 218; *Byrnes v. City of Cohoes*, 67 N. Y. 204, 205; *Rychlicki v. City of St. Louis*, 98 Mo. 497, 11 S. W. 1001; *Pettigrew v. Village of Evansville*, 25 Wis. 223; *Davis v. City of Crawfordsville*, 119 Ind. 1, 21 N. E. 449; *Krug v. St. Mary's Borough*, 152 Pa. St. 37, 25 Atl. 162; *Sleight v. City of Kingston*, 11 Hun,

water flowed in a state of nature, forming swamp in places, and carrying water the greater part of the year, and into which a flowing well was afterwards drained, insuring a flow of living water at all seasons of the year, is a water-course; and an upper riparian owner will be enjoined from diverting the flow of the water at the suit of a lower owner.⁸¹

§ 1035. Restraining diversion of water; pleading and proof.—

It may be stated generally that the right of an upper riparian proprietor or of a person owning the land through or over which a natural stream flows to divert the water thereof should not be unreasonably or wrongfully exercised to the material injury of adjacent landowners or lower riparian proprietors in their right to use the water or to have it flow without serious or material

594; *Clark v. City of Rochester*, 43 Hun, 271; *Gillison v. City of Charleston*, 16 W. Va. 282; *O'Brien v. City of St. Paul*, 25 Minn. 333. The fact that there are surface waters which the inhabitants of the township have a right to carry off by the gutter made for that purpose to this culvert, and thence upon the lands of the defendant, does not justify them in increasing the flow of such waters by the addition of the waste water from the rubber mill, as is clearly established by the case of *Soule v. City of Passaic*, *supra*. In that case the land of the complaining party was already burdened with a running stream from other sources. *Moran v. McClearns*, 63 Barb. 185. The principle involved in these cases controlled the court in the case of *Slack v. Lawrence Twp.* (N. J. Ch.), 19 Atl. 663; *Rathke v. Gardner*, 134 Mass. 14. I think that the fundamental principle is found in the constitutional right of the citizen to be protected in his private property against any invasion or encroachment, although public interests be involved, until just compensation

be made to him, and that there can be no limitation of this right, even by legislative enactment. *Ward v. Peck*, 49 N. J. Law, 42, 6 Atl. 805."

81. *Rummell v. Lamb*, 100 Mich. 424, 59 N. W. 167, per Hooker, J.: "The main controversy is one of fact, as to whether there was such a water-course as to preclude defendants from removing the water from their premises, through another drain, to the exclusion of complainant's right to have it flow upon his land below. We think the Circuit Court was right in holding that there was, and that the defendants were properly enjoined from carrying out their project, which we are satisfied was to obtain the water for their own purposes, by depriving complainant of it. The case is ruled by *Hilliker v. Coleman*, 73 Mich. 170, 41 N. W. 219. It is suggested that defendants are willing to "lay an iron pipe, properly cemented, so as not to interfere with the flow of water in the town drain, to the injury of the complainant," but we see no necessity for doing so. We think the town drain adequate to

diminution or alteration,⁸² and that a wrongful diversion of the water of such a stream by a riparian owner may be enjoined by a lower riparian proprietor.⁸³ So equity will enjoin the diversion of the water of a stream running through plaintiff's land, where defendants are insolvent or likely to become so, and the injury is great.⁸⁴ And where a diversion of water is wrongful, it is not necessary for plaintiff to prove damages to entitle him to an injunction; and the fact that a complaint prayed only for an injunction against a threatened diversion of water, and that at the time of its filing defendant had already begun the diversion, will not prevent the issuance of an injunction against the continued wrongful diversion.⁸⁵ And equity will restrain by injunction the dis-

train defendant's one acre, and we are not disposed to subject complainant to the annoyance of such an apparatus, which might easily get out of order by the action of the weather, and silently and secretly be the means of accomplishing the thing sought to be avoided, which he would have difficulty in detecting or preventing. The decree of the Circuit Court will be affirmed, with costs."

82. Joyce on Nuisance, § 312.

83. *United States*.—Webb v. Portland Mfg. Co., Fed. Cas. No. 17322, 3 Sumn. 189.

Alabama.—Ullricht v. Eufaula Water Co., 86 Ala. 587, 6 So. 78, 11 Am. St. Rep. 72, 4 L. R. A. 572.

California.—Williams v. Harter, 121 Cal. 47, 53 Pac. 405; Heilbron v. Fowler Switch C. Co., 75 Cal. 426, 17 Pac. 535, 7 Am. St. Rep. 183.

Connecticut.—Wells v. Bridgeport Hydraulic Co., 30 Conn. 316, 79 Am. Dec. 250.

Illinois.—Dayton v. Rutherford, 128 Ill. 271, 21 N. E. 198.

Indiana.—Drake v. Schoenstedt, 159 Ind. 90, 48 N. E. 629.

Kansas.—Emporia v. Soden, 25

Kan. 588, 37 Am. Rep. 265.

Kentucky.—Murphy v. Stanford Water, L. & I. Co., 20 Ky. Law Rep. 2000, 50 S. W. 835.

New Jersey.—Sparks Mfg. Co. v. Newton, 57 N. J. Eq. 367, 41 Atl. 385.

New York.—Neal v. Rochester, 156 N. Y. 213, 50 N. E. 803; Mudge v. Salisbury, 110 N. Y. 413, 18 N. E. 249; Garwood v. New York Cent. & H. R. R. Co., 83 N. Y. 400, 38 Am. Rep. 452; Duesla v. Johnstown, 24 App. Div. 608, 48 N. Y. Supp. 683; Corning v. Troy Iron & Nail Factory, 39 Barb. 311.

Oregon.—Shively v. Hume, 10 Oreg. 76.

Virginia.—Carpenter v. Gold, 88 Va. 551, 14 S. E. 329.

Washington.—Rigney v. Tacoma Light & W. Co., 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425.

Wisconsin.—Kimberly & Clark Co. v. Hewitt, 75 Wis. 371, 44 N. W. 303.

84. Graham v. Dahlonga Gold Mining Co., 71 Ga. 296.

85. Conkling v. Pacific Imp. Co., 87 Cal. 296, 25 Pac. 399. Where the grounds of an action are that de-

turbance of a perpetual right of a landowner to have an artificial water-course flow from his neighbor's land to his own.⁸⁶ In an action to restrain the diversion of water from a stream, where plaintiff complains of a continuous wrongful act, an injunction may be granted, although actual damage is neither alleged nor proved.⁸⁷ But in an action to enjoin defendants from diverting the waters of a creek, evidence that each of them claims rights therein adversely to plaintiff, and has contributed money and otherwise assisted in defending the action does not sustain an

defendant "has no right to dam a stream so as to deprive plaintiff of the use of the water, and that he has no right to permit hogs to have free access to it, and the evidence follows the same theory, a decree enjoining defendant from so damming or obstructing the natural flow of the creek as that the same shall become stagnant or foul in any manner, so that the water shall be unwholesome for the use of plaintiff's stock," cannot be maintained. *Spence v. McDonough*, 77 Iowa, 460, 42 N. W. 371. A finding that the appropriator for five years during the low-water season, diverted a stated quantity of water peaceably, openly, notoriously, continuously, and adversely to the riparian proprietors and their grantors, is not supported by evidence which shows that for the first two years the appropriator's ditch drew no water during the low-water period, and that for the succeeding years, by wrongfully entering on the riparian owners' land, without their knowledge, and diverting the water therefrom, the appropriator succeeded in shortening the time in which its ditch ran dry to four months in each year. *Last Chance Water-Ditch Co. v. Heilbron*, 86 Cal. 1, 26 Pac. 523.

86. *Bitting's Appeal*, 105 Pa. St. 517.

A complaint which alleges that plaintiff's own mining claims adjoining and above defendants' land, and that they have a right to dig trenches and construct flumes across defendants' land and have so constructed trenches and flumes, which defendants are filling and destroying, and will continue to do so unless restrained by order of court, shows a *prima facie* case for granting a temporary injunction. *Power v. Klein*, 11 Mont. 159, 27 Pac. 513.

Injunction is the proper remedy against the withdrawal of water by defendant water company from a pond in which plaintiff has superior rights, as an action for damages would compensate the plaintiff only for injuries already sustained. The provisions of defendant's charter, which permit a party suffering damages under it "to have them assessed and determined in a manner provided by law where land is taken for the laying out of highways," apply only to damages occasioned by defendant's lawful acts. *Proprietors of Mills v. Braintree Water Supply Co.*, 149 Mass. 478, 21 N. E. 761.

87. *Moore v. Clear Lake Water Works*, 68 Cal. 146, 8 Pac. 816.

avermment of a conspiracy to deprive plaintiff of the use of such waters, so as to entitle the plaintiff to equitable relief against them.⁸⁸ In an action for improper diversion of water, to obtain an injunction, the complainant need only aver, in addition to the facts relied on for a judgment for damages, facts sufficient to obtain equitable relief, without repeating such averments.⁸⁹

§ 1036. Same subject; plaintiff's delay; mandatory injunction.

—Where the diversion of water from plaintiff's mining claim is sought to be enjoined, it is no objection to relief that the building of the flume, by means of which the water was diverted, was begun more than five years before suit, where the particular diversion complained of occurred within a few months of the action.⁹⁰ A bill alleged that complainant was the owner of a tract of land formerly a part of, and now adjoining, defendant's land; that one

88. *Tolman v. Casey*, 15 Or. 83, 13 Pac. 669.

89. *Jerrett v. Mahan*, 20 Nev. 89, 17 Pac. 12.

90. *Fuller v. Swan River Placer Min. Co.*, 12 Col. 12, 19 Pac. 836. As to changing the point of diversion, see *Sieber v. Frink*, 7 Col. 148, 2 Pac. 901; *Maeris v. Bicknell*, 7 Cal. 262; *Kidd v. Laird*, 15 Cal. 162, 180; *Mining Co. v. Morgan*, 19 Cal. 609, 616; *Davis v. Gale*, 32 Cal. 27; *Water Co. v. Powell*, 34 Cal. 109; *Junkans v. Bergin*, 67 Cal. 267, 270, 7 Pa. 684. In an action to enjoin defendant from diverting the waters of a creek, the answer affirmatively alleged that the creek was not a running stream during the irrigation season, and that none of the waters flowing into it at defendant's ranch could, in the course of its natural flow, reach plaintiff's ranch, and stated that three miles below defendant's ranch the stream sank into the ground, and was lost to sight, and from that point to a point

one mile below plaintiff's ranch, a distance of 15 miles, at places the channel was entirely dry. It was held that the answer stated a good defense. *Raymond v. Wimsette*, 12 Mont. 551, 31 Pac. 537. Plaintiffs sued to enjoin defendants from interfering with their right to divert and use the waters of certain creeks, to furnish water to a city during the winter season, from November 15th to April 15th. Defendants objected on the ground that, when plaintiffs' land was public land, they owned land below it, and claimed the right to use the water of said creek for irrigation purposes, from April 1st to November 1st. The court's findings did not show that defendants needed during the winter season more water than was left them, and it appeared that they had got along with it for a number of years. It was held that an injunction was properly granted. *Stowell v. Johnson*, 7 Utah, 215, 26 Pac. 290.

of the boundary lines of the two tracts ran for some distance with a stream which had supplied both tracts with water ever since complainant purchased his land; that defendants shortly before the bill was filed diverted the water of the stream by means of a ditch, and deprived complainant of access to it, and thereby greatly and irreparably injured him; and prayed that defendants be enjoined from further diversion of the stream. It was held that the bill stated a proper case for equitable relief, but the court expressed the opinion that the right in issue was not an easement, but was irreparably annexed to the soil and passed with it.⁹¹ The jurisdiction of a court to grant a preliminary injunction against the diversion of the water of a stream includes the power to direct the removal of the means by which the diversion is made.⁹²

§ 1037. **Well-right; reservoir; title required.**—A grant to plaintiff of certain lands, “together with the privilege of drawing water from a pipe laid in the ground from a well” on the grantor’s adjoining lands to plaintiff’s house “as now used,” the water being supplied by gravitation, gives plaintiff the right to draw water whenever the well, remaining intact as a structure, and capable of holding water, contains water which will gravitate to plaintiff’s house, but does not stipulate that the house will receive an adequate supply; and such a grant does not preclude the grantor from digging another well on his land, even if by so doing he cuts off the supply of the old well.⁹³ But where plaintiff owns

91. *Carpenter v. Gold*, 88 Va. 551, 14 S. E. 329, per Lewis, J.: “It is a principle of the common law that every riparian proprietor on either side of the stream not navigable *prima facie* owns to the middle or thread of the stream and has an equal right to the use of the water without diminution or alteration. *Atchison v. Peterson*, 20 Wall. 507, 22 L. Ed. 414; *Hardin v. Jordan*, 140 U. S. 371, 35 L. Ed. 428, 11 Sup. Ct. 808, 838.

92. *Johnson v. Tulare County Superior Court*, 65 Cal. 567, 4 Pac. 575.

93. *Davis v. Spaulding*, 157 Mass. 431, 32 N. E. 650, per *Curiam*: “It was held in *Greenleaf v. Francis*, 18 Pick. (Mass.) 117, that a landowner, whose full rights as such have not been diminished, may, in order to obtain a supply of water for himself, dig a well on any part of his land, although he thereby cut off the water from his neighbor’s well. To this extent the case of *Greenleaf v. Francis* is undoubtedly law, and is in accord with the great weight of authority elsewhere. *Acton v. Blundell*, 12

an aqueduct for supplying water to others, which is fed by certain springs, including the one in question, and defendant's interference with the latter spring will be a continuing injury, and will render the supply uncertain, though it cannot be shown precisely

Mees. & W. 324; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Chasemore v. Richards*, 2 Hurl. & N. 168, 7 H. L. Cas. 349; *Reg. v. Metropolitan Board of Works*, 3 Best. & S. 710; *Hodgkinson v. Ennor*, 4 Best & S. 229; *Roath v. Driscoll*, 20 Conn. 533; *Brown v. Illius*, 25 Conn. 583; *Chatfield v. Wilson*, 28 Vt. 49; *Clark v. Conroe*, 38 Vt. 469; *Wheatley v. Baugh*, 25 Pa. St. 528; *Haldeman v. Bruckhart*, 45 Pa. St. 514; *Frazier v. Brown*, 12 Ohio St. 294; *Pixley v. Clark*, 35 N. Y. 520; *Trustees v. Youmans*, 45 N. Y. 362; *Bliss v. Greeley*, Id. 671; *Phelps v. Nowlen*, 72 N. Y. 39; *Chase v. Silverstone*, 62 Me. 175; *Chesley v. King*, 74 Me. 164. Nor is it in conflict with the doctrine held in the cases of *Bassett v. Manufacturing Co.*, 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439—for such a use of land would be reasonable and justifiable, even under the view of the law of percolating waters taken in the cases last cited. The cases cited show that it is very generally held that water percolating underground, and not running in a definite stream or water course, is in law a part of the land itself, in the same sense that earth, gravel, stones, or minerals of any kind are constituent parts of the land, and is the absolute property of the owner of the land, in the same way, and to the same extent, that the other constituent parts of his land are his absolute property; so that he has the same right to keep it from passing from his land by reason of the operation of natural causes, and to separate it

from the other constituents of the soil, and to use it, on the land or elsewhere, that he has to keep or to mine or quarry, and use or sell, sand, soil, clay, ores, or any other constituent part of the land. Nor, if itself land, can it pass by a deed of other land as appurtenant to the other land conveyed. The word 'well,' as a general term of description in a deed, designates the portion of land under and occupied by the excavation, and its surrounding retaining walls, and by any structures or appliances built upon the land to facilitate its use, and also the water actually at any time in the excavation. *Johnson v. Rayner*, 6 Gray, 107; *Mixer v. Reed*, 25 Vt. 254. In the view of the doctrine above referred to, a well fed only by percolating, underground water operates to separate and win from the surrounding soil, or that which is directly underneath the excavation, one of its constituent parts, and to store it when thus separated and collected. If the well and the surrounding soil are both owned by the same proprietor, the water in such a well is still his absolute property, and remains his land, until he sees fit to separate it, and make it a commodity. If the well and the surrounding land are owned by different persons, the ownership of the water is changed, as it passes from the surrounding soil into the well, in a way similar to that by which soil carried by a river from the territory of one proprietor to that of another is changed. In the absence of all other

to what extent, there is no adequate remedy at law, and injunction will lie.⁹⁴ And a reservoir company, which has built a dam at the outlet of a pond, and controls the whole water power in the interest of the owners, for their benefit, has sufficient possession to entitle it to an injunction restraining the drawing of water, even though it has no ownership in the land or water, and is made up of representatives of the several mills owning the water.⁹⁵ And generally where parties have mutual rights to the water from a well or spring a court of equity may grant relief to one of the parties to prevent a violation of, or interference with, his right thereto by the other party or parties.⁹⁶

§ 1038. **Prescriptive diversion of stream.**—Where defendant and its predecessors in title diverted the waters of a stream on

obligations than such as spring from the absolute ownership of land, there can be no reason why the owner of land adjoining or surrounding such a well may not, in this view of the law, lawfully use upon his own territory means to prevent that which is his own land from separating from it by the operation of natural causes, and from passing beyond his own dominion. If his thus keeping his own makes the adjacent land of his neighbor less valuable, or interferes with its accustomed use, it is the *damnum absque injuria* for which no action lies." Where owners of land grant the right to a railroad company to use water from a spring on their land, and to lay pipes from such spring to a certain tank, by a contract which is duly recorded, one who purchases the land many years afterwards, with actual knowledge that the pipes were laid across the land, and that the topography of the land renders it necessary that they should be laid just as they are, takes subject to such easement, and is properly enjoined from interfering therewith, and it is

immaterial that the tank is not located in the exact place specified in the contract, where the change does not affect the position of the pipes. *Diffendal v. Virginia M. Ry. Co.*, 86 Va. 459, 10 S. E. 536. Where plaintiff and others have, for more than 20 years, used a well located in a street, the fee of which is in the public, and have contributed towards the maintenance of a pump and repairs of the well, defendant, who has no interest therein except in its use with the public, will be restrained from destroying the pump, and converting all the water to his private use. *Hoag v. Pierce*, 63 Hun, 424, 20 N. Y. Supp. 224.

94. *Gilchrist v. Van Dyke*, 63 Vt. 75, 21 Atl. 1099.

95. *Watuppa Reservoir Co. v. Fall River*, 154 Mass. 305, 28 N. E. 257. Injunction will not lie to prevent interference with plaintiff's right to draw water from defendant's reservoir, which right was disputed. *Perkins v. Foye*, 60 N. H. 496.

96. *Van Horn v. Clark*, 56 N. J. Eq. 476, 40 Atl. 203.

which plaintiff's land bordered, at a point thereon above plaintiff's land, and for more than five years prior to plaintiff's action to restrain its diversion used the same openly, and adversely to plaintiff and all others, it must be deemed to have acquired a prescriptive right to continue the diversion complained of, and the fact that defendant changed the point of diversion, and applied the waters to a use different from that for which they were diverted by its predecessor, furnishes no ground for complaint to plaintiff, if his rights are not injured thereby.⁹⁷ But a riparian

97. *Gallagher v. Montecito Valley Water Co.*, 101 Cal. 242, 35 Pac. 770, per De Haven, J.: "The plaintiff is an owner of land bordering on the Cold Spring branch of Montecito creek, and this action was brought for the purpose of restraining the defendant from diverting the waters of said stream. 'The defendant is a corporation organized under the laws of this State for the purpose of supplying water to the inhabitants of a portion of Santa Barbara county, and in its answer alleged that prior to January 14, 1888, John Coe and John W. Coe had acquired a prescriptive right to divert the waters of the Cold Spring branch of Montecito creek to the extent of defendant's diversion, and were then in the enjoyment of that right, and that on that day the defendant recovered a judgment against said John and John W. Coe, condemning their rights in said water; and for a separate defense the defendant alleged that plaintiff's right of action was barred by section 318 of the Code of Civil Procedure. It seems to us, however, that the particular findings above quoted, to say nothing of the general finding to the effect that plaintiff's cause of action is barred by section 318 of the Code of Civil Procedure, are alone sufficient to show a good

prescriptive title in defendant to the water in controversy, under the law as declared by this court in *Davis v. Gale*, 32 Cal. 27; *Water Co. v. Crary*, 25 Cal. 504; *Water Co. v. Richardson*, 72 Cal. 598, 14 Pac. 379. It is urged by plaintiff that as Coe was a riparian owner, and the diversion was made upon riparian land, and the water diverted used upon such land, and the court having also found 'that a portion of the waters of said Cold Spring branch of Montecito creek was used by plaintiff and his predecessors in title, for lawful purposes, for a period of more than ten years next before the time of the diversion mentioned in the amended complaint, and also since said diversions were made,' the findings, when taken together, do not show such an invasion of the rights of plaintiff as would have entitled him to maintain an action therefor because of such diversion and use of the water by Coe, as plaintiff may at all times have had sufficient water flowing by his land for the proper use and enjoyment thereof; and the cases of *Ditch Co. v. Crane*, 80 Cal. 181, 22 Pac. 76; *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 186, 30 Pac. 623—are cited to sustain this contention. These cases are not in point. In the first one cited, the de-

owner may be entitled to an injunction to prevent an upper riparian proprietor from acquiring a prescriptive right to divert the waters of a stream.⁹⁸

§ 1039. **Riparian owners.**—Where, in an action by a lower to restrain an upper riparian owner on the same stream from diverting water through a certain small flume by temporary dams, the court found on sufficient evidence, that defendant leased part of

defendant's ditch was above that of plaintiff, and the court held that a finding to the effect that plaintiff had diverted the water from the stream for more than five years prior to the commencement of the action, adversely to the whole world, the water so diverted being sufficient to fill the ditch of plaintiff 'whenever there was water in the stream to fill it,' could not, in the nature of things, show a diversion adversely to the defendant, as no right of his could possibly have been affected by such acts of the plaintiff, while in the case at bar defendant's diversion was a point on the stream above the land of plaintiff. In the case of *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 30 Pac. 623, the court simply held that the diversion of water by one riparian owner for use upon riparian land could not be adverse to the rights of a lower proprietor along the stream, so long as there was left flowing in the stream an abundance of water to supply the present and prospective riparian wants and uses of the lower proprietor; but the facts as found by the court here do not bring this case within the rule there declared. . . . It is shown that defendant has changed the point of diversion, and applied the waters to a use different from that for which they were diverted by his predecessor; but, as the rights of plaintiff do

not seem to be injuriously affected by such change, he has no cause for complaint. It seems to be settled that one entitled to the use of water 'may change the place of diversion or the place where it is used, or the use to which it was first applied, if others are not injured by such change. *Ramelli v. Irish*, 96 Cal. 214, 31 Pac. 41. On a portion of a tract of land located in a city and upon a public street, the surface water collected, as well as the waters on an adjoining lot, and flowed to the public street over the other portion. The owner sold the portion in which the waters so collected, and retained the balance, and the waters were permitted to collect and flow in the same direction, crossing the dividing line between the lot sold and the one retained at the same place for over twenty years. It was held that the owner of the lot so retained would be prohibited by injunction from obstructing the flow of said water; and the fact that during all the period of time named the complainant and her grantors had the surface of her lot over which the water flowed covered with brick, so that no channel was cut in the soil, does not lessen her rights. *Ross v. Mackeney*, 46 N. J. Eq. 140, 18 Atl. 685."

⁹⁸ *Gould v. Eaton*, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181.

his riparian land, and by agreement constructed such flume to carry water to the leased land; that the tenants were bound to keep it in repair, and had actual and exclusive possession and control of it and the premises; that defendant did not cause the water to flow through such flume, but that such tenants caused it to so flow; and that before suit was brought no notice was given him that there was a wrongful diversion of such water, nor any demand made to abate the alleged nuisance, it was held that defendant was not liable for such diversion.⁹⁹ And where land bordering upon a lake is conveyed, the right to erect a building in the lake below low-water mark, as against everybody but the State, passes as an appurtenance to the land, and subject to the restrictions in the deed as to the use of the land, and the grantee will not be enjoined from exercising such right to build.¹

§ 1040. **Drainage license; irrigation.**—The Illinois statutory provisions which legalize all drains constructed by mutual consent of the owners of the land drained, and forbid all interference with the same, except that a party may, within one year after the act takes effect, revoke any parol license for a ditch given before passage of the act, and may bring suit to enforce the revocation, do not authorize such a party to file a bill for an injunction restraining the former licensees from continuing to drain over his land, where he does not allege that the said licensees are preparing or intending to drain water over the said land otherwise than as it flows by nature, since drainage through natural channels is a matter of right, and not of license, and said act does not authorize the filing of a bill for an injunction, except in cases where it could be filed under the principles of the common law.² Where plain-

99. Gould v. Stafford, 101 Cal. 32, 35 Pac. 429, following Gould v. Stafford, 91 Cal. 146, 27 Pac. 543. And see Lewis v. City of Portland, 25 Or. 133, 35 Pac. 256.

1. Winnepesaukee Camp Meeting Assoc. v. Gordon. 67 N. H. 98, 29

Atl. 412; Concord Manufacturing Co. v. Robertson, 66 N. H. 1, 25 Atl. 718.

2. Wilson v. Bondurant, 142 Ill. 645, 32 N. E. 498, per Scholfield, J.: "There is no allegation in this bill that the defendants are proposing or that the necessary effect of what they

tiff's farm is irrigated by water flowing from a cistern placed by him on land owned and exclusively possessed by defendant's wife, and defendant, without any authority from his wife, stops such flowage, plaintiff is entitled to an injunction, though his right is only a license subject to revocation by defendant's wife.³

§ 1041. **Irrigation.**—Injunction will lie by the lessee of lands through which a natural stream of water flows, to restrain diversion to a neighboring town of water which he needs for irrigation, as he has the same right to prevent such a diversion as an owner in possession.⁴ In an action by a riparian owner to enjoin riparian owners above him from diverting the waters of a stream, defendants may file a cross-complaint to enjoin plaintiff from drawing off the water so as to prevent it from irrigating their land, as it would do in its natural flow, under the provisions of the California Code giving a defendant seeking affirmative relief affecting the property to which the action relates the right to file a cross-complaint.⁵ A stream, which had been a natural water-course was obstructed by a flood, and from that time water flowed to plaintiff's lands, situated on the stream, only in time of freshets. Plaintiff purchased the right to turn other streams into the old channel for the purpose of irrigation. The defendant had obtained from plaintiff's grantors the right to turn water into the stream, with the privilege of turning it out again, and of clearing the obstructions from the stream. It was held that, this being a natural water-course defendants were not entitled to take out more water than they turned in, and would be restrained from building a dam across the stream, whereby all the water would be diverted, and none would flow by plaintiff's land.⁶ The owner of the land

have done in making ditches will be to drain water upon the land of appellant otherwise than as it flows according to nature and no one has a right to complain that the volume of water in natural channels is temporarily increased by artificial drainage of the lands which naturally drain into such natural channels."

3. *Emerson v. Bergen*, 71 Cal. 335, 12 Pac. 242.

4. *Crook v. Hewitt*, 4 Wash. St. 749, 31 Pac. 28.

5. *Van Bibber v. Hilton*, 84 Cal. 585, 24 Pac. 598. Overruling *Heilbron, v. Canal Co.*, 76 Cal. 15, 17 Pac. 933.

6. *Paige v. Rocky Ford Irrigation*

who has appropriated the waters of a stream for irrigation purposes cannot enjoin the diversion of waters from the stream by the owner of land fifteen miles above him, which water cannot reach plaintiff's land because of the drying up of the stream between his land and defendant's, on the ground that the volume of water diverted might, in the event of the usual flow of water, cause some to flow in the stream to plaintiff's land.⁷

Co., 83 Cal. 84, 21 Pac. 1102, 23 Pac. 875. In this case though the natural flow of water after the stream was obstructed only reached plaintiff's land on occasions of freshets, yet, when the flow of water was increased by the removal of the ob-

structions by defendants, the increase of flow accrued to the benefit of the plaintiff, and not to that of defendants, who had no right to the natural flow.

7. Raymond v. Wimsette, 12 Mont. 551, 31 Pac. 537.

AGAINST NUISANCE.

CHAPTER XXXVIII.

AGAINST NUISANCE.

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Section 1042. **Definition and jurisdiction; damages.**—A private nuisance is defined to be anything done by one person to the hurt or the annoyance of the lands, tenements or hereditaments of another.¹ It is settled that courts of equity have concurrent jurisdiction with courts of law over cases of private nuisance, the equity jurisdiction in any particular case being justified on the ground of protecting complainant from irreparable injury or of preventing multiplicity of suits.² And chancery, though it may have no power over inferior tribunals, will restrain a party from

1. *Hochstrasser v. Martin*, 74 Hun, 338, 26 N. Y. S. 410; *Heeg v. Licht*, 80 N. Y. 579, 582, 3 Bl. Com. 216.

A private nuisance is one which affects a private right not common to the public, or which causes special injury to person or property of a single person or a determinate number of persons. *Joyce on Nuisances*, § 8.

A nuisance may generally be defined as anything that works or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the enjoyment of his legitimate and reasonable rights of person or property; or that which is unauthorized, immoral, indecent, offensive to the senses, noxious, unwholesome, unreasonable, tortious, or unwarranted and which injures, endangers or damages one in an essential or ma-

terial degree in, or which materially interferes with, his legitimate rights to the enjoyment of life, health, comfort, or property, real or personal. *Joyce on Nuisances*, § 2.

2. *Nixon v. Boling*, 145 Ala. 277, 40 So. 210; *Burnham v. Kempton*, 44 N. H. 79; *Scudder v. Trenton Falls Co.*, 1 N. J. Eq. 694; *Society v. Morris Canal Co.*, 1 N. J. Eq. 157; *Carlisle v. Cooper*, 21 N. J. Eq. 578.

The maintenance of a fence or like obstruction across a street, though a nuisance for which one injured has a legal remedy, is also one which chancery will often assume jurisdiction to enjoin, either on the ground of irreparable injury, or to prevent a multiplicity of suits. *City of Demopolis v. Webb*, 87 Ala. 659, 6 So. 408.

At common law a court of equity

doing an act injurious to an individual, or which may be prejudicial as a public nuisance, pending any judicial proceedings before those tribunals, by which the authority to do the act, or its lawfulness is to be determined.³ And where there is no adequate remedy at law for the injury caused by a nuisance a court of equity will assume jurisdiction to grant an injunction.⁴ So the discharge of refuse matter from a strawboard factory into a non-navigable river, which a water company owning land fronting on it uses as a source of supply for furnishing a city with water for domestic and other purposes requiring purity, is a continuing nuisance, for which no adequate remedy exists at law, and injunction will lie to restrain it.⁵ In a suit in a Federal court to enjoin a nuisance in the erection of coke ovens, if the amount of damage which will accrue to the plaintiff be not sufficient to give the court jurisdiction, the court will nevertheless have jurisdiction if the value of the prohibited erection equal the jurisdictional amount.⁶

§ 1042a. Awarding damages in injunction suit; pleading.—

The court acquiring jurisdiction for the purpose of abating a nuisance, will also, upon proper averments, extend such jurisdiction to the ascertainment and determination of the damages suffered by reason of the nuisance.⁷ So a court of equity having jurisdiction to enjoin a nuisance may, in addition to the injunctive

has jurisdiction to restrain nuisances. *Houlton v. Titcomb*, 102 Me. 272, 66 Atl. 733.

Courts of equity do not always, as a matter of course, afford relief by way of injunction where a right of action exists for a nuisance. *Royce v. Carpenter* (Vt. 1907), 66 Atl. 888.

Where it is sought to enjoin a use of neighboring property on the ground that such use constitutes a nuisance the right to such relief is to be determined by the question whether such use is reasonable. *Leonard v. Hotel Majestic Co.*, 17 Misc. R. (N. Y.) 229, 40 N. Y. Supp. 1044.

Where the evidence is conflicting a preliminary injunction will not be granted. *Connor v. Fisher*. 8 Kulp. (Pa.) 262.

3. *Williamson v. Carnan*, 1 Gill & J. (Md.) 184.

4. *Bischof v. Merchants' Nat. Bank* (Neb. 1906), 106 N. W. 996.

5. *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. 970.

6. *Rainey v. Herbert*, 5 C. C. A. 183, 55 Fed. 443, following *Mississippi, etc. R. Co. v. Ward*, 2 Black, 485.

7. *Barnett v. Tedescki* (Ala. 1908), 45 So. 905, citing *Whaley v. Wilson*, 112 Ala. 627, 20 So. 922.

relief, award to plaintiff such damages as the nuisance has already caused him.⁸ And the complaint of a single plaintiff to restrain the continuance of a nuisance created by the separate acts of several defendants is not demurrable on the ground of multifariousness because it unites with the cause for equitable relief one for damages already suffered.⁹ But although several parties whose individual lands have been injured by a nuisance may unite as plaintiffs in an action to abate it, a complaint by several plaintiffs asking injunction and separate damages is bad on demurrer and not sustainable upon the ground that the allegations as to damage are irrelevant and redundant, for it seeks a recovery for each plaintiff on matters with which the others have no concern.¹⁰ And in a case in North Carolina it is decided that plaintiffs cannot recover permanent damages for the depreciation of their property caused by a nuisance (in this case the establishment of a railway terminal), but that if they can allege and prove unlawful and unwarranted acts and conduct by defendant in the management of its terminal which amount to a nuisance, they may enjoin the further commission of such acts as well as recover such temporary damage as their property has sustained thereby.¹¹ Again, where plaintiff brought an action to restrain the continuance of a nuisance and for past damages, and the jury who were directed to try the issues awarded damages to plaintiff, it was held that the verdict authorized a judgment restraining the nuisance, and that the costs were in the discretion of the court.¹² In an action for damages caused by the erection of a nuisance and to compel defendant to abate it, plaintiff may waive the equitable relief, and in such case a finding of fact by the court, in addition to the verdict of the jury, is unnecessary.¹³

8. *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.*, 79 Wis. 297, 48 N. W. 371; *Stadler v. Grieben*, 61 Wis. 500, 21 N. W. 629; *Fraedrich v. Flieth*, 64 Wis. 184, 25 N. W. 28; *Brickner Woolen Mill Co. v. Henry*, 73 Wis. 229, 40 N. W. 809; *Patten Paper Co. v. Kaukauna Water-Power Co.*, 70 Wis. 659, 35 N. W. 737.

9. *Binghen v. Erie Railroad Co.*, 123 App. Div. (N. Y.) 204.

10. *Binghen v. Erie Railroad Co.*, 123 App. Div. (N. Y.) 204.

11. *Taylor v. Seaboard Air Line Ry.* (N. C. 1907), 59 S. E. 129.

12. *Parker v. Laney*, 58 N. Y. 469.

13. *Castle v. Smith* (Cal.), 36 Pac. 859.

§ 1043. **Nuisance from natural causes.**—The defendant will not be enjoined where the alleged nuisance is fairly attributable to natural causes.¹⁴ So where, in a suit to restrain defendant from maintaining a dam on his premises, it appeared that the water in the pond must rise more than seven inches before it would set back on plaintiff's land; that in the ordinary flow of the stream the land would not be flooded; but that sudden and severe rains in the spring and fall or sudden melting of snow would cause the pond to fill, and the water to overflow on plaintiff's land, it was held that if defendant was liable for such overflows, still there was not evidence of irreparable damage.¹⁵ But the fact that others contribute to the production of the nuisance does not operate to excuse the defendant.¹⁶

14. *Mirkil v. Morgan*, 134 Pa. St. 144, 19 Atl. 628, per Paxson, C. J.: "The master decides upon a review of all the testimony that it is not certainly proved that the presence of water in the plaintiff's cellars, as complained of, is due to the imperfect construction of defendant's drain or want of repair thereof; and so far as this part of plaintiff's bill is concerned the result of the proofs in the case is to leave the matter at the best in a very doubtful state with strong reasons to believe that part at any rate if not all of the water in plaintiff's cellars does arise from natural causes. This is fatal to the plaintiff's bill on this branch of his case, for certainty and precision are required before equity will interfere. The master therefore concludes that it is not a case of equitable relief and cites in support of his views. *Richard's Appeal*, 57 Pa. St. 105; *Huckenstine's Appeal*, 70 Pa. St. 102; *Sparhawk v. Passenger R. Co.*, 54 Pa. St. 401. The learned master was clearly right upon the law. While a court of equity will sometimes re-

strain in a case of a private trespass, it will only do so where the right is clear. Where the facts are disputed and the right is not clear the plaintiff must first establish it at law. In *Parker v. Winnipiseogee, etc., Co.*, 2 Black, 545, it was held that an objection that complainant has not established his right at law or that it is doubtful, and therefore not enforceable in equity goes to the jurisdiction and may be raised by the court itself at any time though not raised in the pleadings, or asserted by counsel. It is sufficient in addition to the cases cited by the master to refer to *Mowday v. Moore*, 133 Pa. St. 598, 19 Atl. 626; and to *New Castle, City of, v. Raney*, 130 Pa. St. 546, 18 Atl. 1066."

15. *Smith v. King*, 61 Conn. 511. And see *Chadeayne v. Robinson*, 55 Conn. 345, 11 Atl. 592; *Grant v. Allen*, 41 Conn. 156.

16. *Evans v. Wilmington W. R. Co.*, 96 N. C. 45, 1 S. E. 529; *Baltimore v. Warren Mfg. Co.*, 59 Md. 96; *Crossley v. Lightowler*, L. R. 3 Eq. 279.

§ 1044. **Nuisance not to be illegal only; to be injurious.**—A trade or employment will not be restrained by injunction merely because it is illegal; it must also be shown to be dangerous to life, detrimental to health, or seriously injurious to property.¹⁷ It is material upon the trial of an action to restrain the continuance of an alleged nuisance, for the jury to determine, upon the question whether the thing complained of is or is not a nuisance, whether the plaintiff has in fact been hurt or damaged by it.¹⁸ To be entitled to an injunction against a nuisance the plaintiff must present a case of pressing necessity and of injury for which there is no adequate legal remedy.¹⁹ And a court of equity will not interpose in the case of an alleged nuisance which consists of a single and temporary grievance.²⁰ Again, the owner of land will not be

17. *Health Department v. N. Y. v. Purdon*, 99 N. Y. 237, 1 N. E. 687; *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 371; *Jordan v. Woodward*, 38 Me. 424; *Wolcott v. Melick*, 11 N. J. Eq. 204.

18. *Hochstrasser v. Martin*, 74 Hun (N. Y.), 338, 26 N. Y. Supp. 410.

19. *Connecticut*.—*Hood v. New York, etc., R. Co.*, 23 Conn. 609; *Whittlesey v. Hartford, etc., R. Co.*, 23 Conn. 421.

Indiana.—*Bolster v. Cotterlin*, 10 Ind. 117.

Kentucky.—*Dumesnil v. Dupont*, 18 B. Mon. 800.

Maine.—*Morse v. Machias Water Co.*, 42 Me. 119.

New Hampshire.—*Eastman v. Amoskeag*, 47 N. H. 71.

A petition to restrain a nuisance alleged that respondent has extended a fence into the highway; has built a stable extending into it; that he stores wagons on the highway in front of complainant's lots, and has deposited earth and ashes there, so as to cause water to stand, and hinder the ingress and egress to the lots.

It did not appear that the lots were improved; that there was no other access to them; or that complainant suffered serious damages; nor did he ask for a preliminary injunction. It was held that there was ample redress at law, and equity would not interfere. *Van Wagenen v. Cooney*, 45 N. J. Eq. 24, 16 Atl. 689.

20. In an action by a fisherman to enjoin a city from discharging its garbage into Lake Michigan, the complaint alleged damage to plaintiff's nets, and destruction of the fish caught therein, on a single occasion, and the destruction of the fishing business in that locality. There was no averment that plaintiff ever before placed his nets at the particular place referred to on the occasion mentioned, or that he ever intended to locate them there again, or that there was any danger of a repetition of injuries of the same character. It was held where plaintiff's operations extended over 400 or more square miles, and there was nothing to show that he had acquired, by occupancy or otherwise, any rights in any particular portion of the lake which did

restrained from maintaining an embankment thereon to protect himself against the waters of a non-navigable stream, merely because, occasionally, when there is a freshet, a few acres of plaintiff's land, part of a farm of more than one hundred acres, are overflowed.²¹ And equity will not decree that a mill dam be torn down as a nuisance when the damage to complainant is scarcely more than nominal.²²

§ 1045. **Same subject.**—Neither a bill in equity nor an information in the name of the Attorney-General can be maintained to restrain a gas company from digging up, without the consent of the municipal authorities, the surface of the highway in front of the plaintiff's premises for the purpose of laying gas pipes, if the injury caused to the plaintiff is not of such a serious, permanent character that it cannot be adequately compensated in damages, it not appearing either that the municipal authorities have refused relief.²³ And the erection of a building will not be enjoined merely because it is prohibited by a city ordinance if there is no allegation of injury.²⁴ But it is no answer to a suit for an injunction to prevent a railroad company from closing an alley which is a means of access to plaintiff's business stand that new and increased custom will result to the plaintiff's business

not belong equally to every other citizen who chose to fish therein, that the complaint would not support an injunction as to any specific portion of the lake. *Kuehn v. City of Milwaukee*, 83 Wis. 583, 53 N. W. 912.

21. *Blaine v. Brady*, 64 Md. 373, 1 Atl. 609.

22. *McCord v. Iker*, 12 Ohio, 387. And see *Cooper v. Hall*, 5 Ohio, 322; *Attorney General v. Sheffield Gas Co.*, 3 DeG. M. & G. 304; *Oswald v. Wolfe*, 129 Ill. 200, 21 N. E. 839; *Thornton v. Roll*, 118 Ill. 350, 8 N. E. 145.

23. *Kenney v. Consumers Gas Co.*, 142 Mass. 417, 8 N. E. 138, per Allen, J.: "Even if it be granted that

the injury which the plaintiff suffered was special and peculiar, differing in kind from the inconvenience to the public at large, the facts by no means show a serious permanent injury which cannot be adequately compensated in damages and which call for the issuing of an injunction. *Cummings v. Barrett*, 10 Cush. (Mass.) 186; *Washburn v. Miller*, 117 Mass. 376; *Parker v. Cotton Co.*, 2 Black, 545.

24. *Janesville, City of, v. Carpenter*, 77 Wis. 288, 46 N. W. 128; *Stadler v. Grieben*, 61 Wis. 500, 21 N. W. 629; *Pennoyer v. Allen*, 56 Wis. 502, 14 N. W. 609.

See § 1047 herein as to wooden buildings.

from the obstructing depot and other improvements to be made near it, and that such improvements will enhance the value of plaintiff's property.²⁵

§ 1046. **Nuisances created by statute or ordinance; wooden buildings; other structures.**—Although it is said that a bill in equity cannot ordinarily be maintained for the mere violation of a municipal ordinance, yet the violation of an ordinance in respect to the construction of wooden buildings within certain limits may constitute a nuisance which a court of equity will enjoin.²⁶ So where a city ordinance prohibits the erection of wooden buildings within its fire limits, individuals who show a threatened violation of the ordinance, and that if unrestrained it will work irreparable injury to them and their property, are entitled to an injunction, though the building if erected would not be a nuisance *per se*.²⁷ And where township trustees are endeavoring to establish a cemetery within two hundred yards of a dwelling, in violation of statute, they may be enjoined in a suit by the owner of the dwelling; as the statutory implication is that a cemetery within the prohibited limit is a nuisance.²⁸ In some States in order to prevent a certain act by injunction it must be a nuisance in fact and not one created solely by statute or municipal ordinance.²⁹ And a person cannot be deprived of the use of his property for the pur-

25. *Harvey v. Georgia, S. & F. R. Co.*, 90 Ga. 66, 15 S. E. 783.

26. *Houlton v. Titcomb*, 102 Me. 272, 66 Atl. 733. See, also, *Bangs v. Dworak* (Neb. 1906), 106 N. W. 780.

27. *First Nat. Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434.

An injunction should not be issued to restrain defendants from maintaining a permanent bridge across the gutter of the street in front of their premises, where it appears that such bridge was constructed pursuant to an ordinance of the city, and that it may be proper for lawful uses, other than driving or backing teams or wagons on the sidewalk. *Richardson & Boynton Co.*

v. Barstow Stove Co., 11 N. Y. Supp. 935.

Under a city charter and ordinances prohibiting the erection of wooden structures within certain limits, and declaring such buildings nuisances which may be abated, an adjacent owner can not in statute proceedings to abate, unless the right is conferred by the charter and ordinances. The removal of such buildings is in the discretion of the city council. *Stilwell v. Buffalo Riding Academy*, 4 N. Y. Supp. 414.

28. *Henry v. Trustees*, 48 Ohio St. 671, 30 N. E. 1122.

29. *Manchester City v. Smyth*, 64 N. H. 380, 10 Atl. 700; *Waupun Vil-*

poses of lawful business by force of an adjudication of a board of health under its powers over the matter of nuisances, without having an opportunity to be heard in his defense; and such powers will not be enlarged by intendment to include a power not expressly conferred. A board of health may be restrained by injunction if it transcends the powers conferred upon it.³⁰

§ 1047. **Wooden buildings.**—A wooden building, like a powder mill or slaughter-house, is not a nuisance *per se*, but may be a nuisance if located in a populous neighborhood, or placed there in violation of law or a city ordinance. So an injunction lies to prevent the removal of such a building to a place within the fire limits in violation of a city ordinance, and the placing it near to plaintiff's residence so as to make the danger from fire imminent, and to increase the cost of insurance.³¹ But the erection of a frame

lage v. Moore, 34 Wis. 450; St. Johns Village v. McFarlan, 33 Mich. 72. And see Wason v. Sanborn, 45 N. H. 169; Perkins v. Foye, 60 N. H. 496. In Waupun Village v. Moore, 34 Wis. 450, the court says that equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation restraining an act unless the act is shown to be a nuisance *per se*. Mayor of Hudson v. Thorne, 7 Paige (N. Y.), 261; Phillips v. Allen, 41 Pa. St. 381; Schuster v. Board of Health, 49 Barb. (N. Y.) 450.

An ordinance of St. Louis, forbids the opening of any stone quarry within a distance of 300 feet of any dwelling-house, without first having obtained permission from the municipality, and forbids the working of such quarry without the consent in writing of the owner or occupant of such dwelling. It was held that when there is no allegation that the quarry is or will be a nuisance, equity will not enjoin the opening thereof merely because such opening is forbidden by

ordinance. Warren v. Cavanaugh, 33 Mo. App. 102.

30. Weil v. Ricord, 24 N. J. Eq. 169; Belcher v. Farrar, 8 Allen (Mass.), 325; Salem v. Eastern R. Co., 98 Mass. 431. But see Taunton v. Taylor, 116 Mass. 254.

31. Kaufman v. Stein, 138 Ind. 49, 37 N. E. 333, per Dailey, J.: "From the briefs of counsel it appears that one point made by counsel for the appellee, in argument on the demurrer before the court below, was 'that the plaintiff was not entitled to maintain this action, but that the city would alone enforce the penalty provided by the ordinance,' or 'or, in other words, that an individual could not have an injunction in such a case, even if the ordinance in question here was in all its provisions valid, as being within the power of the common council to adopt, because the only remedy in such case was by a prosecution in the name of the city for a violation of the ordinance.' Counsel say they do not rely upon this proposition. They concede that 'where an

dwelling house on a city lot will not be enjoined, at the instance of an adjoining owner, where the complaint contains no statement from which it can be inferred that there would be any special damage to plaintiff aside from the fact that a city ordinance prohibits the erection of wooden buildings.³² And a plaintiff who shows no peculiar damage due to the building of a wooden wall within a certain distance of the line of an adjoining lot in violation of a municipal ordinance cannot sustain a bill in equity to restrain such erection.³³

individual shows that he suffers or will sustain special damages or injury, above and beyond what the public generally will suffer, by reason of anything which may constitute an injury or damage to the public generally, he may maintain such an action as is proper in the given case to recover damages for, or to prevent, the doing of such a thing.' An individual has, and always had, the right to enjoin the erection or continuance of a nuisance, where he will suffer a special injury or annoyance, different in kind and degree to that sustained by the public generally. *Keiser v. Lovett*, 85 Ind. 240; *Reichert v. Geers*, 98 Ind. 73; *Owen v. Phillips*, 73 Ind. 285. In *Baumgartner v. Hasty*, 100 Ind. 575, at page 579, it is said: 'It is one of the oldest common-law rules that an individual citizen may, without notice, abate a nuisance, and, if necessary to effectually abate it, destroy the thing which creates it.' A wooden building is not a nuisance *per se*. It is the circumstances that make it a nuisance. A powder mill is not a nuisance *per se*, nor is a slaughter-house or glue factory, but, if located in populous neighborhoods, they are nuisances; and 'even when they are originally built in a place remote from the habitations of men, or from public places, if they become actual

nuisances by reason of roads being afterwards laid out in their vicinity, or by dwellings being subsequently erected within the sphere of their effects, the fact of their existence prior to the laying out of the roads or the election of the dwellings is no defense.' *Wood, Nuis.* 572; *Reichert v. Geers*, 98 Ind. at page 75; *Baumgartner v. Hasty*, *supra*. In the case last cited, *Elliott, J.* says: 'A wooden building is not in itself a nuisance, but when erected in a place prohibited by law, and where it endangers the adjoining property, it may become a nuisance. . . . There are many things that are not nuisances *per se*, but which become such when placed in locations forbidden by law,' etc., citing *Wood, Nuis.*, § 109. We think the complaint under consideration brings this case within the rule thus laid down, as it is alleged that the building is a wooden structure, that it will be removed to a place within the fire limits in violation of a city ordinance forbidding it, and that it will be located within ten feet from the plaintiff's frame house making the danger imminent."

32. *Young v. Scheu*, 56 Hun (N. Y.), 307, 9 N. Y. Supp. 349.

33. *Hagerty v. McGovern*, 187 Mass. 479, 73 N. E. 536.

§ 1047a. **Signboard on building.**—A signboard fastened to the top of a building is a public and private nuisance which may be enjoined by any one who suffers damages thereby. So it was decided that where a tenant showed that a cotenant, maintaining such a sign, by frequently painting the same had caused pecuniary damage to awnings amounting to two hundred dollars and that his place of business was obstructed by painters going and coming and blocking the sidewalk with materials and ropes hanging from their scaffold, he had established a special damage to his business and direct pecuniary loss sufficient to authorize the issuance of an injunction.³⁴

§ 1048. **Statutory remedy concurrent with injunction; election.**—The power of towns, as provided by the Indiana statute, “to declare what shall constitute a nuisance, and to prevent, abate, and remove the same,” is by proceeding *ad rem*, and must be exercised by and through general ordinances, affecting alike all property or business under like conditions, in like situations, and conducted in like manner, and the possession of such power does not exclude the common law right of the town to resort to the court to restrain a nuisance by injunction. But the power under such statute, and the power to resort to the courts, are concurring effectual remedies, and the choice and uninterrupted prosecution of one by a town excludes the other.³⁵ Statutes providing other remedies do not as a rule take away remedies previously existing at common law, unless such an intention is declared, but the statutory remedies are held to be cumulative.^{35a} So where plaintiff's

34. *Buskirk v. Gude Co.*, 115 App. Div. (N. Y.) 330.

35. *American Furniture Co. v. Batesville*, 139 Ind. 77, 38 N. E. 408, 35 N. E. 682, per Hackney, J.: “The action herein was by the appellee, as an incorporated town, to declare an obstruction of one of her streets a nuisance, for the abatement of such obstruction, and for damages. The appellant first complains of the action of the Circuit Court in overruling a demurrer to the first and second paragraphs of

complaint. The point urged is that by section 3333, subd. 4, Rev. Stat. 1881, towns possess the power ‘to declare what shall constitute a nuisance and to prevent, abate and remove the same;’ that such power permits a remedy excluding a resort to the courts for such purposes. The argument is also made that, under the power conferred by the statute, the town could proceed to declare the obstruction a nuisance, and to abate it by the action of its trustees, notwith-

neighbor built and maintained a cornice projecting over the line to the injury or depreciation of plaintiff's property, it was held, that a bill in equity would lie to abate the nuisance, even though

standing a prior adverse adjudication by the courts, if resort to the courts may be had. We cannot concur in this contention. If there are concurring, effectual remedies, the choice and uninterrupted prosecution of one excludes the other. *Buscher v. Knapp*, 107 Ind. 340, 8 N. E. 263; *Insurance Co. v. Carpenter*, 85 Ind. 350; *Klebar v. Town of Corydon*, 80 Ind. 95; *Searle v. Whipperman*, 79 Ind. 424; *Dunkle v. Elston*, 71 Ind. 585; *Ney v. Swinney*, 36 Ind. 454. The insistence is that the summary remedy possessed by the town is exclusive of the remedy adopted, and precludes a resort to the courts. In support of this point, counsel cite *Storms v. Stevens*, 104 Ind. 46, 3 N. E. 401, where it is held that a statute creating a new right, and prescribing the mode of its enforcement, excludes all other remedies. The summary abatement of a nuisance was a right which existed at common law in favor of the individual sustaining special injury from such nuisance, and the statute in question but confers that right upon the municipal corporation. It is not a new right. It should be remembered, also, that it is by proceeding *ad rem*, and not *in personam*, for herein lies a distinction in the proceeding here in review. The power extended to towns does not permit proceedings *in personam*, and in the nature of civil actions, which affect particular persons, but, like other corporate powers, must be exercised by and through ordinances general in their character, and affecting alike all the property or all the business of all

the citizens under like conditions, occupying like situations, and conducted in like manner. *City of Plymouth v. Schultheis*, — Ind. —, 35 N. E. 12 (present term). Therefore it would not be possible for the appellee to adopt the remedy here adopted — a remedy which is personal in its character, and one which invokes the equity jurisdiction of the court to restrain the person from the further maintenance of that which obstructs the way, and affects the corporate rights. It is true that the complaint asks to declare the obstruction a nuisance, and to abate it; but this remedy is sought by and through that jurisdiction which the court may exercise, in the first instance, over the alleged offender. Authors and the judges speak of the enjoining of nuisances in the same sense as of the abatement of nuisances, and, in a general way, there is no distinction. The abatement, in one instance, is accomplished through the restraining influence of the court over the defendant, and in the other it is by and through its officers, under a decree against the defendant, where, as we have said, the proceeding is *in personam*. But, whatever distinction may properly exist, it is certain that towns may not, in their corporate capacity, proceed by adversary methods before their own trustees to adjudge a particular property or structure a nuisance, and, by order against the owner, secure its abatement. In the case of *Cheek v. City of Aurora*, 92 Ind. 107, the city had threatened to abate an obstruction of a street as a nuisance, and the

there was a concurrent statutory remedy.³⁶ And the allegation in a bill to abate the private nuisance of an encroachment on complainant's land that defendant has claimed ownership of a strip of it is not such a statement of a dispute about a boundary as would deprive the court of jurisdiction, if the bill states with certainty the actual boundary and complainant's ownership on one side.³⁷

§ 1049. **Police regulations; railroad grants, etc.**—Legislatures may make police regulations declaring in what manner property shall be used and business carried on,³⁸ and with the increase of

owner of the obstruction instituted suit to enjoin the city from its threatened action. The city, by cross complaint, sought to declare the obstruction a nuisance, and prayed that, as such, it be abated, and the owner enjoined. Upon such cross complaint the city succeeded, and objection was made that the remedy afforded by the statute enabled the city to abate the nuisance, and excluded any remedy by the courts. This court held, quoting from Dill. Mun. Corp., § 659, that 'where, by its charter or constituent act, a municipality has the usual control and supervision of the streets and public places, it may, in its corporate name, institute judicial proceedings to prevent or remove obstructions thereon.' It is there further said that 'the city might have resorted in the first instance to an independent action, seeking the relief obtained in this suit, and the facts which, in such independent action would have entitled the city to such relief, constituted proper ground of counterclaim in this action.' The statute in question gives the power to 'prevent' as well as to 'abate' nuisances, and it could as well be contended that this power would preclude the exercise of the equitable jurisdiction of the courts to enjoin the threatened erec-

tion of a nuisance within the town (a power certainly possessed—see Wood, Nuis., p. 889), as to insist that such jurisdiction is denied by the possession of the power to abate."

35a. *People v. Vanderbilt*, 26 N. Y. 287.

36. *Wilmarth v. Woodcock*, 58 Mich. 482, 25 N. W. 475, per Champlin, J.: "This statute does not take away the jurisdiction of a court of equity, but affords a concurrent remedy; and we can see no good reason for turning the complainant out of a court having full and complete jurisdiction to seek her remedy in a court having not greater but more limited power to afford complete and adequate relief. *Fraedrich v. Flieth*, 64 Wis. 184, 25 N. W. 28." In the last case the demand was that the defendant be required to abate the nuisance by removing the obstruction from the water-course and filling the ditch, and it was held there must be an action in equity because no such relief could be granted in an action at law. See, also, *Denner v. Chicago, M. & St. P. Ry. Co.*, 57 Wis. 218, 15 N. W. 158.

37. *Wilmarth v. Woodcock*, 58 Mich. 482, 25 N. W. 475.

38. *Bancroft v. Cambridge*, 126 Mass. 438, 441; *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. Ed. 77.

population and of business of various kinds in a locality, it often becomes a difficult question to decide how each person's right to prosecute his lawful business in a reasonable manner shall be made consistent with another's right to be free from unreasonable disturbance in the enjoyment of his property.³⁹ The incidental injury which results to the owner of property from the necessary smoke, dust, noise and vibration caused by passing trains would be an actionable nuisance, if not authorized by the Legislature; but being so authorized, is *damnum absque injuria*. This is the general rule in respect to annoyances which are sanctioned and regulated by law.⁴⁰ And where a bridge over a navigable river had been declared a nuisance by a decree of court but had been made a lawful structure by a subsequent act of Congress, it was decided that an attachment against the proprietors of the bridge for disobeying an injunction against the rebuilding of it after it had been destroyed should not be issued, the injunction having been granted after the passage of the act and before it was determined to be invalid.⁴¹ But ordinarily a statute which authorizes a thing to be done, which can be done without creating a nuisance, will not be deemed to authorize a nuisance; and if a nuisance is created, there will be a remedy at law or in equity.⁴² Thus, a company which has general legislative authority to construct necessary works for the proper completion of its railroad, may not build an engine house and machine shop close by an existing church so as to render it unendurable as a place of worship.⁴³ And

39. *Merrifield v. Worcester*, 110 Mass. 216, 219.

40. *Presbrey v. Old Colony R. Co.*, 103 Mass. 1, 6, 7; *Walker v. Old Colony R. Co.*, 103 Mass. 10, 14; *Bancroft v. Cambridge*, 126 Mass. 438; *Call v. Allen*, 1 Allen (Mass.), 137; *Commonwealth v. Rumford Chem. Works*, 16 Gray (Mass.), 231; *Struthers v. Dunkirk, etc., R. Co.*, 87 Pa. St. 282; *Hatch v. Vermont R. Co.*, 28 Vt. 142; *Brand v. Hammer-Smith R. Co.*, L. R. 1 Q. B. 130, 4 H. L. 171; *Vaughan v. Taff Vale R. Co.*,

5 H. & N. 679, 685; *Rex v. Pease*, 4 B. & Ad. 30.

41. *State of Pennsylvania v. Wheeling & B. B. Co.*, 18 How. (U. S.) 421, 15 L. Ed. 435.

42. *Eames v. New Eng. Worsted Co.*, 11 Metc. (Mass.) 570; *Haskell v. New Bedford*, 108 Mass. 208, 215; *Commonwealth v. Kidder*, 107 Mass. 188; *Garney v. Long Island R. R. Co.*, 9 App. Div. (N. Y.) 254, 41 N. Y. Supp. 397. See *Scammons v. City of Gloversville*, 175 N.Y. 346, 67 N.E. 622.

43. *Baltimore, etc., R. Co. v. Bap-*

where a railroad company has authority to lay its track along, under or over a highway, the terms and conditions of the authority must be complied with, and interference with the highway in any other mode is a public nuisance, of which a court of equity has jurisdiction.⁴⁴ Thus, where a railroad company constructs its road along a street, with permission from the city, but under an ordinance, as well as the general laws of the State, requiring it to restore the streets to a passable condition and make crossings, a failure of it to fulfil these obligations is a nuisance, which equity will abate by mandatory injunction.⁴⁵

§ 1050. **Parties.**—Where there is an unauthorized obstruction of a public street, all the adjacent lot owners who sustain a special injury therefrom can maintain a suit for injunction, and no other parties defendant are required than the alleged trespasser.⁴⁶ And in the case of a public nuisance created by the maintenance by a railroad company of a freight depot in a town the town may properly bring an action through its official board to enjoin the nuisance.⁴⁷ And a citizen injuriously affected in his health or

tist Church, 108 U. S. 317, 27 L. Ed. 739. As to the distinction between a statute which merely authorizes an obnoxious thing and one which imperatively orders it to be done, see Metropolitan Asylum District v. Hill, L. R. 6 App. Cas. 193.

44. Connecticut.—Hamden v. New Haven, etc., R. Co., 27 Conn. 158.

Florida.—Palatka L. R. R. Co. v. State, 23 Fla. 546, 3 So. 158.

Indiana.—Evansville T. H. R. R. Co. v. Crist, 116 Ind. 446, 19 N. E. 310.

Iowa.—Gear v. Railroad Co., 43 Iowa, 83.

Massachusetts.—Commonwealth v. Nashua, etc., R. Co., 2 Gray, 54.

New York.—People v. New York Central R. Co., 74 N. Y. 302.

Ohio.—Little Miami R. Co. v. Com'rs, 31 Ohio St. 338.

Pennsylvania.—Northern Central

R. Co. v. Commonwealth, 90 Pa. St. 300; Commonwealth v. Erie, etc., R. Co., 27 Pa. St. 339.

West Virginia.—State v. Monongahela River R. Co., 37 W. Va. 108, 16 S. E. 519.

45. City of Moundville v. Ohio R. Co., 37 W. Va. 92, 16 S. E. 514; **State v. Dayton R. Co.,** 36 Ohio St. 34; **Town of Jamestown v. Chicago, B. & N. R. Co.,** 69 Wis. 648, 34 N. W. 728; **Oshkosh v. Railroad Co.,** 74 Wis. 534. See, also, **Charles Riv. Bridge v. Warren Bridge,** 11 Pet. 420, 9 L. Ed. 773; **Minneapolis v. St. Paul R. Co.,** 35 Minn. 3, 28 N. W. 3.

46. Hart v. Buckner, 54 Fed. 925; **First Nat. Bank v. Tyson (Ala. 1905),** 39 So. 560. And see § 356, *ante*.

47. City of Hickory v. Southern Ry. Co. (N. C. 1906), 53 S. E. 955.

whose life is endangered by a sewage nuisance may have the same enjoined.⁴⁸ And a stockholder in a corporation may maintain an action to restrain it from creating a nuisance.⁴⁹ In a suit to restrain a nuisance the defendant cannot complain of the admission of life tenants as parties plaintiff with the remainder-men.⁵⁰ And one who has only a leasehold interest may sue in equity to enjoin the continuance of a nuisance, which is not one to the freehold, but one which occasions an injury to the business, for the right to maintain an injunction suit must be determined by the character of the injury done and the effectiveness of the remedy at law and not upon the title by which he holds the property in which he conducts the business injured.⁵¹ Where a private way is obstructed by one of several persons claiming the land over which the way is situated, a proceeding to remove the obstruction as a nuisance may be brought against the person who erected it, without joining the other claimants as codefendants.⁵² Where a bill seeks to restrain as a nuisance further interments in a private burying ground, dedicated as such by two persons who owned separate portions in severalty, both may properly be joined as defendants, and one of them having died before the filing of the bill, his widow and heirs and her second husband are properly made defendants with the survivor, but not the personal representatives of the deceased.⁵³ But the owner of land which has been specially assessed for the construction of a sewer is not entitled to bring suit to enjoin the connection of drains outside the drainage district with such sewer, unless he shows that his prop-

48. *Waycross City v. Hauk*, 113 Ga. 693, 39 S. E. 577.

49. *Leonard v. Spencer*, 34 Hun, 341.

50. *Rainey v. Herbert*, 55 Fed. 443.

51. *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107, 83 Pac. 14.

52. *Connor v. Hall*, 89 Ga. 257, 15 S. E. 308. Defendant may be compelled to remove obnoxious obstructions erected on his own lands, on lands of the State, and on lands in which he is interested as partner or

co-tenant, where the other persons interested with him are not within the jurisdiction of the court, without making the latter persons parties to the action; but all persons interested in the lands who are within the court's jurisdiction, and all who own parts of land in severalty should be made parties. *State v. Goodnight*, 70 Tex. 682, 11 S. W. 119.

53. *Kingsbury v. Flowers*, 65 Ala. 479.

erty will be specially injured by such connection.⁵⁴ And a railroad company cannot enjoin expressmen and hotel runners from assembling in the street in front of its passenger station and there soliciting business in such a manner as to constitute a public nuisance, where the only injury to the company is through the annoyance suffered by its passengers; nor in such a case can the company enjoin the city authorities from granting the right to those persons to so solicit business.⁵⁵

§ 1051. **Tenants as parties.**—The tenant of one story of a building used for manufacturing purposes may enjoin the tenant of the story above, in the floor of which there are holes for the passage of belting which runs the machinery of both tenants, from allowing sand and acids used in his business and the fumes of the acids, to come through the holes in the floor and injure his goods and machinery.⁵⁶ In such case it is not necessary that the bill allege in terms that the business of defendants is unsuitable to be carried on in the building, or that there is negligence in the mode of carrying it on, or that complainant has used due care.⁵⁷ And the right of a tenant as a plaintiff to an injunction against a nuisance affecting his health and comfort and that of his family is not destroyed either because of the fact of a joinder with him of the owner of the premises in the petition or because of the fact of a joinder with him as relator where such tenant stands on his own right and not on that of the owners.⁵⁸ And the lessee of a dwelling house is entitled to an injunction and to compensation where a planing-mill near by is so managed that the house at times is enveloped in smoke, and dust and soot are deposited on

54. *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761.

55. *Pittsburgh, Ft. W. & C. Ry. Co. v. Cheevers*, 149 Ill. 430, 37 N. E. 49.

56. *Boston Ferrule Co. v. Hills*, 159 Mass. 147, 34 N. E. 85. And see *Wesson v. Washburn Iron Co.*, 13 Allen (Mass.), 95, 104; *Crump v. Lam-*

bert, L. R. 3 Eq. 409; *Cooke v. Forbes*, L. R. 5 Eq. 166; *Rex v. White*, 1 Burr. 333.

57. *Boston Ferrule Co. v. Hills*, 159 Mass. 147, 34 N. E. 85; *Tipping v. St. Helens Smelting Co.*, 4 Best & S. 608, 11 H. L. Cas. 642.

58. *State, Violet v. Judge*, 46 La. Ann. 78, 84, 14 So. 423.

the windows and upon washed clothing hung in the yard to dry.⁵⁹ But a court of equity will discourage as far as possible a resort to its aid for the prevention of quarrels among neighboring tenants, and particularly where there is reason to believe that both are at fault.⁶⁰

§ 1052. **Joinder of abutting owners, etc.**—Abutting lot owners jointly interested in preventing the construction of a drain along their street by the town may join as plaintiffs though the degree of injury suffered may not be the same to each of them.⁶¹ And where defendant placed piers in the bed of a stream running through his land and thereby obstructed its natural flow and caused the water to set back upon the lands adjoining the stream farther up, it was held that the owners of separate parcels of the land upon which the water was set back could join as plaintiffs in restraining the nuisance.⁶² Several owners of distinct premises may also join in a suit to restrain a nuisance which is common to all of them and affecting each in a similar way but may not so join when the injury is distinct and special to each of them.⁶³

59. *Beir v. Cooke*, 37 Hun (N. Y.), 38.

60. Equity will not restrain a family, occupying rooms in the house with another family, from committing a nuisance against the latter, on proof that the defendants did some loud talking which annoyed petitioner's wife, who was sick; kept their kitchen door open into the hall while cooking, so that the odors troubled petitioner's family; and left floor sweepings in the hall for a long while—it appearing that near neighbors had not been annoyed, and also that petitioner's wife was partly at fault. *Medford v. Levy*, 31 W. Va. 649, 8 S. E. 302.

61. *Town of Sullivan v. Phillips*, 110 Ind. 320, 11 N. E. 300; *Tate v. Ohio, etc., R. Co.*, 10 Ind. 174. And see *First Nat. Bank of Mt. Vernon v.*

Sarlls, 129 Ind. 201, 21 N. E. 434; *Cadigan v. Brown*, 120 Mass. 493.

The rule is different where the grievance is a series of independent acts affecting each individual plaintiff alone. *Heagy v. Black*, 90 Ind. 534.

62. *Gillespie v. Forrest*, 18 Hun (N. Y.), 110; *Belknap v. Trimble*, 3 Paige (N. Y.), 577; *Oakley v. Trustees*, 6 Paige (N. Y.), 262; *Catlin v. Valentine*, 9 Paige (N. Y.), 575; *Cady v. Conger*, 19 N. Y. 256; *Milhau v. Sharp*, 27 N. Y. 611; *Peck v. Elder*, 3 Sandf. (N. Y.) 126. And see *Foot v. Bronson*, 4 Lans. (N. Y.) 47; *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241.

63. Two persons, occupying separate dwellings, filed a bill to enjoin the nuisance occasioned by the maintenance of an insane asylum near their dwellings. The bill alleged that

And two or more persons owning separate and distinct tenements, whether they occupy them themselves or by tenants, may together with the tenants join in a suit to restrain a nuisance which is a common injury to all the tenements and their occupants.⁶⁴ Again, a defendant cannot demur on the ground of improper joinder with him of other defendants if his liability is not thereby increased.⁶⁵

§ 1053. **Parties in liquor nuisance suits.**—Under the Iowa statute providing that a citizen may sue in his own name or in that of the State to enjoin a liquor nuisance, it is held that where pending an action to set aside such injunction granted in a suit by a citizen in his own name, he dies, his personal representatives cannot be substituted as parties, but the State or any person who might originally have brought the action may be substituted.⁶⁶ And in such an action another citizen cannot intervene and join with the plaintiff on the theory that their interest is the same, for the reason that the cause of action is not a private interest but the redress of a public wrong and the protection of a public statutory right.⁶⁷ And where the owner of land leased it and on learn-

the insane patients made indecent exposure of their persons, and uttered violent screams, that could be seen and heard from plaintiffs' dwellings. It further alleged that the patients were allowed to go at large insufficiently attended, and that the fences which surround the asylum are insecure, especially that between the asylum and the dwelling of plaintiff R. The bill alleged that the annoyances complained of did not occur to both plaintiffs at the same instant of time, nor were they due to the same particular acts of the lunatics in both cases; but that the habitual occurrence of such acts annoyed one complainant at one time, and the other at another, and thus discomfort was produced to both. It was held that the bill did not exhibit distinct nuisances affecting each complainant in

a different way, but a single nuisance common to both. *Rowbotham v. Jones*, 47 N. J. Eq. 337, 20 Atl. 731. And see *Marselis v. Banking Co.*, 1 N. J. Eq. 31; *Hinchman v. Railroad Co.*, 17 N. J. Eq. 75; *Davidson v. Isham*, 9 N. J. Eq. 186; *Demarest v. Hardham*, 34 N. J. 469; *Murray v. Hay*, 1 Barb. Ch. 59.

64. *Snyder v. Cabell*, 29 W. Va. 48, 1 S. E. 241; *Robinson v. Baugh*, 31 Mich. 290; *Reid v. Gifford*, *Hopk. Ch.* 419; *Scofield v. Lansing*, 17 Mich. 437; *Middleton v. Booming Co.*, 27 Mich. 533; *Peck v. Elder*, 3 Sandf. (N. Y.) 126.

65. *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.*, 79 Wis. 297, 48 N. W. 371.

66. *Geyer v. Douglass*, 85 Iowa, 93, 52 N. W. 111.

67. *Conley v. Zerber*, 74 Iowa, 699,

ing of a liquor nuisance created on it by the lessee did his utmost to abate it and to eject the lessee, an injunction against him as joint defendant with the lessee should be dissolved and the proceeding as to him dismissed.⁶⁸ But where in an action to abate a saloon nuisance, it is alleged that one of the defendants is a saloon-keeper, and the other two the owner and lessor of the property, and the allegation is not denied, and the owner and lessor knew of the use which was being made of the property, it is reversible error to enjoin the saloon-keeper only from maintaining the nuisance, and to dismiss the others with costs.⁶⁹

§ 1054. **City enjoining county.**—A municipal corporation, being a governmental agency intrusted with the care and superintendence of the highways and public squares within its boundaries, may sue a county to enjoin it from maintaining a nuisance on one of the city's public squares. And a dedication by a county of a public square in a city for the use of the public, with a right reserved in the county to use it for courthouse purposes, gives the county no right to erect thereon a jail and a cesspool, and the city has the right to abate such use of the square by the county as a purpresture and public nuisance.⁷⁰

39 N. W. 113. And see *Littleton v. Fritz*, 65 Iowa, 495, 22 N. W. 641; *Applegate v. Winebrenner*, 66 Iowa, 68, 23 N. W. 267.

68. Where the owner of a lot leased it for five years, with authority to erect a building for "confectionery purposes," and a building was erected and a saloon nuisance established therein, and, upon a preliminary hearing of a proceeding against the lessor, lessee, and saloonkeeper to abate the nuisance, a temporary injunction was granted, and thereafter the lessor served notice to quit on the lessee, and instituted proceedings for forcible entry and detainer against him, and prosecuted them vigorously, but unsuccessfully, both before the

justice and in the district court, a judgment on the final hearing of the injunction proceedings dissolving the temporary injunction, and dismissing the proceeding as to him, was not error. *Morgan v. Koestner*, 83 Iowa, 134, 49 N. W. 80.

69. *Bell v. Glaseker*, 82 Iowa, 736, 47 N. W. 1042.

70. *Llano City v. Llano County*, 5 Tex. Civ. App. 132, 23 S. W. 1008. A city corporation is a governmental agency, to which is intrusted the care and superintendence of highways within its boundaries, and of removing obstructions therefrom. And in all matters pertaining to the highways a town, to the extent of these powers and du-

§ 1055. **Health board acting for city.**—A board of health is entitled to maintain an action for an injunction where the State and city ordinance so provides and the nuisance endangers the public health.⁷¹ And a board of health having statutory authority to forbid the exercise within the limits of a city of any trade which is dangerous to the public health or injurious to property may bring a suit in the name of the city to enjoin the exercise of an

ties, is the representative of the State; and if it has the power to abate such a nuisance, as it undoubtedly has, there is no apparent reason why it may not in a proper case resort to a court of equity to aid it by injunction or other appropriate remedy in the performance of its public duties as a governmental agency of the State. To the same effect is *Village of Pine City v. Munch*, 42 Minn. 342, 44 N. W. 197. In *Price v. Inhabitants of Plainfield*, 40 N. J. Law, 608, it is held that the city has the authority to bring a suit for land that is dedicated to the public. The theory upon which the right is permitted is by virtue of its representing the public, in which is the right of possession. In *Campbell Co. v. Town of Newport*, 12 B. Mon. 539, a suit in equity by the town against the county to restrain it in erection of buildings upon the public square was allowed. In *City of Denver v. Mullen*, 7 Colo. 346, 3 Pac. 693, it is held that a city may maintain an action to abate a nuisance. *City of New Orleans v. Lambert*, 14 La. Ann. 247, holds that the city may by injunction restrain and abate a nuisance. In *City of Dubuque v. Maloney*, 74 Amer. Dec. 365, it is held that a city, by a suit for the benefit of the public, may enjoin a nuisance. In *Metropolitan City Ry. Co. v. Chicago*, 96 Ill.

627, the court holds that the State has the undoubted power by a suit in equity by its proper officers to restrain and abate a public nuisance. The law gives cities the authority over their public streets, and by this authority the town or city has the same power as the State, as its representative, to maintain the suit. In *City of Winona v. Huff*, 11 Minn. 119 (Gil. 75), it is held that a city or town holds a public square for the use of the public, and it may maintain an action to recover it. In *Dummer v. Selectmen of Jersey City*, 40 Am. Dec. 214, it is held that a city, or trustees for the public, may sue for the recovery of a public square. The court, in *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 541, holds that the city has the authority, as the representative of the public, to enjoin a nuisance, and use of a public square. In *Samuels v. Mayor, etc., of Nashville*, 3 Sneed, 299, it is held that a city may enjoin a county from creating a public nuisance. And see, also, *Trustees v. Cowen*, 4 Paige, 511; *Mayor, etc., v. Bolt*, 5 Ves. 129; *Town of Hutchinson Twp. v. Filk*, 44 Minn. 536, 47 N. W. 255.

71. *Board of Health of Yonkers v. Capcutt*, 140 N. Y. 12, 35 N. E. 443, 23 L. R. A. 485, 55 N. Y. St. R. 422, *aff'g* 71 Hun, 149, 24 N. Y. Supp. 625, 54 N. Y. St. R. 311.

obnoxious trade in violation of the order of the board.⁷² And in such a suit the bill may properly be signed by the mayor.⁷³ And a suit to enjoin the violation of an order of a board of health to abate a nuisance and to enforce the same is properly brought in the name of the village instead of that of the board of health. But in such a case it is not enough to allege and prove that the board of health declared a nuisance and ordered it abated; the complaint must allege facts showing the nuisance, and the resolution and order of the board of health are not evidence thereof.⁷⁴

§ 1056. **Enjoining Federal receivers.**—If, upon intervening petition, it be shown that a Federal receiver has been guilty of a public nuisance, such as the erection of a fence across a highway, it is the duty of the court to order its discontinuance, although the public character of the nuisance would prevent the petitioner from maintaining a suit thereon for injunction.⁷⁵

72. *Taunton v. Taylor*, 116 Mass. 254; *Watertown v. Mayo*, 109 Mass. 315; *Salem v. Eastern Railroad*, 98 Mass. 431; *Winthrop v. Farrar*, 11 Allen (Mass.), 398.

73. *Central Bridge v. Lowell*, 15 Gray (Mass.), 106, 122; *Nichols v. Boston*, 98 Mass. 39.

74. *Village of White Plains v. Tarrytown, W. P. & M. R. Co.*, 117 App. Div. (N. Y.) 841.

75. *Felton v. Ackerman*, 9 C. C. A. 457, 61 Fed. 225, per Taft, J.: "It is first objected to the order granted below that the injury to Ackerman, as shown by the proof, was of the same character as that suffered by the public, and that there was no peculiar damage to him, different from that which the public suffered in the obstruction of the highway, which should enable him to bring suit, on his own account, to recover damages for the obstruction, or to enjoin its continuance. The peculiar damage which he sets up in his peti-

tion is the damage to him as a butcher by reason of the fact that he cannot reach Chattanooga by any other road than the Shallow Ford road, closed by the receiver. It does not appear that the route on the east side of the railroad is any more circuitous than that on the west, and, even if it did, the authorities are quite clear to the point that such a damage is not one which can be remedied by private action. It is a damage which the public share with the particular complainant. *Farrelly v. Cincinnati*, 2 Disn. 516; *Hubert v. Groves*, 1 Esp. 148; *Wilkes v. Hungerford Market Co.*, 2 Bing. (N. C.) 281; *Holman v. Inhabitants of Townsend*, 13 Mete. (Mass.) 297; *Smith v. City of Boston*, 7 Cush. (Mass.) 254; *Baxter v. Turnpike Co.*, 22 Vt. 114; *Lowery v. Petree*, 8 Lea (Tenn.), 678. The reason why one person cannot sue for damages or an injunction to abate the obstruction of a road when the injury is shared

§ 1057. **Prescriptive right to maintain nuisance.**—The defendant's right to maintain a nuisance may be established by prescription or a user of twenty years, and though he may not have fully acquired a prescriptive right, yet his very long user may be a sufficient reason for denying an injunction until plaintiff's right shall have been tried at law.⁷⁶ The rule that a right to maintain a nuisance cannot be acquired by prescription, applies only to public and not to private nuisances.⁷⁷ No prescriptive right to

by the complainant with the rest of the public is that, otherwise, the courts and the trespasser would be burdened by a multiplicity of suits. The law, therefore requires that what is a public injury, shall be redressed by some person, entitled to represent the public. One remedy is by indictment of the wrongdoer and abatement of the nuisance. Another remedy is that the public prosecutor shall file a bill on behalf of the public for an injunction. Wood, Nuis., 938. In the present case, however, we are of the opinion that the principle relied on, cannot aid the appellant. He is the receiver of the Federal court; and, while it is true that this is an adversary proceeding, as already stated, he does not lose his character as an officer of the court, with all the consequences as to directness of remedy against him which this relation makes necessary. Section 2 of the act of August 13, 1888, defining the jurisdiction of the Circuit Courts of the United States, provides that whenever, in any cause pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that

the owner or possessor thereof would be bound to do, if in possession thereof. And then follows a provision for punishment of any receiver who shall violate the foregoing requirement. If Ackerman, by his petition and his proof, shows that the receiver has been guilty of a public nuisance in erecting a fence across the highway in the administration of the trust, it is the duty of the court to make an order enjoining him from doing so, even though, in an independent action, Ackerman, as an individual, may not be able to obtain such relief. It is of the greatest importance that receivers of the Federal courts shall not be violators of the State laws; and wherever a court is made to know, in any proper way, that its receiver is violating the law of the State in which is the property, of which he has charge, the court must *sua sponte* direct him to cease further violation."

76. Tuttle v. Church, 53 Fed. 422, 428; Ingraham v. Dunnell, 5 Metc. (Mass.) 118; Dana v. Valentine, 5 Metc. 8; Bolivar Mfg. Co. v. Neponset Co., 16 Pick. (Mass.) 241; Campbell v. Seaman, 63 N. Y. 568; Goldsmid v. Improvement Com'rs, L. R. 1 Ch. App. 349; Flight v. Thomas, 10 Ad. & El. 590.

77. Drew v. Hicks (Cal.), 35 Pac. 563.

maintain the former can be acquired.⁷⁸ But where a turnpike company has acted strictly within its charter and the statute in constructing a gate on a city street, the principle that lapse of time furnishes no defense for an encroachment on a public right, has no application, and the city having permitted the gate to stand for twenty-three years, may be enjoined from removing it as a public nuisance.⁷⁹ It has been held, however, that where the grievances have been continued to the present time, and are still threatened and will continue unless restrained by injunction, the suit for injunction is not liable to the bar of the statute of limitations, though the mischief began long ago.⁸⁰

§ 1058. When prescription has no application.—Carrying on

78. *United States*.—*Woodworth v. North Bloomfield G. & M. Co.*, 18 Fed. 753.

Alabama.—*Weiss v. Taylor* (Ala. 1905), 39 So. 19; *Birmingham v. Land*, 137 Ala. 538, 34 So. 613; *Olive v. State*, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33.

California.—*Cloverdale v. Smith*, 128 Cal. 230, 60 Pac. 851.

Georgia.—*Phinizy v. Augusta*, 47 Ga. 260.

Illinois.—*Litchfield v. Whitenack*, 78 Ill. App. 364.

Indiana.—*Pettis v. Johnson*, 56 Ind. 139.

Maine.—*Charlotte v. Pembroke Iron Works*, 82 Me. 391, 19 Atl. 902, 8 L. R. A. 828.

Maryland.—*Woodyear v. Schaefer*, 57 Md. 1, 40 Am. Rep. 419.

Massachusetts.—*New Salem v. Eagle Mill Co.*, 138 Mass. 8.

Michigan.—*Ronayne v. Leranger*, 66 Mich. 373, 33 N. W. 840.

New Hampshire.—*State v. Franklin Falls Co.*, 49 N. H. 240, 6 Am. Rep. 513.

New Jersey.—*State v. Lederer*, 52

N. J. Eq. 675, 29 Atl. 444.

New York.—*Dygert v. Schenck*, 23 Wend. 446, 35 Am. Dec. 757; *Mills v. Hall*, 9 Wend. 315, 24 Am. Dec. 160; *People v. Cunningham*, 1 Denio, 536, 43 Am. Dec. 709.

North Carolina.—*State v. Holman*, 104 N. C. 861, 10 S. E. 758.

Pennsylvania.—*Blizzard v. Danville*, 175 Pa. St. 479, 34 Atl. 846; *Commonwealth v. Morehead*, 118 Pa. St. 344, 12 Atl. 824, 4 Am. St. Rep. 599.

South Carolina.—*State v. Rankin*, 3 S. C. 438, 16 Am. Rep. 737.

Utah.—*North Point Consol. I. Co. v. Utah & S. L. C. Co.*, 16 Utah, 246, 52 Pac. 168, 40 L. R. A. 851, 67 Am. St. Rep. 607.

Wisconsin.—*Weiners v. Miller Brew. Co.*, 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586; *Childs v. Nelson*, 69 Wis. 125, 3 N. W. 587.

England.—*Weld v. Hornby*, 7 East. 196.

79. *Conestoga Turnpike v. Lancaster*, 151 Pa. St. 543, 24 Atl. 1092.

80. *Cedar Lake Hotel Co. v. Cedar Creek Co.*, 79 Wis. 297, 48 N. W. 371.

an offensive trade for twenty years in the same place, remote from buildings and public roads, does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants and travelers upon which it is a nuisance. In such cases, prescription, whatever the length of time, has no application. Every day's continuance is a new offense, and it is no justification that the party applying for the injunction came voluntarily within its reach.⁸¹

81. Board of Health v. Lederer, 52 N. J. Eq. 675, 29 Atl. 444, per Bird, V. C.: "It is also strenuously urged that the defendants have had possession of the premises complained of for at least twenty-eight years, and for all that period of time have been carrying on the tanning of hides and rendering of fat, and are consequently entitled to the protection of the court, notwithstanding the hazard to public health may be ever so great. Courts will be very slow to yield to such a proposition. An acknowledgment of the principle claimed would practically give to the defendants and others dominion over a very much larger extent of territory than it would be actually necessary for them to own, in order to conduct their business, provided they had occupied the premises beyond the prescribed statutory period, which prohibits actions to be brought by individuals. In the case of Com. v. Upton, 6 Gray, 473, the court said: 'Carrying on an offensive trade for twenty years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupants of and travelers upon which it is a nuisance.' People v. Detroit White-Lead Works 82 Mich. 471, 46 N. W. 735; Peo-

ple v. Cunningham, 1 Denio, 524; Fertilizing Co. v. Hyde Park, 97 U. S. 668, 24 L. Ed. 1036; Mills v. Hall, 9 Wend. 315; Gas Co. v. Murphy, 39 Pa. St. 257; Savile v. Kilner, 26 Law T. (N. S.) 277; Renwick v. Morris, 7 Hill, 575; Wood, Nuis., § 18; Dygert v. Schenck, 23 Wend. 446; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451. See Railroad Co. v. Loeb, 118 Ill. 203, 8 N. E. 460. But, since the public is interested, I think the principle of *nullum tempus occurrit regi*, announced and maintained in Cross v. Mayor, etc., 18 N. J. Eq. 305, should control the case before me. In addition to this, very high authority has said: 'In such cases, prescription, whatever the length of time, has no application. Every day's continuance is a new offense, and it is no justification that the party complaining came voluntarily within its reach. Pure air, and the comfortable enjoyment of property, are as much rights belonging to it as the right of possession and occupancy.' Fertilizing Co. v. Hyde Park, *supra*; Wells v. Northampton Co., 151 Mass. 46, 23 N. E. 724; Sloggy v. Dilworth, *supra*. In note to Railroad Co. v. Loeb, see principles in harmony with this view, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 353, 354; Hargreaves v. Kimberly, 53 Am. Rep. 130, notes."

§ 1059. **Injunction to prevent prescription.**—A riparian owner is entitled to an injunction against the daily befouling and discoloration of a stream by the discharge of dyes from a plush factory, even though no actual damage is shown, since, if not stopped, the use may become a prescriptive right.⁸² And so a person may enjoin another from diverting water to which he is entitled, though at the time not actually injured by such diversion, since the repetition or continuance of the diversion may become the foundation of an adverse right in the defendant.⁸³

§ 1060. **Pre-existing nuisance.**—It is not at all conclusive in favor of a nuisance that it existed before the party aggrieved bought his land or built his house; for one cannot place upon his land anything which the law would pronounce a nuisance, and thus compel a neighbor to leave his land vacant or to use it only in such a manner as the nuisance will allow.⁸⁴ And carrying on an essentially dangerous trade, like that of the making of gunpowder, for any length of time, in a place remote from buildings

82. *Townsend v. Bell*, 17 N. Y. Supp. 210, per Learned, P. J.: "It is urged by defendants that no actual damages to plaintiff is shown. The cases hold that this is not necessary in such instances. The plaintiff's right is interfered with. Unless stopped the interference may grow into a right by prescription. *Bickett v. Morris*, L. R. 1 H. L. Sc. 47; *Crossley v. Lightowler*, L. R. 3 Eq. 279; *Pennington v. Coal Co.*, L. R. 5 Ch. D. 769; *Clinton v. Myers*, 46 N. Y. 511, 520; *Crooker v. Bragg*, 10 Wend. 260. In *Harrop v. Hirst*, L. R. 4 Exch. 43, it was held that an action against a riparian owner for diverting water was maintainable without proof of any actual personal damage, inasmuch as the defendant's act might, if repeated without objection, furnish evidence in derogation of plaintiff's legal rights. See, also,

Commonwealth v. Croushore, 145 Pa. St. 157, 22 Atl. 807, where the State lost her right to enjoin by waiting eighteen years."

83. *Smith v. Rochester*, 104 N. Y. 674, *aff'd* 38 Hun. 612; *Webb v. Portland Mfg. Co.*, 3 Sumn. 189. And see *Brookline v. Mackintosh*, 133 Mass. 215, 224; *Wilts, etc., Nav. Co. v. Swindon Co.*, L. R. 9 Ch. App. 451, *aff'd* L. R. 7 H. L. 697.

84. *Campbell v. Seaman*, 63 N. Y. 568, 584, 20 Am. Rep. 567. In *Boston Ferrule Co. v. Hills*, 159 Mass. 147, 34 N. E. 85, *Holmes, J.*, said: "It may be said that plaintiff need not have hired rooms in this building, and that if it did, it took the risk. No doubt, when once it is decided that a certain liability or risk shall be attached to a voluntary relation, the party entering that relation takes that risk. The argument

and public roads, does not authorize its continuance there when houses have been built and roads laid out.⁸⁵ And in a suit by a riparian owner to enjoin the pollution of a stream, the facts that part of the stream is in a measure polluted by others besides defendant; that plaintiff's lands are comparatively valueless; that he bought them after the nuisance was established; that his motive in so doing was bad; and that the injury to the business of defendants by an injunction will be very great,—are not material. Having a right to buy the land, he took all the vendor's rights in the stream, and is entitled to enforce them.⁸⁶

§ 1061. **Estoppel by acquiescence; laches.**—A person may so encourage another in the erection of a nuisance, as not only to be disentitled to an injunction, but also to relieve the adverse party from liability for damages at law.⁸⁷ And a person who stands

is that in a broad sense the plaintiff has come to the nuisance. But a man is as free not to buy the fee as he is not to hire, and it is wholly immaterial that a purchaser has come to the nuisance. *Commonwealth v. Upton*, 6 Gray (Mass.), 473, 475; *Tipping v. St. Helens Smelting Co.*, L. R. 1 Ch. App. 66. It seems that the law is the same as to lessees."

85. *Wier's Appeal*, 74 Pa. St. 230.

86. *Townsend v. Bell* (Sup.), 17 N. Y. Supp. 210; *Clinton v. Myers*, 46 N. Y. 511, 520.

87. *Williams v. Earl of Jersey*, 1 Cr. & Ph. 91.

On application for an injunction against the erection of a bridge by a city, the affidavits as to the effect of the structure on plaintiff's property were conflicting. Plaintiff had stood by until the greater part of the work was completed, and disclaimed any intention of permanently enjoining the construction of the bridge, but she only desired to secure the amount of damages occa-

sioned to her property before the work was completed. There was no claim that defendant was unable to respond in damages. It was held that the injunction was properly denied. *Bigelow v. City of Los Angeles*, 85 Cal. 614, 24 Pac. 778.

A mining company built and operated its first washer more than three years before complainant filed his bill to enjoin its use as polluting a water course. No objection being made, the company from time to time constructed and operated additional washers on the same stream. It was held that complainant, having failed to exercise reasonable diligence, must be left to his remedy at law. *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 So. 192.

Where the owner of a sawmill located near his residence sold the same and subsequently sold other pieces of land for the building of additions to the mill, it was held that though on some occasions the cinders and soot from the mill were such as

silently by and passively encourages another to expend money under an erroneous opinion of his rights, may thereby estop himself from asserting his own title and thus defeating the other's expectation upon which he made the expenditure.⁸⁸ But no acquiescence short of twenty years will bar one from complaining of a nuisance, unless by some act or omission he has induced the party causing the nuisance to incur large expenditures, or to take some action upon which an estoppel may be based.⁸⁹ And the fact that plaintiff, by defendant's permission, took ice from a pond for two winters, does not constitute such acquiescence in the continuance of the dam to the pond as to estop plaintiff from claiming the dam to be a nuisance, after discovering more clearly its effects; nor does the fact that plaintiff suggested improvements, and made efforts to have the pond rendered innocuous.⁹⁰ But where plaintiff

to create a nuisance in respect to him in the use of his dwelling, yet he was not entitled to an injunction. *Woodard v. West Side Mill Co.* (Wash. 1906), 86 Pac. 579.

88. *Raritan Water Co. v. Veghte*, 21 N. J. Eq. 463, 475; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 531; *Hulme v. Shreve*, 4 N. J. Eq. 116; *Ross v. Railroad Company*, 2 N. J. Eq. 422; *Wendell v. Van Rensselaer*, 1 Johns. Ch. 354; *Davies v. Marshall*, 10 C. B. (N. S.) 697; *Ramsden v. Dyson*, L. R. 1 H. of L. 140; *Rochdale Canal Co. v. King*, 2 Sim. (N. S.) 78; *Dann v. Spurrier*, 7 Ves. 231. In an action by a city against an irrigating canal company to enjoin the operation of its canal along one of plaintiff's streets, it appeared that it was built at great expense, five years before the incorporation of plaintiff, and eleven years before suit brought, and had ever since been used adversely to all the world; that the proprietors of the land where the city is located induced such company to run its canal through the town,

and located the latter on the assurance that the company would do so; that the supervisors were consulted at the time; that taxes on the canal were paid to the city, and its trustees, by official acts, recognized its existence; that a mill of the company was erected at a cost of \$100,000; that there are other expensive mills on the canal; that, after leaving the city, it is used for irrigation of many farms; and that it can be constructed below the street, and covered, so that the surface can be restored to its former condition. It was held that a decree ordering the canal to be abated as a nuisance by filling it up was erroneous. *City of Fresno v. Fresno Canal Co.*, 98 Cal. 179, 32 Pac. 943.

89. *Campbell v. Seaman*, 63 N. Y. 568, 585, 20 Am. Rep. 567; *Radenhurst v. Coate*, 6 Grant Ch. (Ont.) 140; *Heenan v. Dewar*, 18 Grant Ch. (Ont.) 438; *Bankart v. Houghtor*, 27 Beav. 425.

Mere lapse of time not a bar. *United States v. Luce*, 141 Fed. 385.

90. *Adams v. Popham*, 76 N. Y. 410.

has had his damages caused by the nuisance assessed, and has been paid the amount of the award, he is thereby estopped from enjoining the nuisance.⁹¹

§ 1062. **Same subject.**—Where injunctive relief is sought against a nuisance, due diligence must have been used by complainant in the assertion of his rights, and a court of equity will not interfere where he, without complaint, has allowed the defendant to continue at great expense in the erection of his obnoxious structure.⁹² The principle of estoppel does not operate if it does not appear that complainant knew that the obnoxious obstruction would create a nuisance.⁹³

§ 1063. **Acquiescence illustrated.**—The evidence showed that the dam maintained by the defendants had been built by their grantor, of such a height that it would injuriously flood the plain-

91. A boom company was incorporated in 1859, and erected its boom soon after, and an addition to it in 1869. Millions of feet of timber have been annually caught in it, and rafted to mills which have been erected in its neighborhood and were made accessible by it. Plaintiffs made no objection, but had their damages by the boom and enlargement assessed and paid, and recovered damages for overflow. It was held that a suit to restrain the maintenance of the boom as thus enlarged was without equity. *Powers v. Bald Eagle Boom Co.*, 125 Pa. St. 175, 23 W. N. C. 435.

92. *Tuttle v. Church*, 53 Fed. 422, per Colt, J.: "The plaintiffs have resided in Tiverton at least portions of each year for more than thirteen years prior to bringing this suit, and for five years previous to 1882 they lived nearer the defendant's works. They passed the works frequently, and were upon friendly relations with

the defendants and must have known of the improvements which were going on, yet they made no complaint or objection. Under these circumstances it would be inequitable to permit a party to come into a court of chancery and restrain the defendants from the prosecution of their business. A delay of three years or more has been ordinarily held to be such laches as will preclude a party from this form of relief, and where an injunction has been granted and a party fails with diligence his action at law, the injunction will be vacated. *Weller v. Smeaton*, 1 Cox, 102; *Bickford v. Skewes*, 4 Myl. & C. 498; *Reid v. Gifford*, 6 Johns. Ch. 19; *Dana v. Valentine*, 5 Metc. 8; *Tichenor v. Wilson*, 8 N. J. Eq. 197; *Southard v. Morris Canal*, 1 N. J. Eq. 518; *Johnson v. Wyatt*, 2 DeG. J. & S. 18.

93. *Indianapolis Water Co. v. Strawboard Co.*, 57 Fed. 1000.

tiffs' land, to the plaintiffs' knowledge, but that the plaintiffs made no objection thereto at the time, but kept silence, and without putting the builder of the dam in equal knowledge of the fact, permitted him to incur large expense in creating the defendants' water power and building the structure connected therewith; and that in the following year the plaintiffs exchanged deeds with the builder of the dam, settling the boundary line between them upon the stream, without making any claim that the dam set back water upon their premises. It was held that the acquiescence of the plaintiffs in the erection of the dam to such a height as to cause the damages complained of, together with their silence at the time of the exchange of deeds, prevented a recovery by them.⁹⁴

94. *Dean v. Benn*, 69 Hun, 519, 23 N. Y. Supp. 708, per Tappan, J.: "In equity, when a man has been silent, when in conscience he ought to have spoken, he will be debarred from speaking when conscience requires him to be silent. *Niven v. Belknap*, 2 Johns. 573, 589. As was said in that case, 'there is a negative fraud in imposing a false apprehension on another by silence, where silence is treacherously expressive. Austin had the right to act upon the presumption that the plaintiffs would not suffer an injury to their rights by his grantors, without resistance, and that if the building of the dam of 1887 would be an encroachment upon plaintiff's rights, that they would have knowledge of it, and make objection; that as they did not make any objection, and acquiesced in the building of the dam, and the expenditures on the structures to be used in connection with the water power that there was no encroachment. Defendants succeed to Austin's rights. If there is an estoppel in his favor, it applies equally to them. *Wood v. Seely*, 32 N. Y. 105, 116; *Willard's Eq. Juris*. 250, 609; *Alex-*

ander v. Pendleton, 8 Cranch, 462; *Bigelow on Estoppel*, 341, 607, 608, and cases cited. The principle of estoppel by silence has been applied repeatedly in this State, and by the courts of the United States. *Niven v. Belknap*, 2 Johns. 573, 589; *L'Amoureux v. Vandenburg*, 7 Paige, 316; *Erie County Savings Bank v. Roop*, 48 N. Y. 292, 298; *McClare v. Lockard*, 121 N. Y. 308, 24 N. E. 453; *Leather M'f'gs Bank v. Morgan*, 117 U. S. 96, 106, 112, 6 S. Ct. 657, 29 L. Ed. 811. It is not necessary to an equitable estoppel that the party should intend wilfully to mislead, but whatever may be the intent, if he makes such a representation as a sensible man would take to be true, and believe that it was meant that he should act upon it and does so act, the party making the representation is precluded from contesting the truth. *Continental Nat. Bank v. N. Bank of the Commonwealth*, 50 N. Y. 575, 580, 582; *Blair v. Wait*, 69 N. Y. 113, 116. The case at bar comes within the principle that if one man knowingly permits another to purchase and expend money on land upon an erroneous opinion of title, without

§ 1064. **Establishing the fact of a nuisance.**—If the thing sought to be enjoined is in itself a nuisance a court of equity will interfere to prevent irreparable injury without waiting for the result of a trial at law; and will according to the urgency of the case direct an issue and even expedite the proceedings, continuing the injunction in the meantime.⁹⁵ Thus the erection of dams or other obstructions in such manner as to impede the natural flow of a stream to the serious injury of other riparian lands or to injure the health of persons residing in the vicinity has been enjoined without awaiting the trial of an issue at law or until there was a trial of the issue.⁹⁶ But where the thing sought to be restrained is not in itself necessarily obnoxious, but may prove to become so, a court of equity will often refuse to interfere by injunction until the matter has been tried at law in cases in which the facts as presented are at all conflicting.⁹⁷ The general rule is that a private nuisance, if not admitted, will not be perpetually enjoined until its existence has been established in a trial at law if the defendant demands such trial.⁹⁸ Thus as a private drain laid under a public

making known his claim, he will thereafter be estopped from asserting it. *Wendell v. Van Rensselaer*, 1 Johns. Ch. 354; *Town v. Needham*, 3 Paige, 545; *Storrs v. Barker*, 6 Johns. Ch. 166; *Brown v. Bowen*, 30 N. Y. 519, 541."

95. *United States.*—*State of Missouri v. State of Illinois*, 180 U. S. 208, 45 L. Ed. 497, 21 S. Ct. 331.

Alabama.—*Ogletree v. McQuaggs*, 67 Ala. 580.

Georgia.—*Harrison v. Brooks*, 20 Ga. 537.

Illinois.—*Flood v. Consumers' Co.*, 105 Ill. App. 559.

Kentucky.—*Marrs v. Fiddler*, 24 Ky. Law Rep. 722, 69 S. W. 953.

Maryland.—*Gallagher v. Flury*, 99 Md. 181, 57 Atl. 672.

Missouri.—*Holke v. Herman*, 87 Mo. App. 125.

New Jersey.—*Duncan v. Hayes*, 22

N. J. Eq. 25; *Wolcott v. Melick*, 11 N. J. Eq. 204, 66 Am. Dec. 790.

New York.—*Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige, 534.

Pennsylvania.—*Biddle v. Ash*, 2 Ashm. 211.

Tennessee.—*Pierce v. Gilson County*, 107 Tenn. 224, 64 S. W. 33, 55 L. R. A. 477, 89 Am. St. Rep. 946; *Cheatham v. Shearon*, 2 Swan, 213, 55 Am. Dec. 734.

England.—*Ripon v. Hobart*, 3 Myl. & K. 169.

96. *Sprague v. Rhodes*, 4 R. I. 301; *Whitfield v. Rogers*, 26 Miss. 84; *White v. Forbes*, Walk. (Mich.), 112.

97. *Cummings v. Barrett*, 10 Cush. (Mass.) 186; *Burnham v. Kempton*, 44 N. H. 78; *Eastman v. Amoskeag, etc., Co.*, 47 N. H. 71; *Wason v. Sanborn*, 45 N. H. 169.

98. *Dorer v. Bridge*, 17 N. H. 200, 214; *Coe v. Cotton, etc., Co.*, 37 N.

street is not a nuisance *per se*, an injunction for its removal cannot be granted until after the right has been established in an action at law where the evidence is conflicting as to whether it is a nuisance in fact.⁹⁹ And a court of equity will not enjoin the proposed erection of a structure which may be a nuisance, unless the right threatened by such structure is clear and the fact clearly established that the proposed structure will infringe such right. Otherwise the plaintiff must first establish his claim at law.¹ And the same rule is applied to informations in equity filed by the Attorney-General for the suppression of public nuisances.² Even in England the evidence of a nuisance is sometimes so convincing that a court of equity will not hesitate to grant an injunction without having the existence of the nuisance established by a jury.³ In both classes of nuisances if irreparable injury may otherwise happen the alleged grievance is restrained until the question of the existence of the nuisance is determined at law.⁴ Where the existence of a nuisance has been established at law, a court of equity will grant an injunction, as a matter of course, if it is of

H. 254; Webber v. Gage, 39 N. H. 182; Burnham v. Kempton, 44 N. H. 79; Eastman v. Amoskeag M'fg Co., 47 N. H. 71; Perkins v. Foye, 60 N. H. 496; Ingraham v. Dunnell, 5 Metc. 118, 126; Crowder v. Tinkler, 19 Ves. 617; Harman v. Jones, 1 Craig & P. 299.

99. Wood v. McGrath, 150 Pa. St. 451, 24 Atl. 682; Mowday v. Moore, 133 Pa. St. 598, 19 Atl. 626; New Castle v. Raney, 130 Pa. St. 546, 18 Atl. 1066; Rhea v. Forsyth, 37 Pa. St. 503.

1. Whitmore v. Brown, 102 Me. 47, 65 Atl. 516.

2. Attorney General v. Cleaver, 18 Ves. 211.

3. Inchbald v. Barrington, L. R. 4 Ch. App. 388. In this case a circus, the performances in which were to be carried on for two months, was erected 115 yards from plaintiff's

house, and the performances lasted from half past seven till half past ten every evening. The noise of the music and shouting in the circus could be distinctly heard all over the plaintiff's house, and was so loud that it could be heard in the dining room, though the windows were closed and several persons were talking in the room. An injunction was granted. In Inchbald v. Robinson, L. R. 4 Ch. App. 388, the whole case made by the bill was that the circus would draw together a great crowd of disorderly persons. The evidence was held insufficient to justify an injunction.

4. Burnham v. Kempton, 44 N. H. 78, 97; Rowe v. Bridge Corp., 21 Pick. (Mass.) 347; Irwin v. Dixon, 9 How. (U. S.) 10, 28, 29, 13 L. Ed. 25; Parker v. Woolen Co., 2 Black, 545.

constantly recurring character, and especially if the damages recovered are merely nominal, and therefore inadequate to prevent a repetition of the injury.⁵

§ 1065. **Jury trial in New York, etc.**—Under the New York Code an action for a nuisance must be tried by a jury unless a jury trial is waived;⁶ but an equitable action to restrain the continuance of a nuisance or an action for a nuisance in which equitable relief is also demanded is not within that provision.⁷ So it has been decided by the Court of Appeals that where an action is properly brought in equity the defendant is not entitled to a jury trial as of right.⁸ So where the complaint, in an action brought by riparian owners, on whose premises was a mill operated by a water wheel, alleged that the defendants, who maintained a dam and operated a mill on the same stream next below the plaintiffs, by their dam wrongfully raised the water of the stream and set it back upon the plaintiffs' wheel, impairing its efficiency, and stated that such flooding existed when the action was commenced and had existed for some time before; the complaint prayed that the plaintiffs might recover the damages already sustained, and that the defendants be perpetually enjoined and restrained from continuing the unlawful flooding, it was held that the action was an equity action, governed as to the trial of the issues therein by the law applicable to equity cases; that the defendants had no absolute right to the trial of such issues by a jury; and that in regard to questions submitted by it to the jury, the trial court had power to reverse, disregard or modify the findings of the jury.⁹ By bringing such an action, the plaintiff waives the right to trial by jury,

5. *Paddock v. Simes*, 102 Mo. 226, 14 S. W. 746.

6. N. Y. Code Civ. Pro., § 968.

7. *Cogswell v. New York, N. H. & H. R. Co.*, 105 N. Y. 319, 11 N. E. 518.

8. *Miller v. Edison Elec. Illum. Co.*, 184 N. Y. 17, 76 N. E. 734. See *Tucker v. Edison Elec. Illum. Co.*, 100 App. Div. (N. Y.) 407, 91 N. Y. Supp. 439, *aff'd* 184 N. Y. 548, 76 N. E. 1110.

9. *Dean v. Benn*, 69 Hun, 519, 23 N. Y. S. 708, per Tappan, J.: "This being an equity case, the court has power to reverse, disregard or modify the findings of the jury. *Vermilyea v. Palmer*, 52 N. Y. 471-474; *Learned v. Tillotson*, 97 N. Y. 1; *Hammond v. Morgan*, 101 N. Y. 179, 4 N. E. 328; *Acker v. Leland*, 109 N. Y. 5, 15 N. E. 743."

and the case may be tried by the court against his objection, with the aid of a jury, as the court in its discretion may determine, according to the practice in equity cases.¹⁰ The legal remedy by the former writ of nuisance for the recovery of damages and abatement of the nuisance can now be had by an action under the Code;¹¹ in that action and upon those issues the defendant cannot be deprived of his right to trial by jury though the plaintiff in his complaint also demands equitable relief.¹² And in a recent case in New York it is decided that in an action under section 1660 of the Code of Civil Procedure to recover damages for a nuisance and for a removal thereof a jury trial is a matter of right.¹³ Under the New Hampshire statute, giving the Supreme Court jurisdiction in equity, on information or petition, to enjoin or abate as a common nuisance the use of a building for the sale of liquors, defendant is entitled to a trial by jury to ascertain the fact of the nuisance before it can be abated in equity.¹⁴

§ 1066. **Establishing right at law; judicial discretion.**—Formerly in England the practice was not to enjoin a nuisance until plaintiff's right had been established at law.¹⁵ In modern times both in England and this country a suit at law is not in a clear case a necessary preliminary,¹⁶ and an injunction may rightfully

10. *Davison v. Associates of the Jersey Co.*, 71 N. Y. 333; *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30, 46; *Ward v. Plato*, 23 Hun, 402; *Baird v. Mayor*, 74 N. Y. 382; *Cogswell v. New York, N. H. & H. R. Co.*, 105 N. Y. 319, 321, 11 N. E. 518. And if no objection is taken at the trial by either party the right is waived. *Barlow v. Scott*, 24 N. Y. 40.

11. N. Y. Code Civ. Pro., § 1660.

12. *Cogswell v. New York, N. H. & H. R. Co.*, 105 N. Y. 319, 321, 11 N. E. 518; *Hudson v. Caryl*, 44 N. Y. 553.

13. *Heughes v. Galusha Stove Co.*, 122 App. Div. (N. Y.) 118.

14. *State v. Currier*, 66 N. H. 622, 19 Atl. 1000.

15. *Campbell v. Seaman*, 63 N. Y. 568, 682, 20 Am. Rep. 567; *Carlisle v. Cooper*, 21 N. J. Eq. 577; *Blackmore v. Canal Navigation*, 1 Myl. & K. 154; *Broadbent v. Imperial Gas Co.*, 7 Deg. M. & G. 436, 7 H. of L. Cas. 600; *Elmhirst v. Spencer*, 2 Mac. & G. 45.

16. *Canton Cotton Warehouse Co. v. Potts*, 69 Miss. 31, 10 So. 448; *Learned v. Hunt*, 63 Miss. 373.

The Pennsylvania doctrine is that the objection that complainant has not established his right at law, where it is doubtful, goes to the jurisdiction, and may be raised by the

be demanded to restrain a nuisance in order to prevent irreparable injury or multiplicity of suits and its refusal in a proper case is error to be corrected by an appeal. And if upon application for such an injunction judicial discretion is improvidently exercised either in granting or refusing it the error is one to be corrected by an appellate tribunal.¹⁷ Where the legal right of a complainant is clearly established and the unreasonable and unlawful use by the defendant of its property to the injury of the complainant is also proved it is not necessary that the question should first be determined in a suit at law.¹⁸ But whenever a doubt arises in the mind of the chancellor as to the right of a plaintiff to maintain a suit, or as to the existence of a nuisance, a court of equity will not intervene and by injunction grant relief, until such questions are settled by a judgment at law, unless the damages sustained or reasonably to be apprehended, from a continuation of the alleged wrongful acts are irreparable.¹⁹

§ 1067. *Judicial discretion; comparative injury, etc., considered.*—When an injunction to restrain a nuisance will produce

court itself at any time, though not raised by the pleadings. *Mirkil v. Morgan*, 134 Pa. St. 144, 19 Atl. 628.

17. *Campbell v. Seaman*, 63 N. Y. 566, 582, 20 Am. Rep. 567; *Corning v. Troy Iron Factory*, 46 N. Y. 191; *Reid v. Gifford*, Hopkins Ch. 416; *Pollitt v. Long*, 58 Barb. 20; *Mohawk, etc., R. Co. v. Archer*, 6 Paige (N. Y.), 83; *Parker v. Lake Cotton Co.*, 2 Black (U. S.), 545; *Webber v. Gage*, 37 N. H. 182; *Dent v. Auction Assoc'n*, 35 L. J. Ch. 555; *Attorney General v. United Tel. Co.*, 30 Beav. 287; *Wood v. Sutcliffe*, 2 Sim. (N. S.) 165; *Clowes v. Potteries Co.*, L. R. 8 Ch. App. 125. And see *Gray v. Manhattan Ry. Co.*, 128 N. Y. 499, 28 N. E. 498; *Dierks v. Com'rs of Highway*, 142 Ill. 197, 31 N. E. 496. In *Tuttle v. Church*, 53 Fed. 422, 428, Colt, J., said: "A motion for an injunction

is addressed to the sound discretion of the court guided by certain established rules. This means that the court is to consider all the circumstances of each case before it will exercise this extraordinary remedy. Among the considerations which should influence a chancellor is the relative effect upon the parties of the granting or refusing the injunction. Unless the public good calls for the injunction to issue it should not be granted where a large number of people are in favor of the acts to be restrained and no serious damage to individual is made to appear."

18. *Wente v. Commonwealth Fuel Co.*, 232 Ill. 526, 83 N. E. 1049.

19. *Van Buskirk v. Bond* (Oreg. 1908), 96 Pac. 1103. Per Moore, J., citing 1 Am. & Eng. Ency. Law (2d Ed.), 64; *Spelling, Inj. & Extra. Rem.* (2d Ed.) 402.

great public or private mischief a court of equity is not bound to grant it merely for the purpose of protecting a technical or unsubstantial right.²⁰ And where the right at law between the parties is doubtful the case often resolves itself into a mere question of comparative injury, that is whether the defendant will be more injured by the injunction being granted or the plaintiff by its being denied. In such a case, if the nuisance causes but slight injury to the plaintiff the injunction will be denied if its effect would be to close defendant's works and thereby cause the loss of a large amount of invested capital.²¹ And it has been decided that in determining whether an injunction will be issued the court will take notice that while an invasion of private rights may produce injury entitling the owner to redress yet that great public interests will accrue from the acts alleged to be a nuisance.²² But in other cases the rule is otherwise if substantial rights are involved. Thus as against the right of a riparian proprietor to have water flow in its natural purity there is no public policy in favor of industrial development which will justify the erection and operation of a factory that pollutes a stream to the irreparable injury of such proprietor.²³ And where a plaintiff sustains a substantial injury of a continuing character as the result of a nuisance caused by the carrying on of a business on adjacent property the fact that a large amount of capital may be invested in such business is held not to deprive the plaintiff of his right to an injunction.²⁴ The

20. *Gray v. Manhattan Ry. Co.*, 128 N. Y. 499, 28 N. E. 498; *Goldschmidt v. New York Steam Co.*, 7 App. Div. (N. Y.) 609, 40 N. Y. Supp. 1143; *Humphrey v. Banfil*, N. B. Eq. Cas. 243.

21. *Tuttle v. Church*, 53 Fed. 422; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530; *Jones v. Newark*, 11 N. J. Eq. 452; *Torrey v. Railroad Co.*, 18 N. J. Eq. 293; *Richards' Appeal*, 57 Pa. St. 105, 113; *Wood v. Sutcliffe*, 2 Sim. (N. S.) 163; *Hilton v. Granville*, *Craig & P.* 283; *Attorney General v. Gas Co.*, 3 DeG. M.

& G. 304, 311; *Attorney General v. Conservators*, 1 Hem. & M. 1.

22. *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 So. 192. See, also, *Harrison v. Brooks*, 20 Ga. 537, 544; *Robinson v. Baugh*, 31 Mich. 290; *Higbee & Riggs v. Camden & Amboy R. & T. Co.*, 20 N. J. Eq. 435; *Brown v. Carolina Cent. Ry. Co.*, 83 N. C. 128; *Barnes v. Calhoun*, 37 N. C. 199, 201.

23. *Indianapolis Water Co. v. Strawboard Co.*, 57 Fed. 1000.

24. *United States v. Luce*, 141 Fed. 385; *McCleery v. Highland Boy Gold M. Co.*, 140 Fed. 951.

New Jersey court of equity has taken quite a decided position against *de minimis*, "balance of injury" and "discretion" doctrines as applied to the granting of injunctive relief where the complainant's legal rights and equities are clearly shown.²⁵

25. *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374. "This ground of equitable action is of itself sufficient in those cases where the injury, though not irreparable, promises to be repeated for an indefinite period, and so is continuous in the sense that it will be preserved indefinitely. See *Ross v. Butler*, 19 N. J. Eq. 302. Several matters have at various times and on various occasions been held to stand in the way of granting an injunction in this class of cases. The principal one is what may be called the "*de minimis*" "balance of injury," and "discretion" doctrine. It has been said and held on some occasions that, where the injury to the complainant by the continuance of the nuisance is small, and the injury to the defendant by its discontinuance is great, the court will consider the circumstance, and, if the balance is greatly against the complainant, will, in the exercise of a sound discretion, refuse the injunction, and leave the complainant to his remedy at law. As instances in which this notion has been advanced in this State may be cited *Quackenbush v. Van Riper*, 3 N. J. Eq. 350; *Vanwinkle v. Curtis*, 3 N. J. Eq. 422; *Morris, etc., R. Co. v. Prudden*, 20 N. J. Eq. 530.—In the Court of Errors and Appeals; and in the later case of *Demarest v. Hardham*, 34 N. J. Eq. 469. The two cases in 3 N. J. Eq., as well as *Railroad Co. v. Prudden*, were instances of interlocutory applications, and distinguishable on that ground; and, further, in *Railroad Co. v. Prudden* the injunc-

tion was dissolved on the express ground that the complainant's right was not clear. And at page 540 (20 N. J. Eq.) the learned judge says: "The defendants will not occupy, with the proposed track, any of the complainant's lands. For the contingent and consequential damages he may suffer from any unlawful interference with his enjoyment of his property he has his remedy by action at law, whenever and as often as loss or damage ensues; and if the use of a railroad in front of his premises becomes a nuisance, or the aggression proves to be a permanent injury, without an adequate remedy at law, then the court will be competent to administer equitable relief by injunction to prevent its continuance, or for its removal. But a strong case must be presented, and the impending danger must be imminent and impressive, to justify the issuing of an injunction as a precautionary and preventive remedy." And, in adverting to this opinion in *Carlisle v. Cooper*, 21 N. J. Eq. 584, the same learned judge distinguishes it from the case of a final hearing for the abatement of a permanent and continuous nuisance. ". . . After a court of equity has entertained a bill, and, instead of sending the case to a trial at law, has itself tried the questions of fact involved, and settled the legal right in favor of the complainant, it certainly would be a result much to be depreciated, if, at such a stage of the controversy, it was the law that the chancellor were required to say to such a complain-

§ 1068. **Quia timet injunctions; hospitals.**—Anyone seeking to enjoin an alleged future nuisance, public or private, must show a strong case of probability that the apprehended mischief will arise. So an injunction was refused to restrain a city from establishing a smallpox hospital, as the plaintiffs failed to show,

ant: ‘Your right is clear. If you sue at law, you must inevitably recover; and, after several recoveries, it then will be the duty of this court, on the ground of avoiding a multiplicity of suits, to enjoin the continuance of this nuisance. Still you must go through the form of bringing such suits, before this court of equity can or will interfere.’ In those cases in which, to the mind of the chancellor, the right of the complainant is clear, and the damage sustained by him is substantial so that his right to recover damages at law is indisputable, and the chancellor has considered and established his right, I think it not possible that any authority can be produced which sustains the doctrine contended for by the counsel of the defendant. For an example of such a proceeding, we were referred to the case of *Earl of Sandwich v. Railroad Co.*, L. R. 10 Ch. D. 707; but the authority is not relevant to the point, for the vice chancellor expressly states that the complainant had suffered no damage.” The case of *Broadbent v. Gas Co.*, so cited by the learned chief justice, was affirmed on appeal, as reported in 7 H. L. Cas. 601. At page 615, Lord Kingsdown uses this language: “It is said that the balance of inconvenience is so great against granting an injunction that it ought not to be done; that, in one view of it, it may stop these large and expensive works to the great injury of the public, while, on the other hand, the

only inconvenience to which the plaintiff in the suit will be subjected is the inconvenience of the trifling damage it is said (but, be it trifling or large, makes no difference in principal) that he may sustain from time to time, for which he may recover compensation by action.” In this case there had been an action at law brought to trial before Lord Chief Justice Jervis, and so trifling did the action appear that the chief justice is said by Lord Cranworth (7 DeG. M. & G. 445), to have said: “with his usual keenness that it was a most ridiculous action.” While the “balance of injury” notion has found frequent place in many English cases, the latter and best-considered of them put the rules governing courts of equity in such cases upon their true ground. *Clowes v. Staffordshire Potteries Water Works Co.*, L. R. 8. Ch. App. 125, at pages 142, 143; *Wilts, etc., Co. v. Water Works Co.*, L. R. 9 Ch. App. 451; *Goodson v. Richardson*, 9 Ch. App. 221—are examples. This last was a case of an injury to a bare right of property without any actual damage. Defendant had laid a water main in a public street, the fee of which was in the complainant, and Lord Selborne held he was entitled to a mandatory injunction compelling it to remove it. In the course of his judgment he uses this language: “It is said that the objection of the plaintiff to the laying of these pipes in his land is an unneighborly thing, and that

in the present state of science, that the apprehended danger of the disease spreading from the hospital would in fact ensue; and the court attached some importance to the evidence that the maintenance of the hospital would, on the whole, be more beneficial to public health than having persons suffering from the disease scat-

his right is one of little or no value, and one which parliament, if it were to deal with the question, might possibly disregard. What parliament might do, if it were to deal with the question, is, I apprehend, not a matter for our consideration now, as parliament has not dealt with the question. Parliament, is, no doubt, at liberty to take a higher view upon a balance struck between private rights and public interests than this court can take. But with respect to the suggested absence of value in the land in its present situation, it is enough to say that the very fact that no interference of this kind can lawfully take place without his consent, and without a bargain with him, gives his interest in his land, even in a pecuniary point of view, precisely the value which that power of veto upon its use creates, when such use is to any other person desirable, and an object sought to be obtained. Besides which, I am not prepared to accede to the proposition that it is an unneighborly proceeding in a man, whose motive for desiring to prevent a particular act may be collateral to the interest in his land—such, for instance, as his being a proprietor of waterworks which may be injured by the proposed use of it—to say to his neighbor who wishes to compete with him in that business: ‘You are perfectly at liberty to enter into competition with me as a seller of water to the public at Ramsgate in any lawful

manner; but you are not at liberty to take my land without my consent for the purpose of competing with me’ and I shall object to your doing so.’ In that, I confess, I see nothing unneighborly whatsoever. . . . I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man’s land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunction.” There was, in the case in hand, no contention that the neighborhood here in question was ever given up by common consent to mechanical or manufacturing purposes. It seems to be one mainly of cheap residences and retail shops. The language of Chancellor Zabriskie, in *Ross v. Butler*, 19 N. J. Eq., at pages 305, 306, is apt: “I find no authority that will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences and carrying on their trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, is a proper and convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders, or intolerable noises, even if the

tered in their own homes.²⁶ Hospitals are not *prima facie* or *per se* nuisances, but they may under some circumstances become nuisances and be subject to an injunction against their maintenance or continuance where the evidence is clear and certain.²⁷ And where there are facts in evidence which give good reason

inhabitants are themselves artisans, who work at trades occasioning some degree of noise, smoke, and cinders. Some parts of a town may, by lapse of time or prescription, by the continuance of a number of factories long enough to have a right as against every one, be so dedicated to smells, smoke, noise, and dust that an additional factory, which adds a little to a common evil would not be considered at law a nuisance, or be restrained in equity. There is no principal in law, or the reasons on which its rules are founded, which should give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer, and their families, the fewer and more restricted comforts which they enjoy."

26. Attorney General v. Manchester, 2 Ch. D. 87, per Chitty, J.: "The foundation of the motion is an apprehended public nuisance, not an actual or existing nuisance, which it is alleged will arise if the hospital is opened. The action, then, is what is technically known as a *quia timet* action. The question as to the principle on which the court proceeds in granting or refusing to grant an injunction in such actions has been the subject of numerous decisions, among which are Crowder v. Tinkler, 19 Ves. 617; Ripon v. Hobart, 3 Myl. & K. 169, 176; Haines v. Taylor, 2 Ph. Ch. 209; Hepburn v. Lordan, 2 H. & M. 345; Attorney-Gen-

eral v. Kingston, 34 L. J. Ch. 481; Salvin v. North Branspeth Coal Co., L. R. 9 Ch. App. 705; Fletcher v. Bealey, L. R. 28 Ch. D. 688. The court does not require absolute certainty before it intervenes, something less will suffice. In Attorney General v. Kingston, Wood, V. C., who refused the injunction, considered the question to be whether there was evidence of an actual nuisance committed or evidence of the extreme probability of a nuisance, if that which was being done was allowed to continue." See State v. Inhabitants of Trenton (N. J. Eq. 1906), 63 Atl. 897.

In England, in 1881, the erection of a hospital for infectious diseases, within the metropolitan district, was found to be a nuisance, and, therefore, enjoined, though the metropolitan poor act of 1867 authorized the erection of a hospital for the reception of the sick poor, but did not order it to be erected by direct and imperative provisions. Metropolitan Asylum District v. Hill, L. R. 6 App. Cas. 193, Lord Selborne cited Rex v. Pease, 4 B. & Ad. 30, and Hamersmith R. Co. v. Brand, L. R. 4 H. L. 171, which would have been in point if the statute had ordered the erection of the hospital.

27. Deaconess Home & Hospital v. Bontjes, 104 Ill. App. 484, *aff'd* 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215; Gilford v. Babies Hospital, 21 Abb. N. C. (N. Y.) 159, 1 N. Y. Supp. 448, 17 N. Y. St. R. 886.

to believe that the owner of property in the residential portion of a thickly settled vicinity is about to devote it permanently to a use which imports serious menace to the health of the owners and occupants of adjacent property, such user should be restrained until the facts on which the rights of the parties depend can be properly determined at the final hearing.²⁸ So where the evidence on the part of a plaintiff is direct, positive and specific, that the erection and use of a hospital in a particular locality for the treatment of consumptives will be a source of real danger to the lives and health of numbers of people living in that vicinity, it has been decided that an order restraining the use for such purposes is properly granted and should be continued to the final hearing.²⁹

§ 1068a. **Explosives.**—Where the evidence is conflicting as to whether the erection of buildings for storage of gunpowder, dynamite and other explosives near the land of plaintiffs would be dangerous to them or their property, it is not an abuse of discretion to refuse a temporary injunction and to leave that question of fact to be passed upon by a jury at the final trial.³⁰

§ 1069. **Contingent and speculative nuisance.**—Equity will not afford relief against a merely prospective or threatened nuisance, where the injury is apprehended, doubtful or contingent. A mere prospect or possibility of future annoyance or damage is insufficient.³¹ So in accordance with this rule that mere

28. *Cherry v. Williams* (N. C. 1908), 61 S. E. 267. Per Hoke, J.

29. *Cherry v. Williams* (N. C. 1908), 61 S. E. 267. The court said, per Hoke, J.: "The conditions suggested, if established, come well within the definition of an actionable nuisance, and, if there is a well-grounded apprehension that neighbors will be unreasonably exposed to serious damage from a disease of the nature of consumption, the injunction should be continued to the

hearing. The injury threatened in such case would be irreparable."

30. *Born v. Loflin, etc.*, Powder Co., 84 Ga. 217; *Remsburg v. Tola* Portland Cement (Kan. 1906), 84 Pac. 548.

31. *United States*.—*Ramsay v. Riddle*, 1 Cranch, 399, Fed. Cas. No. 11544.

Florida.—*Thebaut v. Conova*, 11 Fla. 143.

Georgia.—*Bacon v. Walker*, 77 Ga. 336.

allegations of contingent or speculative injuries, with nothing to show that they will actually occur, are not sufficient grounds for an injunction, it has been held that as a private stable in a city is not a nuisance in itself its erection will not be enjoined from the mere apprehension that it may become a nuisance.³² And a preliminary injunction will not be granted in behalf of the owners of lots held for sale to restrain the erection near them of a slaughter-house, where it is not alleged that anyone intends to erect any buildings upon them. Whether such an erection so near the lots as to retard or injure their sale is an injury for which the law will give redress before the buildings are erected is a question which is proper to be determined by a court of law, and a court of equity

Illinois.—Thornton v. Roll, 118 Ill. 350, 8 N. E. 145.

Indiana.—Dalton v. Cleveland, C. C. & St. L. R. Co., 144 Ind. 121, 43 N. E. 130.

Kentucky.—Pfingst v. Senn, 15 Ky. Law Rep. 325, 2 S. W. 358, 21 L. R. A. 569.

Michigan.—St. Johns v. McFarlan, 33 Mich. 72, 29 Am. Rep. 671.

Mississippi.—Gwin v. Melmoth, 1 Freem. Ch. 505.

Missouri.—Van de Vere v. Kansas City, 107 Mo. 83, 17 S. W. 695.

New York.—Depieris v. Mattern, Board v. Passaic, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55.

New York.—Depieris v. Matteru, 10 N. Y. Supp. 636.

North Carolina.—Vickers v. City of Durham, 132 N. C. 880, 44 S. E. 685.

Oregon.—Essier v. Wattier, 25 Oreg. 7, 34 Pac. 756.

Pennsylvania.—Rhodes v. Dunbar, 37 Pa. St. 274, 98 Am. Dec. 221.

32. Rounsaville v. Kohlheim, 68 Ga. 608; Harrison v. Brooks, 20 Ga. 597.

An action, by the appropriators of the waters of a creek, to

restrain a ditch company from polluting it by turning a large quantity of alkali water into it from a reservoir constructed by the company, was brought before any such water had ever been actually turned into the creek. It was held that a judgment denying the injunction on the ground of failure of proof as to permanent injury liable to result to plaintiffs from the threatened action of the company would not be disturbed on appeal, where the evidence is conflicting, since plaintiffs may bring an action for damages, or file another bill to restrain the continuation of the pollution, on proof of the permanent character of the injuries from the actual result of the turning of the alkali water into the creek. Cushman v. Highland Ditch Co., 3 Colo. App. 437, 33 Pac. 344. And see Attorney General v. Steward, 26 N. J. Eq. 415, where a preliminary injunction was denied in behalf of owners of building lots held for sale to restrain the erection near them of a slaughter-house, where it was not alleged that anyone intended to erect any buildings on them.

will not interfere by preliminary injunction until it is so determined.³³ A railroad switch also is not a nuisance *per se* though it may become so by reason of circumstances of location, construction or use, and equity will not enjoin the construction of a switch unless under the allegations and proof there are substantial grounds for interference.³⁴ And a building for the keeping of horses and of hay which, as shown by defendant's strong affidavits, can and will be used without annoyance to the neighbors, will not be enjoined *in limine*.³⁵ In a suit by a city for an injunction to restrain defendant from driving piles into the bed of a river, and erecting a building thereon, the petition states no cause of action where it merely alleges that the effect of defendant's "example" in erecting such building will be that others will do likewise, to the injury of complainant in respect of the public health, equal taxation, and liability to fire and flood.³⁶

§ 1070. **Livery stables.**—Neither a livery nor a private stable is a nuisance *per se*.³⁷ And an injunction restraining the erection of a structure to be used for such a purpose will not be granted unless it appear in the particular case that it will in fact be a nuisance,³⁸ in which case an injunction will be granted.³⁹ And

33. Attorney General v. Steward, 20 N. J. Eq. 415.

34. Davis v. Baltimore & Ohio R. Co. (Md. 1905), 62 Atl. 572.

35. Stilwell v. Buffalo Riding Academy, 21 Abb. N. C. 472. As to livery stables, see Dargan v. Waddill, 9 Ired. (N. C.) 244, where an injunction was refused; and Coker v. Birge, 10 Ga. 336, where it was granted, as the stable was only sixty-five feet from a hotel and shown to be an annoyance. And see Kirkman v. Handy, 11 Humph. (Tenn.) 406.

36. Janesville, City of, v. Carpenter, 77 Wis. 288, 46 N. W. 128.

37. Joyce on Nuisances, §§ 200-205.

A livery stable is not *prima facie*

a nuisance, that is to say, it is not a nuisance *per se*. Mason v. Deitering (Mo. App. 1908), 111 S. W. 862.

38. Keiser v. Lovett, 85 Ind. 240, 44 Am. Rep. 10; Gallagher v. Flury, 99 Md. 181, 57 Atl. 672, 675; King v. Hamill, 97 Md. 103, 54 Atl. 625; Flint v. Russell, Fed. Cas. No. 4876, 5 Dill. 151.

See § 1069 herein.

The proposed use of a building for a livery stable will not be enjoined where the evidence does not show that such use will actually result in a nuisance. So where a defendant sought to enjoin the use of a building next to his dwelling for the keeping of horses, on the ground that noxious and offensive odors would

where a livery stable was constructed on a lot next to plaintiff's residence with openings in the wall for windows next to the residence, it was held that such openings should be closed and filled with material to make the wall solid and that the defendants should be required to do this without unnecessary delay.⁴⁰ So where a jury found that defendant's livery stable as kept was a nuisance to plaintiff, and the defendant did not propose to alter the construction or change the manner of keeping it, he was perpetually enjoined from keeping it at all in the place where it was.⁴¹ Where an injunction does not order the closing up of defendant's business as keeper of a livery stable, but restrains him simply from carrying it on in a manner resulting in an alleged continuing nuisance to the health and comfort of plaintiff and his family, it should not be set aside on bond, as the effect of the dissolution is to authorize and permit the defendant to continue to do the act complained of, and restrained during the pendency of the suit. And the fact that the plaintiff in injunction does not own the premises which he occupies, but occupies them as tenant, does not withdraw from him and his family the protection of the law against a nuisance affecting their health and comfort. And the failure of the owner of the property, who has joined with the tenant in an application for an injunction, to perfect the injunction by giving bond, does not destroy the right of the tenant, who is before the court standing on his own rights, and not depending upon those of the owner, to the benefit of the injunction, when he has himself given bond.⁴² In an action to enjoin a livery stable

result therefrom, the court refused to grant the relief sought where it was alleged in the defendant's affidavits that the building would be so used as to cause no annoyance or injury. *Stilwell v. Buffalo Riding Academy*, 21 Abb. N. C. (N. Y.) 472, 4 N. Y. Supp. 414.

The erection of a private stable near a church will not be enjoined on the ground that it may become a nuisance. *St. James Church v. Arrington*, 36 Ala. 546, 76 Am. Dec. 332.

39. *Filson v. Crawford*, 5 N. Y. Supp. 882, 23 N. Y. St. R. 335; *Collins v. City of Cleveland*, 2 Ohio S. & C. P. Dec. 380.

40. *Durfrey v. Thalheimer* (Ark. 1908), 109 S. W. 519.

41. *Burditt v. Swenson*, 17 Tex. 489.

42. *State v. King* (La.), 14 So. 423, per *Curiam*: "In the case at bar the injunction was not sought to restrain defendants from carrying on their business as keepers of a livery stable, but only from doing so in the

as a nuisance the burden of proving that the stable deprives the plaintiffs of the comforts of home or renders life in their home

manner complained of, which it was claimed was resulting in the commission of a nuisance intolerable to the plaintiffs. The fact that the particular plaintiff who perfected the injunction by giving bond does not own the premises which he occupies, but occupies it as a tenant, does not withdraw from him and his family the protection of the law against a nuisance affecting their health or their comfort. The law in this State does not limit its protection to parties who are aggrieved in dollars and cents by a continuing nuisance. *Blanc v. Murray*, 36 La. Ann. 164. The right of the tenant as plaintiff in injunction is destroyed neither because of the joinder with him of the owner of the premises in the petition for an injunction, and her failure to give bond, nor by the fact that she joins him in this court as one of the relators herein. If the owner has failed to give bond, she may have no standing in court, and should be so adjudged; but the tenant is before us, standing on his own rights, and not depending on hers. The effect of the dissolution in this case would be to authorize and permit the defendants in injunction to do the act complained of and restrained; in other words, defendants, through the judge's order, would not only be authorized to pursue and carry on their business as keepers of a livery stable, but to do so regardless of what are alleged to be plaintiff's legal rights. Had the injunction taken out had, as its effect, the entire closing up at once of defendants' establishment, this case would have been

presented to us in a very different aspect from that which it actually has. Under the pleadings, plaintiff has a vital present interest in having defendants' business conducted in such a manner as would not result in a nuisance to him. In view of the fact that the petition for the injunction does not claim defendants' business to be *per se* a nuisance, does not claim that it was carried on in an unauthorized locality, and does not pretend that the common council of New Orleans has enacted regulations in respect to it which defendants have violated, the district judge would unquestionably, on a matter of contempt, bear in mind that within reasonable limits the individual citizen has to submit to some annoyance and inconvenience from the legal exercise of the rights of others, and would only hold defendants responsible on strict proof of a clear disregard by the defendants in injunction of those obligations which article 666, Civil Code, declares "citizens owe to each other under the law, independently of all agreement." *Wood, Nuis.*, § 498. In *De la Croix v. Villere*, 11 La. Ann. 40, the court, alluding to a number of cases where defendants in injunction had been permitted to bond the injunction, said that an examination of them would show that they were cases in which the injury was really appreciable in money, and where the continuance of the injunction was likely to work a more serious injury to the other side. That there was some things that bonds would not cover, and which could not be esti-

uncomfortable rests upon them and it is incumbent upon them to establish this by a preponderance of the evidence.⁴³

§ 1070a. **Livery stables; ordinances.**—The erection and maintenance of a livery stable may be enjoined where it appears that such acts are in violation of a city ordinance and will cause a special, particular and irreparable injury to the rights of the plaintiff in depreciating the value of his property, destroying the comfort of his home and endangering the health of himself and of his family.⁴⁴ Where the ordinances of a city forbid the deposit of any manure on any lot within the city limits without the consent of the owner or occupiers of the lot under the penalty of a certain fine and provide that if any stable in the city shall be so kept that the filth and stench therefrom shall become offensive or annoying to any neighbor, the person keeping it shall also be subject to a certain fine, and also that if any person shall cause to flow into any street or alley any liquid or offensive matter or shall suffer

mated in dollars and cents, and, if our law cannot protect in cases like those, it but poorly earned the encomiums bestowed upon it. In *Blanc v. Murray*, the court said: ‘In determining the question of nuisance *vel non* it is necessary to balance the rights of the parties in view of all the circumstances, and say whether or not the use of the property in the manner complained of is reasonable, and in accordance with the relative rights of the parties.’ This remark was made after a trial on the merits, but the relative rights of parties as they appear *prima facie* in the pleadings are easily discoverable in this case. The parties to this litigation do not stand before the court, by any means, with an equality of right. The plaintiff has everything to lose, and the defendant nothing legally to gain, by bonding the injunction. It might well be asked (altering a little the words of Mr. Justice Egan in

his dissenting opinion in the case of *State v. Judge*, — *La. Ann.* 870): ‘Who can recall or repair the effect of a continuing nuisance to the health and comfort of plaintiff and his family, and what is the effect of allowing a dissolution of the injunction in this case if it be not to permit defendants to continue and keep up the nuisance complained of during the pendency of the suit, however long? We are of the opinion that the plaintiff was entitled to a continuance of the injunction until the hearing of the case on its merits, and that the dissolving of the same on bond would work irreparable injury to the relator, *Atwood Violet*.”

43. *Durfrey v. Thalheimer* (Ark. 1908), 109 S. W. 519.

44. *Mason v. Deitering* (Mo. App. 1908), 111 S. W. 862. See *Brookline v. Hatch*, 167 Mass. 380, 45 N. E. 756, 36 L. R. A. 495.

the same to be and remain on his premises he shall forfeit a certain sum, it is held that such ordinances provide an adequate remedy which will preclude the granting of an injunction on the ground of nuisance caused by a livery stable.⁴⁵

§ 1071. **Enjoining nuisance before injury.**—In cases in which it is entirely apparent, and no denial can change the fact, that a certain intended use of property in a manner proposed will result in a nuisance to the occupants of neighboring property, an injunction may be granted and maintained prior to any actual disturbance or injury from such intended use of the property. This rule has been applied to slaughter houses;⁴⁶ and to a fat factory and a soap factory in a populous locality;⁴⁷ and to a distillery with a pig-sty, which rendered the water of a creek unwholesome;⁴⁸ and to the discharge of sawdust into a stream of water, rendering it impure and disgusting to those who had occasion to use it;⁴⁹ and to the discharge of sewerage into a running stream.⁵⁰ In such cases an injunction may be granted to restrain the obnoxious use before it begins.⁵¹

§ 1072. **Modified injunctions; where nuisance can be avoided.**
—In many cases, especially where property is used for the carrying on of a business, the nuisance is caused by the manner in which the business is conducted and not from the business itself. In such cases the injunction should not be granted against the carrying on of the business but should be against it being carried on in such a manner as to constitute a nuisance. Where a business can be so carried on that it will not constitute a nuisance an injunction restraining the carrying on of such business will not be issued but the court will so frame its order that the business may be

45. *Bonaparte v. Denmead* (Md. 1908), 69 Atl. 697.

46. *Catlin v. Valentine*, 9 Paige (N. Y.), 575; *Brady v. Weeks*, 3 Barb. (N. Y.) 157.

47. *Peck v. Elder*, 3 Sandf. (N. Y.) 126; *Howard v. Lee*, 3 Sandf. (N. Y.) 281.

48. *Smith v. McConathy*, 11 Mo. 517.

49. *Lewis v. Stein*, 16 Ala. 214.

50. *Chipman v. Palmer*, 77 N. Y. 51.

51. *McKeon v. See*, 51 N. Y. 300; *Adams v. Popham*, 76 N. Y. 410.

continued, provided that it is so conducted as not to create a nuisance.⁵² So where a person is injured by the smell from a market place owing to the fact that the yards where the cattle are enclosed are not kept clean, the maintenance of the market place will not be enjoined, but the court will require that the yards will be kept in a clean condition where this can be done and will avoid the nuisance complained of.⁵³ And where it is shown that the defendant has made substantial improvements and has practically abated the nuisance, save minor defects, the court should not absolutely enjoin the prosecution of the business but should merely require the correction of the defects remaining.⁵⁴ And where a brass foundry and machinery incident thereto are not, *prima facie*, nuisances, and in an action by an adjoining proprietor for damages and injunction, where the evidence shows that the smoke-stack and steam escape-pipe are too low; that the fuel is not such as should be used; that the dipping of brass castings in diluted acids was practiced upon the sidewalk,—the resulting annoyances are such as can be remedied, and an injunction restraining defendant from operating the factory at all is error, and must be modified.⁵⁵ And where, in an injunction suit by the United States to restrain hydraulic mining on certain rivers, as

52. *Chamberlain v. Douglass*, 24 App. Div. (N. Y.) 582, 48 N. Y. Supp. 710; *Warwick v. Wah Lee & Co.*, 10 Phila. (Pa.) 160.

53. *Miller v. Webster City*, 94 Iowa, 162, 62 N. W. 648.

54. *Saal v. South Brooklyn Ry. Co.*, 122 App. Div. (N. Y.) 364.

55. *McMenomy v. Baud*, 87 Cal. 134, 26 Pac. 795, per *Curiam*: "A brass foundry and machinery incident thereto are not *prima facie* nuisances, and a plaintiff who complains of them must allege and prove that they are such by reason of their peculiar location, or the improper manner in which they are conducted. Therefore, where the injuries effects complained of may be prevented

without enjoining the works or the operations entirely, only the causes of the specific injurious effects should be enjoined. If, for example, the cause be the production and escape of smoke and soot in such a way as that they penetrate plaintiffs' premises to his injury, the remedy by injunction should be restricted to this specific injury and leave the defendant at liberty to operate his works if he can, and elects to do so in such a manner as to remove the cause and prevent the injury. *Tuebner v. California R. Co.*, 66 Cal. 171, 4 Pac. 1162; *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655; *Carson v. Central R. Co.*, 35 Cal. 332, 13 Pac. 655; *Brown v. Kentfield*, 50 Cal. 129."

being obstructive of navigation, it appeared that the operation of defendant's mine had been enjoined some time prior to the commencement of the suit; that intimation was made in the decree that when it was shown to the court that proper impounding reservoirs had been constructed, such decree would be modified so as to permit resumption of operations; and that the company, before the bringing of the present suit, had caused to be erected extensive works, by means of which it impounded on its own premises, within its own mine, all materials likely to injure the navigation, it was held that an injunction should be denied.⁵⁶ Again, where plaintiffs, residents and owners of property in a thickly populated neighborhood, filed a bill asking that defendants should be enjoined from erecting buildings as a bone-boiling establishment, it was held that an injunction restraining the use of the buildings as a bone-boiling establishment was properly issued, but that the erection of the buildings was not a nuisance, and the portion of the injunction restraining the erection must be dissolved.⁵⁷ When an injunction restraining the working of an ash receiving plant "in such manner as to cause a nuisance to plaintiff's said real property," does not prohibit the operation absolutely nor prohibit any express acts, a defendant who has made improvements in the plant so as to obviate most of the defects complained of should not be adjudged guilty of contempt in continuing to operate the plant although the improvements are not beyond criticism.⁵⁸ Where a decree granting an injunction contains a provision allowing an application to modify it, an order making such modification and adjudging the defendant in contempt but postponing the punishment until the coming in of a further report by a referee is an amendment of the judgment and is appealable whether interlocutory or not.⁵⁹

§ 1073. Form and scope of injunction against nuisance.—
The decree restraining a nuisance must not be broader in its

56. *United States v. North Bloomfield Gravel Min. Co.*, 53 Fed. 625.

57. *Appeal of Czarniecki (Pa.)*, 11 Atl. 660.

58. *Saal v. South Brooklyn Ry. Co.*, 122 App. Div. (N. Y.) 364.

59. *Saal v. South Brooklyn Ry. Co.*, 122 App. Div. (N. Y.) 364.

terms than the bill or complaint. Thus a defendant must not be wholly enjoined from carrying on his trade where the bill alleges it to be a nuisance only on a certain street.⁶⁰ And where a petition by an adjoining landowner asks only that a turnpike company be restrained from opening a disused culvert on its road, and does not pray for general relief, it is error for the court to go beyond the prayer, and require the company to dig a ditch along its road, so as to enable water to escape through another culvert.⁶¹ And only partial injunctive relief should be granted where the legal remedy is partly adequate.⁶² An injunction having been awarded against the maintenance of a culvert overflowing complainant's land, refusal to embody in the decree an order abating the culvert as a nuisance, if error, is harmless.⁶³

60. *Rainey v. Herbert*, 55 Fed. 443.

An element of a nuisance being that a switching yard is made of the street, and that engines are constantly passing carrying cars to the yard of the company, a prayer to restrain the shifting and transferring of freight cars between the street (meaning that part of it which is the scene of the nuisance) and the grounds of the company is proper, and should be granted. *Kavanagh v. Mobile & G. R. Co.*, 78 Ga. 803, 4 S. E. 113.

The nuisance complained of being in part the loading and unloading of freight cars in the street from a side track, to cease doing these acts from the side track, and then to do them instead from the main track, would be a virtual continuance of the nuisance; wherefore a prayer, in general terms, to restrain the loading and unloading of freight cars in the street, is proper, and, under the former ruling in this case, should be granted. *Kavanagh v. Mobile & G. R. Co.*, 78 Ga. 803, 4 S. E. 113.

61. *Mundy's Turnpike Co. v. Har-*

din, 14 Ky. Law Rep. 400, 20 S. W. 385.

62. An action was brought by the fire department of New York city to recover penalties for violating the building laws by constructing oriel windows projecting into the street, and not shown on the plans approved by the department. Pending suit plaintiff moved to enjoin all further work on the premises. Defendant, by affidavit, denied that the windows were obstructions. A temporary injunction was granted. It was held that, as an adequate remedy exists to compel the removal of the oriels if decided to be obstructions in the streets, the temporary injunction should be confined to restraining further work in completing the oriels, and should not restrain work which is not shown to be a violation of the plans and specifications. *Fire Department of the City of New York v. Beaudet*, 4 N. Y. Supp. 206, 21 Abb. N. C. 164. And see *Ballentine v. Webb*, 84 Mich. 38, 47 N. W. 485.

63. *Patoka Twp. v. Hopkins*, 131 Ind. 142, 30 N. E. 896.

Where a suit to enjoin a li-

§ 1074. **Indefinite injunctions.**—In a suit to enjoin defendant from maintaining a nuisance by carrying on a slaughter-house in the vicinity of complainant's residence, a decree enjoining defendant from so conducting his business as to become offensive to complainant is too indefinite; and it appearing that its offensiveness could be largely avoided thereby, defendant should be required to remove daily in closed wagons all refuse, to cleanse and disinfect his premises daily, and to provide pens sufficient to hold his hogs without crowding, so as to render them less noisy.⁶⁴ And where residents of a certain neighborhood complained of a nuisance a mile and a half away, it was held that the injunction should restrain defendant from so conducting his business as to cause a nuisance at the place where complainants lived, not to restrain the maintenance of a nuisance at some other place or generally.⁶⁵ And where the complainant in an action in equity asked "that said nuisance be abated," it was held that an injunction suitable to the facts of the case was the proper mode of granting the relief, although it was not expressly prayed for.⁶⁶

§ 1075. **Mandatory injunctions.**—In New Jersey a preliminary mandatory injunction will not be granted to compel defendant to remove offending obstructions, except in cases of extreme necessity. The better practice in courts of equity is to withhold a mandatory injunction in cases of mere inconvenience to plaintiff until the facts are fully heard and settled on final hearing.⁶⁷ Thus,

quor nuisance was submitted on the pleadings and affidavits, and the petition alleged illegal sales upon premises "known as the 'Union Hotel,'" and there was nothing in the answer or affidavits to indicate that the sales were made in any particular part of the hotel, an objection that the evidence warranted an injunction only against the bar-room is not well taken. *Geyer v. Douglass*, 85 Iowa, 93, 52 N. W. 111.

64. *Ballentine v. Webb*, 84 Mich. 38, 47 N. W. 485.

65. *Williams v. Osborne*, 40 N. J. Eq. 235.

66. *Sullivan v. Royer*, 72 Cal. 248, 13 Pac. 655.

67. *Bailey v. Schnitzius*, 45 N. J. Eq. 178, 16 Atl. 680. On this bill to enjoin the obstruction of a water-course and to compel the removal of obstructions, complainant's pleadings and proofs showed that it was an ancient water-course, running through her land, crossing a highway, and flowing over defendant's land. Defendant's answer and affidavit showed

while a preventive injunction will be granted to restrain one of two adjacent mine owners from removing the supports which prevent the surface of his mine from caving in, when it appears that such removal will result in the destruction of his neighbor's mine, yet he will not be compelled by a mandatory injunction to build bulkheads or other barriers to prevent the water from flowing into such mine, except on a very clear and positive showing of plaintiff's right, and of irreparable injury to his property.⁶⁸ And it has been decided in a recent case in Maine that except in extreme case a court of equity will not exercise its powers to compel the removal of existing structures alleged to be nuisances, but will remit the plaintiff to his remedies at law where they are plain, adequate and complete.⁶⁹ But in Mississippi, where defendants permanently obstructed a public street, and thus deprived a resident fronting on it of his own direct and convenient approach to the business part of the town, it was held that he sustained such a special injury as to entitle him to a mandatory injunction to compel the removal of the obstruction.⁷⁰

that it was a gully on complainant's land, which in times of heavy rains received the surface water, and carried it to the road, where it ran off; that it had very rarely crossed the road; that drains constructed on complainant's land had increased the flow of water so that a trunk had to be made to save the road from washing out; that in heavy rains the water passing through the trunk was emptied on defendant's lands; that without the accumulation of water neither the road nor defendant's lands would be overflowed. It was held that, since the most serious damage alleged by complainant was that defendant's embankment had made the road impassable, and she had failed to show special damage to herself, irreparable injury to her lands by the back-water, or obstruction to her passage to the road, a

mandatory injunction should not have been granted till final hearing. And see *Hart v. Leonard*, 42 N. J. Eq. 416, 7 Atl. 865; *Durell v. Pritchard*, L. R. 1 Ch. App. 244.

68. *Lord v. Carbon Iron Co.*, 38 N. J. Eq. 452, 458.

69. *Whitmore v. Brown*, 102 Me. 47, 65 Atl. 516.

70. *Canton Warehouse Co. v. Potts*, 69 Miss. 31, 10 So. 448. And see *State v. Goodnight*, 70 Tex. 682, 11 S. W. 119, where a mandatory injunction was granted to compel the removal of inclosures of the public lands; and *Cedar Lake Hotel Co. v. Cedar Lake Co.*, 79 Wis. 297, 48 N. W. 371, where a mandatory injunction was granted to compel defendant to fill up the outlet of a lake which it had lowered, and thereby so lowered the water of the lake as to render it marshy and unwholesome.

§ 1076. **Effect of malicious motive.**—It has been held in several States that the maxim, *sic utere tuo ut alienum non laedas*, applies only to cases where the act complained of violates some right, and an act legal in itself violating no right cannot be restrained by injunction, upon the ground of the wrong motive which induced it.⁷¹ Thus, where there was on defendant's land an embankment surrounding a spring, the effect of which was to raise the water in a well upon plaintiff's land, it was held that defendant could not be restrained from digging a ditch through the embankment and thereby lowering the water in plaintiff's well, because his sole motive in so doing was to divert the water from plaintiff's well.⁷² But one may be enjoined from producing noises or sounds where he acts maliciously for the purpose of annoying his neighbor.⁷³ In Michigan, a fence erected with no other purpose than the malicious one of shutting out the light and air from a neighbor's windows, will be enjoined as a nuisance.⁷⁴ But where defendant erected on his lots small tenement houses and proposed to let them to negroes in order to spite his neighbor, it was held that as the houses were legitimate improvements of his property they could not be enjoined as nuisances, however disagreeable they might be to plaintiff.⁷⁵

§ 1076a. **Statute enjoining malicious erection of structure construed.**—Where a statute provides that the malicious erection of a structure with the intention of annoying or injuring any pro-

71. *Chatfield v. Wilson*, 28 Vt. 49; *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505. And see *Walker v. Cronin*, 107 Mass. 555; *Greenleaf v. Francis*, 18 Pick. (Mass.) 117; *Frazier v. Brown*, 12 Ohio St. 294.

72. *Phelps v. Nowlen*, 72 N. Y. 39. And see *Clinton v. Myers*, 46 N. Y. 511; *Pickard v. Collins*, 23 Barb. (N. Y.) 444.

73. *Christie v. Davey* (1893), 1 Ch. 316.

74. *Kirkwood v. Finegan*, 95 Mich. 543, 54 N. W. 720; *Flaherty v.*

Moran, 81 Mich. 52, 45 N. W. 381; *Burke v. Smith*, 69 Mich. 380, 37 N. W. 838. The New York doctrine, as laid down in *Mahan v. Brown*, 13 Wend. (N. Y.) 261, and followed in *Phelps v. Nowlen*, 72 N. Y. 39, is not accepted as sound in Michigan. And see *Wheatley v. Baugh*, 25 Pa. St. 528; *Roath v. Driscoll*, 20 Conn. 533; *Carson v. Western R. Co.*, 8 Gray (Mass.), 423.

75. *Falloon v. Schilling*, 29 Kan. 292.

prietor of adjoining lands, may be enjoined, it has been decided that the malicious quality of the act must be the predominant one; that the question of malice is to be determined by the character, location and use of the structure as well as by an inquiry into the actual motive of the person; and that the acts referred to by such a statute must, as a general rule, go beyond those of petty business competition. So, where persons occupied adjoining stores, one of which came up to the street line and the other was a few feet back, and the proprietor of the latter store had a show case made to place on the platform in front of his store for the purpose, primarily, of displaying his goods to the best advantage, and secondarily, of obstructing a view of the goods displayed in the adjoining store and to injure and annoy the proprietor thereof in his use of such store, it was decided that a case had not been shown for the granting of an injunction under the statute.⁷⁶ But where it is provided by statute that a malicious erection upon one's own land, intended to injure or annoy an adjacent owner, may be enjoined, as to such an erection, it is no defense that it serves to screen defendant's premises from observation.⁷⁷

§ 1077. **Unreasonable use enjoined; miscellaneous.**—One having the right to maintain and use a pond on the land of another may be enjoined at the instance of the owner of the land from so using the pond as to make it a nuisance.⁷⁸ And where the approaches to plaintiff's store and the sidewalks were blocked up frequently each day by a puppet-show given by way of advertisement in the windows of defendant's store opposite, it was held, that an injunction should be granted to prevent the show, as an unreasonable and injurious method of advertising.⁷⁹ But a person should not in advance of the trial be enjoined from using the sidewalk in front of his premises by loading, unloading and storing

76. *Gallagher v. Dodge*, 48 Conn. 387, 40 Am. Rep. 182.

77. *Harbison v. White*, 46 Conn. 106.

78. *Leonard v. Spencer*, 34 Hun (N. Y.), 341. And see *Susquehanna*

Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900.

79. *Jaques v. National Exhibit Co.*, 15 Abb. N. C. (N. Y.) 250, following *Doellner v. Tynan*, 38 How. Pr. (N. Y.) 176.

goods there, where the affidavits are conflicting as to whether such use of the sidewalk is unreasonable.⁸⁰ On the trial, however, it must be shown that such use is necessary with reference to the tradesman's business, and reasonable with reference to the rights of the public.⁸¹ Again, where defendants, keeping an hotel in London, put up a stove, the heat of which rendered the cellar of an adjoining house unfit for storing wine, it was held that, although defendants were acting reasonably in the use of their house, yet, as they caused serious annoyance and injury to plaintiff, the court would interfere and protect plaintiff; but as the injunction would be attended with hardship to defendants it was ordered not to be enforced for three months.⁸² Where it appears, on the face of an application by a telegraph company to condemn a right of way for a telegraph line over and along a bridge spanning a navigable river, that the method outlined in the application will obstruct navigation, and justify an injunction restraining such condemnation proceedings, a proposal by the telegraph company, in its answer to the injunction proceedings, to so change its plans as to obviate the objections, and which is a substantial departure from the plan stated in the application, will not defeat the action for the injunction. But the injunction will not prevent the company from instituting another condemnation proceeding within the provisions of the law.⁸³ Where, on motion to dissolve an injunction *pendente lite*, prohibiting defendant from throwing stones by blasting in a quarry, it

80. Richardson, etc., Co. v. Barstow Stove Co., 11 N. Y. Supp. 935. As to temporary obstructions of a sidewalk and streets which are allowable, see Welsh v. Wilson, 101 N. Y. 254, 4 N. E. 633; Mathews v. Kelsey, 58 Me. 56.

81. Callanan v. Gilman, 107 N. Y. 360, 14 N. E. 264.

If a trader needs larger premises than he has, he must either enlarge such as he has or remove his business to some more convenient place. People v. Cunningham, 1 Denio (N. Y.), 524; Commonwealth

v. Passmore, 1 Serg. & R. (Pa.) 217. For the primary object of a street is for free passage of the public. Rex v. Russell, 6 East. 427, and is not to be used for a stable yard. Rex v. Cross, 3 Camp. 224; Rex v. Jones, 3 Camp. 230.

82. Reinhardt v. Mentasti, L. R. 42 Ch. D. 685, following Broder v. Saillard, L. R. 2 Ch. D. 692, where a stable was enjoined because the noise from the horses disturbed the plaintiff's sleep.

83. Pacific Mut. Tel. Co. v. Chicago Bridge Co. (Kan.), 12 Pac. 560.

appears that stones have been thus thrown by defendant several times on plaintiff's premises, sometimes crashing into her dwelling, the motion is properly denied; and the fact that defendant can conduct his business without casting stones on plaintiff's premises is no reason for dissolving such injunction, since it does not prohibit him from so doing.⁸⁴

§ 1078. **Injunction of public nuisance not favored.**—The jurisdiction of courts of equity to restrain the continuance of public nuisances is well settled;⁸⁵ but will not be exercised where the object sought may be as well attained in the ordinary tribunals.⁸⁶ Except for special and urgent reason, equity will not enjoin the erection of a public nuisance where its maintenance is a misdemeanor, subject to indictment, even though its intervention be sought by the Attorney-General.⁸⁷ A municipal corporation, as the representative of the equitable rights of its inhabitants, may enjoin nuisances affecting matters with reference to which a portion of the power of the State has been confided to it.⁸⁸ And the

84. *Wilsey v. Callanan*, 21 N. Y. Supp. 165. And see *Rogers v. Hanfield*, 14 Daly (N. Y.), 339.

85. *Greenwich Township v. Railroad Co.*, 24 N. J. Eq. 217, 25 N. J. Eq. 565.

A purpresture which is an encroachment upon or appropriation of lands or waters, or rights or easements therein which belong to the public, may be enjoined though it is not a public nuisance or only slightly inconveniences travel. *Joyce on Nuisance*, §§ 59, 60; *Revell v. People*, 177 Ill. 468, 52 N. E. 1052, 69 Am. St. Rep. 257, 43 L. R. A. 790; *Smith v. McDonald*, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393.

85. *Raritan Township v. Port Reading R. Co.*, 49 N. J. Eq. 11, 23 Atl. 127.

86. *Raritan Township v. Port Reading R. Co.*, 49 N. J. Eq. 11, 23

Atl. 127; *Attorney General v. Railroad Co.*, 3 N. J. Eq. 136; *Attorney General v. Heishon*, 18 N. J. Eq. 413; *Attorney General v. Brown*, 24 N. J. Eq. 90; *Attorney General v. Railroad Co.*, 27 N. J. Eq. 26; *Inhabitants v. Inslee*, 37 N. J. Eq. 397.

88. *Houlton v. Titcomb*, 102 Me. 272, 66 Atl. 733. See *Board of Health of Green Island v. Magill*, 17 App. Div. (N. Y.) 249, 45 N. Y. Supp. 710; *Pittsburgh v. Epping-Carpenter Co. (Pa.)*, 29 Pitts. L. J. N. S. 255; *Town of Britton v. Guy (S. D.)*, 97 N. W. 1045; *Huron v. Bank of Volga*, 8 S. D. 449, 66 N. W. 815.

Where a statute gives a remedy only to "any person injured thereby" to maintain an action to abate a nuisance the city cannot maintain such an action on the ground of injury to its citizens. City

Attorney-General may maintain an information in equity to restrain a corporation from any abuse of its powers which creates a public nuisance.⁸⁹ In such cases the preventive force of an injunction which restrains the illegal acts before any mischief is done is often a more efficacious remedy than an indictment or a statutory proceeding by a health board, as neither of the latter remedies can be invoked until a part of the mischief is done.⁹⁰ While equity has jurisdiction to restrain a public nuisance upon the information of the Attorney-General either on behalf of the State or at the relation of an individual,⁹¹ yet injunctions have often been refused where it appeared that the informations were not brought in behalf of the public, but merely at the relation of private parties, who might themselves have instituted the suit if they had sustained any special injury.⁹²

§ 1079. **Public nuisances; limited power to enjoin.**—The power of a court of equity to enjoin the commission of a public nuisance, at suit of the Attorney-General, is limited to those public nuisances which affect or endanger the public safety or convenience, and require immediate judicial interposition; and

of *Ottumwa v. Chinn*, 75 Iowa, 405, 91 N. W. 156.

The selectmen of a town may maintain an action for an injunction against a slaughterhouse. *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694.

The local authorities of London have both by statute and by common law the right to relief in equity to restrain vacant lands becoming a nuisance, except in certain cases where special authority is vested in them to abate such nuisance themselves. *Attorney General v. Tod-Heatly* (Ch.), 75 Law T. Rep. 452; *English Pub. Health* (London) Act, 1891.

89. *Attorney General v. Jamaica Pond*, 133 Mass. 361; *Attorney Gen-*

eral v. Tudor Ice Co., 104 Mass. 239; *Attorney General v. Cambridge*, 16 Gray (Mass.), 247; *District Attorney v. Lynn, etc., Railroad*, 16 Gray (Mass.), 242; *Attorney General v. Cohoes Co.*, 6 Paige (N. Y.), 133; *Attorney General v. Great Northern R. Co.*, 4 DeG. & S. 75; *Attorney General v. Great Eastern R. Co.*, L. R. 11 Ch. D. 449; *Attorney General v. Leeds Corporation*, L. R. 5 Ch. App. 583; *Attorney General v. Mid-Kent R. Co.*, L. R. 3 Ch. App. 100.

90. *Cadigan v. Brown*, 120 Mass. 493.

91. *Attorney General v. Jamaica Pond*, 133 Mass. 361; *District Attorney v. Lynn, etc., Railroad*, 16 Gray (Mass.), 242. See *Coosaw Min. Co. v. South Carolina*, 144 U.

the unauthorized tearing up of street pavements to lay gas mains will not be thus enjoined, when the municipal officials have ample power to protect and maintain the city streets.⁹³

§ 1080. **Same subject; protecting public lands.**—Public nuisances, though indictable at common law or made expressly so by statutes, have always been subject to be enjoined.⁹⁴ The in-

S. 550, 565, 36 L. Ed. 537, 12 Sup. Ct. 689; *State v. Donovan*, 10 N. D. 203, 86 N. W. 709.

92. *Attorney General v. Sheffield Gas Co.*, 3 DeG. M. & G. 304; *Attorney General v. Cambridge Gas Co.*, L. R. 4 Ch. App. 71, 84.

93. *People v. Equity Gas Light Co.*, 141 N. Y. 232, 36 N. E. 194, per Bartlett, J.: "It is familiar law that the people can maintain a suit in equity to abate a public nuisance in the highways of the State, when the circumstances of the case show it involves the public safety or convenience. It is equally true that a court of equity will not interfere when the matter can be dealt with effectually by the local officials, to whom the State has delegated a portion of its authority. This was held in *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515. The court said: 'The jurisdiction of a court of equity to abate an existing, or prevent a threatened, nuisance, upon information filed by the attorney general, is limited to those public nuisances which affect or endanger the public safety or convenience, and require immediate judicial interposition. *Attorney General v. Tudor Ice Co.*, 104 Mass. 239. The nuisance must be clearly established. *District Attorney v. Lynn & B. R. Co.*, 16 Gray (Mass.), 242. And the court will not interfere where the obstruc-

tion to the rights of the public is of such a character that it may, with equal facility be removed by other constituted authorities and public officers. *Attorney General v. Bay State Brick Co.*, 115 Mass. 431, 438. 'There must be a want of adequate sufficient remedy, and the injury to public rights must be of a substantial character, and not a mere theoretical wrong.' This same principle is sustained by the English cases. In *Attorney General v. Sheffield Gas Consumers' Co.*, 3 DeG. M. & G. 304 it was held that the disturbance of a pavement in a town, by an unincorporated gas company, for the purpose of laying down gas pipes, was not such a nuisance as to warrant an injunction, either upon a bill or upon an information. In the case at bar, the people have abundant remedy without coming into a court of equity. The State has delegated to various officials, acting under the present charter of Brooklyn, ample power to protect and maintain the streets of that city. We are, therefore, of opinion that the facts in this case do not warrant the intervention of the equitable powers of the court, and the complaint must be dismissed as to the appellant the Equity Gas Works Construction Company."

94. *People v. St. Louis*, 5 Gilman (Ill.), 351; *Penn. Lead Co.'s Appeal*, 96 Pa. St. 116; *Attorney General v.*

closure of public lands for private use, whether regarded as a wrong merely to the body politic or as an infringement of the rights of its citizens, is a nuisance subject to be abated at the suit of the State, and an injunction is the appropriate remedy.⁹⁵ And where the enclosure of public school lands obstructed the right of common, of travel, and of the removal of cattle to market, thus interfering with individual rights in public property, it was decided that it constituted a public nuisance which could be abated by injunction at the suit of the State, though by statute such an act was made a penal offense, for which a prosecution and punishment was provided.⁹⁶ But the enclosure of public lands cannot be enjoined at the suit of an individual by reason of the fact that he owns lands in the vicinity and is deprived of the right of public pasturage therein, as such injury is one sustained by all alike whose live stock graze in that vicinity or who seek to enjoy the pasturage afforded by such public lands.⁹⁷

§ 1081. **Private injunction of public nuisance.**—Where an individual seeks to obtain an injunction against a public nuisance it is essential to sustain the action that he should show some special,

Hunter, 1 Dev. Eq. 12. In *Attorney General v. Woods*, 108 Mass. 436, an injunction was held to be a proper remedy though the statute which declared the nuisance which was sought to be enjoined made provision for the indictment of those who offended against its requirements. See, also, *Scheurich v. Southwest Missouri Light Co.*, 109 Mo. App. 406, 84 S. W. 1003.

95. *State v. Goodnight*, 70 Tex. 682, 11 S. W. 119; *United States v. Ranch Co.*, 25 Fed. 465; *State v. Atkinson*, 24 Vt. 448; *State v. Woodward*, 23 Vt. 92. A petition by the State for an injunction to compel the removal of inclosures, and restrain the erection of additional ones, alleged that defendant had practically inclosed a large area of the public

school-lands and of the unappropriated public domain; and that such inclosures prevented the use of such lands as public grazing commons by the people, interfered with the moving of stock, and obstructed travel, that they were unlawful and impeded sale of the lands, under laws for that purpose. It was held that the petition alleged both a purpresture and a public nuisance, and was not demurrable, as the obstruction to the right to sell the public lands cannot be waived since the Texas Act of 1884. *State v. Goodnight*, 70 Tex. 682, 11 S. W. 119."

96. *State v. Goodnight*, 70 Tex. 682, 11 S. W. 119.

97. *Anthony Wilkinson Live Stock Co. v. McIlquham* (Wyo. 1905), 83 Pac. 364, 370.

particular or peculiar injury beyond and distinct from that suffered by the public and which is different in kind and not merely in degree. There must be some special privilege or right as distinguished from the public right.⁹⁸ Where proceedings to enjoin a public nuisance are instituted by a private individual he must allege and prove some special damage different in kind from that suffered by the general public.⁹⁹ So where the complaint does not show by averment of probative facts, that the plaintiffs have suffered or will sustain any injury differing in kind from that experienced by the public at large, an injunction to restrain a

98. *United States.*—*Mississippi & Mo. R. R. Co. v. Ward*, 2 Black, 485; *Indianapolis Water Co. v. American Strawboard Co.*, 57 Fed. 100.

Alabama.—*Barnett v. Tedeseki* (1908), 45 So. 905.

Arkansas.—*Packet Co. v. Sorrels*, 50 Ark. 466, 8 S. W. 683.

California.—*Payne v. McKinley*, 54 Cal. 532.

Connecticut.—*Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502.

Florida.—*Thomas v. Wade* (1904), 37 So. 743.

Illinois.—*Chicago Gen. R. Co. v. Chicago, B. & Q. R. Co.*, 181 Ill. 605, 54 N. E. 1026; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164.

Iowa.—*Innis v. Cedar Rapids, I. F. & N. W. R. Co.*, 76 Iowa, 165, 40 N. W. 701, 2 L. R. A. 282.

Kansas.—*School Dist. v. Veil*, 36 Kan. 617, 59 Am. Rep. 575, 14 Pac. 253.

Louisiana.—*Werges v. St. Louis, C. & N. O. R. Co.*, 35 La. Ann. 641.

Maine.—*Low v. Knowlton*, 26 Me. 128, 45 Am. Dec. 100.

Massachusetts.—*Hagerty v. McGovern*, 187 Mass. 479, 73 N. E. 536; *Inhabitants of Winthrop v. New England Chocolate Co.*, 180 Mass. 464, 62 N. E. 969; *McDonnell v. Cam-*

bridge R. Co., 151 Mass. 159, 23 N. E. 841.

Mississippi.—*Green v. Lake*, 54 Miss. 540, 28 Am. Rep. 378.

Missouri.—*Baker v. McDaniel*, 178 Mo. 447, 77 S. W. 531.

Nebraska.—*Shed v. Hawthorne*, 3 Neb. 179.

New York.—*Wakeman v. Wilbur*, 147 N. Y. 657, 42 N. E. 341; *Hill v. New York*, 139 N. Y. 495, 30 N. E. 1090, 54 N. Y. St. R. 797; *Hilhau v. Sharp*, 28 Barb. 228, 7 Abb. Prac. 220.

Oklahoma.—*United States v. Choctaw, O. & G. R. Co.*, 3 Okla. 404, 41 Pac. 729.

Oregon.—*Van Buskirk v. Bond* (1908), 96 Pac. 1103.

Pennsylvania.—*Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401.

Wisconsin.—*Tiede v. Schneide*, 105 Wis. 470, 81 N. W. 826.

99. *McDonald v. English*, 85 Ill. 232; *Chicago v. Union Building Assoc'n*, 102 Ill. 379; *East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395.

The maintenance of a public nuisance—a railroad for instance, built along a street without authority—will not be enjoined at the instance of the abutter, unless he shows a special injury. *Garnett v. Jacksonville, etc., R. Co.*, 20 Fla. 889.

nuisance will not be granted.¹ So the erection of a dam across a navigable stream, though a nuisance, will not be enjoined on application of one sustaining no special or personal injury thereby. Thus, where plaintiff's land, which bordered on a stream, was overflowed during the winter freshets, his application for an injunction to restrain the building of a dam on the stream should be denied, since it cannot be inferred that the damage from overflow would be augmented by its existence.² And where the erection of a bridge over a navigable stream obstructs navigation a suit to abate the obstruction cannot be maintained by an individual who does not show any injury or damage different in kind from that of any other person who might undertake to use the stream for purposes of navigation under similar circumstances.³ And where a city discharges its garbage into Lake Michigan so as to interfere with the fishing rights of a particular locality, but affects all alike who fish there, it is a public, and not a private, nuisance; and no private individual can maintain an action to enjoin its continuance.⁴ But where defendants demur to a bill on the ground that the alleged grievance is a public nuisance for the restraining of which a suit cannot be maintained by a private person, the objection may be avoided by an amendment which joins the Attorney-General as plaintiff.⁵

1. *Van Buskirk v. Bond* (Oreg. 1908), 96 Pac. 1103.

2. *Esson v. Wattier*, 25 Or. 7, 34 Pac. 756, per Moore, J.: "A court of equity," says Lord, C. J., "ought not to interfere to prevent a public nuisance, or to abate one already existing, at the instance of a private party, unless he shows a special injury, distinct from the public, actually sustained or justly apprehended. The obstruction of a public highway is, without doubt, a public nuisance; but this of itself is not sufficient to justify the interposition of equity in behalf of the plaintiff, unless he sustains some private, direct and material damage beyond the public at

large." *Luhrs v. Sturtevant*, 10 Or. 170. Plaintiff has not alleged that the obstruction of the navigation of the river has or will cause him any special or personal injury, and hence he is not entitled to any relief on that ground. And see *Pittsburgh, etc., R. C. v. Cheevers*, 149 Ill. 430, 37 N. E. 49.

3. *Thomas v. Wade* (Fla. 1904), 37 So. 743.

4. *Kuehn v. City of Milwaukee*, 83 Wis. 583, 53 N. W. 912. And see *Wright v. Mulvaney*, 78 Wis. 89, 46 N. W. 1045.

5. *Conn. Lumber Co. v. Olcott Falls Co.*, 65 N. H. 290, 21 Atl. 1090; *Dover v. Portsmouth Bridge*, 17 N.

§ 1081a. **Private injunction of public nuisance; continued.**—Where a person shows that he has sustained an injury of the character mentioned in the preceding section as a result of a public nuisance he may be granted relief by a court of equity. So an injunction has been held to be properly granted in the case of one who sustains a private, substantial and peculiar injury from the obstruction of a highway.⁶ And a person who has sustained such special damages, from the act of another who has raised a dam in violation of a statute as entitles him to a private remedy, the nuisance being a continuing one, and who has recovered double damages under a statute so providing, may have the nuisance enjoined, if the facts warrant, and the damages awarded are only for damages already sustained.⁸ And where a bill to enjoin a nuisance avers special damages to the complainant and to complainant's property, distinct from that suffered by the public, it is immaterial whether the alleged nuisance under the facts stated in the bill be considered a public or a private nuisance.⁹

§ 1082. **Private area way on public street.**—The permanent encroachment upon the public highway or street, unauthorized by the Legislature, and the creation of a purpresture therein, which obstructs the free and uninterrupted passage of the public, is, as a matter of law, a public nuisance. Thus a municipality cannot grant a license to use part of a street as a private area way, since such use, being permanent, is inconsistent with the due use of the street by the public; and it may be enjoined as a public nuisance at suit of the State's attorney on behalf of the public, irrespective of the question of pecuniary damage.¹⁰ And an area

H. 200; Griffin v. Sanbornton, 44 N. H. 246.

6. Wakeman v. Wilbur, 147 N. Y. 657, 42 N. E. 341.

7. Frink v. Lawrence, 20 Conn. 117, 50 Am. Dec. 274. See Small v. Harrington (Idaho, 1904), 79 Pac. 461.

8. Redway v. Moore, 2 Ida. 1036, 29 Pac. 104; Hamilton v. Whitridge, 11

Md. 128, 69 Am. Dec. 184; Weakley v. Page (Tenn.), 53 S. W. 551; Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513.

9. Barnett v. Tedeschi (Ala. 1908), 45 So. 905.

10. Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, per Shope, J.: "The matter or inconvenience to the public, or that sufficient of the street

in front of a dwelling house on a public street without a fence or gate to prevent persons from falling into it could also be enjoined on account of its dangerous character.¹¹

§ 1082a. **Public highway nuisance; general rule.**—The obstruction of a public highway being a public nuisance the right of a private party to restrain such a nuisance is not recognized unless he has sustained some damage or injury differing in kind

may remain unobstructed to still accommodate the public travel, cannot be considered. The trustee of the public—the municipality—is charged with the duty of keeping and maintaining the streets, in all their parts, open and unobstructed, and in reasonably safe condition, for the public use. No question of the amount of damage done or that may ensue from the creation of the purpresture is raised, nor can it be considered in proceedings by the public, the question being simply whether there has been an invasion of the public right. Where the proceedings are instituted by a private individual for a public nuisance, the gist of his right of action is the private injury, and he must allege and prove some special damage, different in kind from that suffered by the general public. *McDonald v. English*, 85 Ill. 232; *Chicago v. Union Bldg. Ass'n*, 102 Ill. 379; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395. The public may institute proceedings for the abatement or prevention of the nuisance by its authorized public officers, irrespective of the question of pecuniary damages. *Jackson v. Norris*, 72 Ill. 364; *Hunt v. Railway Co.*, 121 Ill. 638, 13 N. E. 176. Nor does it seem to be necessary when the erection is itself an invasion of the public right

—that is, where it is a nuisance *per se*—that the fact should be established at law, preliminary to the jurisdiction by injunction. The public is entitled to the speediest and most effectual way to prevent the threatened invasion of its right. *Wood, Nuis.*, §§ 777-786; *Dill Mun. Corp.*, 520; *State v. Mayor, etc., of Mobile*, 5 Port. (Ala.) 279; *Reimer's Appeal, supra*; *People v. Vanderbilt*, 26 N. Y. 287; *Gaslight Co. v. Barker*, 7 Rob. (N. Y.) 523; *Eden, Inj.*, 11-159. And, if there has been a clear invasion of the common right—the unauthorized taking for private use that which belongs to the public, as by the permanent occupation of a public street, or a portion of it—injunction will be granted, at the suit of the proper officers, on behalf of the public, to prevent the creation and maintenance of the nuisance. 3 Pom. Eq. Jur. 1359, and note; *Earl v. De Hart*, 12 N. J. Eq. 280; *Sparhawk v. Railway Co.*, 54 Pa. St. 401; *East India Co. v. Vincent*, 2 Atk. 83; *Murdock's Case*, 2 Bland, Ch. 461, 20 Am. Dec. 389, notes."

11. *Condon v. Sprigg*, 78 Md. 330, 28 Atl. 395, per Roberts, J.: "We come now to the consideration of the prayers. The plaintiffs' fifth prayer was granted in connection with and subject to the defendant's second prayer. Standing by itself, the plain-

from that sustained by the general public.¹² This is the general rule from which there is no dissent.¹³ But where such a special injury is shown by an individual he may be granted an injunction. So, though the obstruction of a street is a public nuisance and subject to abatement as such, yet an individual who is specially injured by it is entitled to an injunction to restrain its

tiffs' fifth prayer substantially embodies the law announced by this court in *Irwin v. Sprigg*, 6 Gill, 200, which has been approved in *Owings v. Jones*, 9 Md. 108, and in other cases. That which this court said in *Irwin v. Sprigg*, *supra*, is, we think, equally applicable here: 'The existence of an area, open and unprotected, like that described by the witnesses in this case, is an unauthorized and illegal obstruction of a public street in a populous city, of a most aggravated and dangerous character, and is therefore a public nuisance; yet, as he subsequently became the owner of the house to which it belonged, the law imposed upon him the obligation to render it secure.' The doctrine of this case was much criticised at the hearing in this court. It was contended that the case found its only support in the case of *Coupland v. Hardingham*, 3 Camp. 398, where Lord Ellenborough had delivered the opinion of the court, and that since then *Coupland v. Hardingham* had been overruled in *Fisher v. Prowse*, 2 Best & S. 770. However this may be, we think the doctrine announced in *Irwin v. Sprigg* is proper under the circumstances shown by the record in this case, to be applied here."

12. *Van Buskirk v. Bond* (Oreg. 1908), 96 Pac. 1103.

13. *United States v. Irwin v. Dixon*, 9 How. 10, 27, 13 L. Ed. 25.

Alabama.—*Baker v. Selma Street & S. P. Co.*, 135 Ala. 552, 33 So. 685.

Arkansas.—*Ward v. Little Rock*, 41 Ark. 526, 48 Am. Rep. 46.

California.—*Hegan v. Central Pacific R. Co.*, 71 Cal. 83, 11 Pac. 876.

Connecticut.—*Wheeler v. Bedford*, 54 Conn. 244, 248, 7 Atl. 22.

Georgia.—*East Tennessee & G. R. Co. v. Boardman*, 96 Ga. 356, 23 S. E. 403.

Idaho.—*Stufflebaum v. Montgomery*, 3 Idaho, 20, 26 Pac. 125.

Illinois.—*Aurora Elec. L. & P. Co. v. McWethy*, 104 Ill. App. 479, *aff'd* 202 Ill. 218, 67 N. E. 9; *Chicago v. Union Building Assn.*, 102 Ill. 379, 40 Am. Rep. 598.

Indiana.—*O'Brien v. Central Iron & S. Co.*, 158 Ind. 218, 63 N. E. 302, 92 Am. St. R. 305; *Dantzer v. Indianapolis Union Ry. Co.*, 141 Ind. 604, 39 N. E. 223, 39 Am. St. R. 343, 34 L. R. A. 769.

Louisiana.—*Irwin v. Great Southern Teleph. Co.*, 37 La. Ann. 63, 1 Am. Elec. Cas. 709.

Maine.—*Brown v. Watson*, 47 Me. 161, 74 Am. Dec. 482.

Maryland.—*Bernbe v. Anne Arundel Co.*, 94 Md. 321, 51 Atl. 179, 37 L. R. A. 279.

Massachusetts.—*Robinson v. Brown*, 182 Mass. 266, 65 N. E. 377; *Stetson v. Faxon*, 19 Pick. 147, 31 Am. Dec. 123.

Minnesota.—*Guilford v. Minneapolis & St. P. R. R. Co.* (1905), 102 N.

continuance.¹⁴ And one who owns property abutting on a street has not only the right in common with the public of using the street from end to end for the purpose of passage, but also has the individual right of free and convenient egress from and ingress to his property, which is a private and personal right unshared by the community, and if taken away or materially impaired by an unauthorized obstruction of the highway such owner sustains a special injury different in character from that sustained by the public, which will entitle him to maintain an action to enjoin the continuance of the same.¹⁵ So a railroad company may maintain a bill in equity to enjoin the continuance of a nuisance con-

W. 365; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072.

Missouri.—*Baker v. McDaniel*, 178 Mo. 447, 77 S. W. 531.

Nebraska.—*George v. Peckham* (1905), 103 N. W. 665.

New York.—*Adams v. Popham*, 76 N. Y. 410.

Ohio.—*Mobile v. Toledo Plow Co.*, 6 Ohio N. P. 294.

Pennsylvania.—*Knowles v. Pennsylvania R. R. Co.*, 175 Pa. St. 623, 34 Atl. 974, 32 Am. St. R. 860.

Texas.—*Parsons v. Hunt* (Civ. A. 1904), 81 S. W. 120.

Vermont.—*Baxter v. Winoski Turnpike Co.*, 22 Vt. 114, 52 Am. Dec. 84.

Washington.—*Wilson v. West & Slade Mill Co.*, 28 Wash. 312, 68 Pac. 716.

West Virginia.—*Keystone Bridge Co. v. Summers*, 13 W. Va. 476, 485.

Wisconsin.—*Zettel v. West Bend*, 79 Wis. 316, 48 N. W. 379, 24 Am. St. R. 715; *Carpenter v. Mann*, 17 Wis. 155.

14. *Canton Cotton Warehouse Co. v. Potts*, 69 Miss. 31, 10 So. 448; *Frink v. Lawrence*, 20 Conn. 117; *Pratt v. Lewis*, 39 Mich. 7; *Conrad v. Smith*, 32 Mich. 429.

A citizen may maintain a proceeding by mandamus to compel public officials to perform their duty and remove unlawful obstructions and nuisances in public streets without being specially damaged. *People v. Ahearn*, 124 App. Div. (N. Y.) 840.

Where a street railway company is given an exclusive right to use a certain portion of a street for its tracks in case of a public nuisance caused by another company using the same portion of the street for its tracks, the power company is entitled to an injunction as it sustains a special injury. *Central Crosstown R. Co. v. Metropolitan St. R. Co.*, 17 Misc. R. (N. Y.) 716, 40 N. Y. Supp. 1095.

15. *Alabama*.—*Goggans v. Myrick*, 131 Ala. 286, 31 So. 22.

California.—*Hargro v. Hodgdon*, 89 Cal. 623, 26 Pac. 1106.

Connecticut.—*Hubbard v. Deming*, 21 Conn. 356.

Indiana.—*O'Brien v. Central Iron & S. Co.*, 158 Ind. 218, 63 N. E. 302, 92 Am. St. R. 305; *Dantzer v. Indianapolis Union Ry. Co.*, 141 Ind. 604, 39 S. E. 223, 34 L. R. A. 769, 50 Am. St. R. 343.

sisting of an obstruction in the highway by which access to its property is materially impaired.¹⁶

§ 1083. **Public highway nuisance continued.**—To a bill filed by the State on the relation of the Attorney-General for an injunction to abate an obstruction of a highway, the defendant answered that the erection complained of was not an obstruction, that it had been in existence for eighteen years, and that upon an indictment for its maintenance as a nuisance, he had been acquitted. It was held that though the jurisdiction was undoubted, yet that the laches of the commonwealth, together with the defendant's acquittal, was sufficient to justify a refusal of the injunction.¹⁷ In such cases of highway nuisance the remedy by indictment is considered more appropriate, and the process of injunction is allowed with considerable reluctance.¹⁸ The fact that an abutting owner observed in silence the erection by the adjacent owner of a structure extending into the street and constituting a nuisance will not estop him from demanding its removal.¹⁹ A county may maintain an action to enjoin a railroad company from laying its road without lawful authority along a county road in several towns, even though the supervisors of the several towns might

Kansas.—*Venard v. Cross*, 8 Kan. 172; *Dyche v. Weichselbaum*, 9 Kan. App. 360, 58 Pac. 126.

Maine.—*Sutherland v. Jackson*, 32 Me. 80.

Minnesota.—*Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072; *Brokau v. Minneapolis & St. L. R. Co.*, 29 Minn. 41, 11 N. W. 124.

Missouri.—*Wallace v. Kansas City & S. R. Co.*, 47 Mo. App. 491.

Texas.—*Kalteyer v. Sullivan*, 18 Tex. Civ. App. 488, 46 S. W. 288.

16. *Pennsylvania S. V. R. Co. v. Reading Paper Mills Co.*, 149 Pa. St. 18, 24 Atl. 205.

17. *Commonwealth v. Croushore*, 145 Pa. St. 157, 22 Atl. 807; *Hutchinson v. Merchants Bank*, 41 Pa. St.

42; *Corbley v. Wilson*, 71 Ill. 209; *Petrie v. Nuttall*, 11 Exch. 569.

18. *Rowe v. Granite Bridge Co.*, 21 Pick. (Mass.) 344; *Morris, etc., R. Co. v. Pruden*, 20 N. J. Eq. 530; *Attorney General v. Railroad Co.*, 3 N. J. Eq. 136; *Attorney General v. Insurance Co.*, 2 Johns. Ch. 378. Notwithstanding the legal remedies for a public nuisance, such as the obstruction of a highway, equity will interpose by injunction in a proper case, especially where the nuisance is of a permanent nature. *Stearns County v. St. Cloud M. & A. R. Co.*, 36 Minn. 425, 32 N. W. 91.

19. *People v. Ahearn*, 124 App. Div. (N. Y.) 840.

20. *Stearns County v. St. Cloud*

bring several actions for the same purpose.²⁰ A complaint in an action to restrain the erection of a building on land alleged to have been dedicated as a street need not state whether such dedication was effected in the manner prescribed by statute or as at common law.²¹

§ 1084. **Same subject.**—Where, in an action by a city against an irrigating canal company to enjoin the operation of its canal along one of plaintiff's streets, and abate it is a nuisance, the court found, *inter alia*, that said canal could be constructed below the surface of the street, and covered up, so that it would not be an obstruction to the street, it was held that such finding was inconsistent with a finding, or conclusion of law, that "said canal, where it traverses the streets of said city, is a nuisance *per se*," and a judgment granting an injunction, and ordering the nuisance abated, must be reversed.²² Upon such a state of facts the defendant should be enjoined from conducting his enterprise in such a manner as to make it a nuisance, but a total destruction of his property should not be decreed.²³ Upon a bill to restrain the erection of coke ovens on a specified street in front of or near complainant's premises, and for general relief, the court has no authority to restrain the operation of ovens elsewhere on defendant's property "so near the premises of the said complainants as to injure the same by reason of flames, heat, gases, or smoke, emitted therefrom."²⁴ A temporary injunction restraining the

M. & A. R. Co., 36 Minn. 425, 32 N. E. 91. And see *Troy v. Cheshire R. Co.*, 23 N. H. 83; *Springfield v. Conn. Riv. R. Co.*, 4 Cush. (Mass.) 63; *Easton, etc., R. Co. v. Greenwich*, 25 N. J. Eq. 565; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88; *Philadelphia v. Passenger R. Co.*, 8 Phila. 643.

21. *Village of Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931; *Pine City Village v. Munch*, 42 Minn. 342.

22. *City of Fresno v. Fresno Canal Irrigation Co.*, 98 Cal. 179, 32 Pac. 943.

23. *McMenomy v. Baud*, 87 Cal. 134, 26 Pac. 795; *Shepard v. People*, 40 Mich. 487; *People v. Albany*, 11 Wend. (N. Y.) 539.

24. *Rainey v. Herbert*, 55 Fed. 443, per Dallas, J.: "The gravamen of the complaint is that coke ovens 'upon the said Front street, of the said town of Sedgwick, will be a permanent and continual trespass, . . . and a permanent obstruction;' and although it is added that a nuisance from smoke, etc., will result, this, too, is averred with respect, only, to ovens upon the street. From begin-

construction of a side track for a steam railway in the streets of a city may be granted at the instance of a citizen alleging special damage to his land in the vicinity of the nuisance; and, though the evidence be conflicting as to whether he will sustain special damage or not, the discretion of the judge in granting the injunction will not be controlled unless abused. In such a case it is no legal bar to an injunction that plaintiff may have acquired his title to adjacent property from collateral motives, and very recently before the work complained of began.²⁵

§ 1084a. **Where defendant conveys property pending suit.**—Where, during the trial of an action for a mandatory injunction to compel an adjoining landowner to remove a structure encroaching upon the street, the defendant conveys the premises, the court is without power to decree that the defendant abate the nuisance, for that would require him to enter upon another man's property and destroy the building.²⁶

§ 1085. **Discharging cesspools into public gutters.**—The discharging of the privies and cesspools of a large factory into the public gutters of a city is a public nuisance which may be enjoined by the city board of health, even though it has been prohibited by a municipal ordinance, which also provides for the imposition of a penalty.²⁷

ning to end, not a word is said about nuisance to arise from the operation of ovens elsewhere; the special prayer does not relate to any such nuisance; and, as we have said, the general prayer cannot be applied to it. This branch of the case was disposed of by the learned judge below in a single paragraph of the opinion which he filed, from which it does not appear that his attention had been directed to the restricted character of the bill; but we, with that fact in view, are constrained to hold that, in so far as ovens upon the street were included in the terms of the decree, it was improvidently

made. *English v. Foxall*, 2 Pet. (N. S.) 595, 611; *Hobson v. McArthur*, 16 Pet. (N. S.) 182, 195; *Savory v. Dyer*, Amb. 70; *Wright v. Atkins*, 1 Ves. & B. 313."

25. *Savannah & W. R. Co. v. Woodruff*, 86 Ga. 94, 13 S. E. 156.

26. *Ackerman v. True*, 120 App. Div. (N. Y.) 172.

27. *Board of Health v. Maginnis Cotton Mills*, 46 La. Ann. 806, 15 So. 164, per Breaux, J.: "The nuisance being denounced by ordinances of the city of New Orleans, and a penalty provided against those who committed the nuisance, it is contended that a writ of injunction should not

§ 1086. **Public wharf nuisance, etc.**—It is not essential to an action for injunction by an individual to prevent an unlawful

issue, and that the authority seeking to abate the nuisance must find procedure in the statute itself. The board of health, by Act. No. 14, of 1870, was invested by the State with the power of removal of 'any substance, matter or thing which they may deem detrimental to health.' It was also authorized to adopt sanitary ordinances, and to fix penalties for their enforcement. By Act No. 80 of 1877 the board was given power, on the concurrence of the city council, to provide for, protect and preserve by adequate means the health and salubrity of the city of New Orleans, and, with the consent of the council, incur reasonable expenses to that end. This act contains the following section: 'This act shall not be construed so as to deprive the board of health of any powers or authority it has under existing laws.' Section 6 of the same act provides that the 'board shall in any suit or proceeding in which it may be a party obtain all writs, appeals or other process without being compelled to furnish bond.' The plaintiff and the city council co-operated in adopting the first ordinance, No. 4077. The amended city ordinances were passed by the city council. The plaintiff seeks to abate an alleged nuisance by injunction, and not by the collection of a fine, or the removal of the cause of nuisance by the commissioner of streets, in accordance with authority conferred for such removal. The authority to enforce the ordinance by imposing a fine, the board contends, is too limited to prove of any service, and it is urged that the first fine, which may be much less than the

limit, is imposable only once, for building a privy in violation of specifications; and the second fine, imposable only once, may be imposed for failing to obey the order to reconstruct the work, and make it comply with the ordinance. It is also argued in behalf of plaintiff that the jurisdiction of the recorder's court does not include jurisdiction over all remedies needful to enforce these ordinances, and to secure prohibition from their violation that will prove effective. The defendant argues, through counsel, that there is adequate remedy by statute, and that an injunction should not 'be granted to restrain an alleged nuisance.' In weighing the different grounds of attack and defense, it suggests itself that the nuisance is no longer an 'alleged nuisance.' In the present condition of the case, for the purpose of the trial of the issues on the exception of the defendant, the nuisance is necessarily admitted. The fact of the nuisance is clear. The right of the plaintiff is well defined, and the law on which it depends not doubtful. They have an established right to remove this nuisance. No judgment at law would add to the admitted violation. The right to abatement being made manifest by the allegations admitted as true, it only remains for us to determine whether further remedy shall be prosecuted before the recorder's court or the district court. Each of these courts has jurisdiction over certain questions involved. These are questions exclusively within the jurisdiction of the district court. The fact that there is a partial, or even complete,

use of a public wharf that his dwelling will be injured by such use if its comfortable enjoyment will be materially interfered with by dust, smoke and offensive odors.²⁸ And an injunction in

remedy in another tribunal in different proceedings, will not alone prevent injunctive relief, but it is good reason to confine that relief to cases of very plain character, with great prudence, where there is a continuous nuisance, and to prevent its threatened repetition. Even then every step, possible and legal, should be taken, in order not to inflict wrongful damage and loss. The writ of injunction is of the highest character, and should be granted to municipal authority on the broad ground only of 'preventing irreparable injury, interminable litigation, multiplicity of actions, and the protection of rights.' It should be hedged by limitations and restrictions, and, if needful, its enforcement suspended, until it is ascertained that a public right is violated. 'If the authorities abate a nuisance under the authority of an ordinance of the city, they are subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance.' Wood, Nuis. (3d Ed.), p. 976. The nuisance is clearly of that character, if it exists at all, which should be abated, if needful, by process of injunction. We would not feel justified in curtailing the court's authority in cases of the character of the one at bar, unless the grounds were quite clear. To plaintiff is given the power and imposed the duty of preserving and promoting public health, and to that end it is vested with authority to sue for the removal of public nuisances. It may be said of the case at bar, as was said of other similar cases: 'There are many

cases—of which this would seem to be one—where the remedy of injunction would be much more efficacious than by enforcing the penalties of an ordinance.' Wood, Nuis (3d Ed.), p. 974, note 1. High, Inj. (3d Ed.), p. 568, approvingly quotes the following: 'So, if plaintiff's right is clear, and the injury is manifest, and of a constantly recurring nature, the relief may be granted without requiring the fact of injury to be determined by an action at law.' It is announced with clearness and emphasis in Wood on Nuisances (page 1120, note), 'that an injunction is a proper remedy to stay mischief resulting from a public nuisance.' In *City of New Orleans v. Lambert*, 14 La. Ann. 247, the nuisance was not as great as the nuisance complained of in the case at bar. The court held that the facts set forth in the petition authorized an injunction. We do not wish to be understood as favoring hasty action in the matter of injunction, applied for without bond, in the interest of the public. But where health is exposed, if there is nuisance, it should be abated, even if injunction must be resorted to for its abatement. It is therefore ordered, adjudged and decreed that the judgment appealed from be reversed, the injunction reinstated, and the cause remanded to the district court for further proceedings according to law, and that appellee pay the cost of this appeal."

28. *Adams v. Ohio Falls Car Co.*, 131 Ind. 375, 31 N. E. 57; *Owen v. Phillips*, 73 Ind. 284.

such a case will be the more readily granted where the unlawful use is for the convenience and profit not of the public, but of a private company.²⁹ The Louisiana Code provides that an injunction must be granted when the defendant opposes the execution of works necessary for the repairs of public levees, roads, canals, etc. A petition alleged that defendants were interfering with complainants, commissioners of a drainage district, in removing obstructions from a canal. It was held, that the granting of an injunction prohibiting such interference, and of an order commanding the removal of the obstructions, was proper.³⁰

§ 1087. **Wharf nuisance; relative rights established.**—Where a lot of land borders on tide waters the owner or tenant has the right of access to, and departure from, the lot by water, and such right is a private right peculiar to such owner or tenant distinct from the public right of navigation, and where an unlicensed wharf obstructs such right of access and departure, it is to that extent a nuisance which can be abated at the suit of such owner or tenant.³¹ Where a divisional line between adjoining riparian proprietors has been settled in a suit at law so far as the line runs from high to low water mark, the record of that suit is at least a *prima facie* settlement by law of the relative rights of property which the same parties possess beyond low water mark in deep water. And in such a case equity will restrain by injunction one riparian proprietor from maintaining a narrow strip of his wharf in deep water below low water line in front of another proprietor's wharf, when the nuisance is permanent, and the injuries caused by it, though small, are frequent and annoying, not easily measurable or adequately compensated for by actions at law.³² But the

29. *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577. 24 N. E. 1066.

30. *State v. Duffel*, 41 La. Ann. 557, 6 So. 514.

31. *Whitmore v. Brown*, 102 Me. 47, 65 Atl. 516.

32. *Proprietor of Maine Wharf v. Proprietors of Custom House Wharf*,

85 Me. 175, 27 N. E. 93, per Peters, C. J.: "The respondents urge objections to the complainant's claim: First. That a remedy at law should be first resorted to. This proposition is that a court of equity will not undertake to restrain or remove an alleged nuisance until a court of law has first established the existence of

fact that a wharf is unsightly and obstructs the view from an adjoining residence lot and thereby reduces the value of the residence, is held not to infringe any legal right of the owner or tenant of such lot and not to give him any right to an abatement by suit or otherwise.³³ And a wharf extending beyond the wharf line established by statute is not of itself a nuisance of such a character as to justify an injunction at the instance of a private citizen.³⁴ And where a party sought to enjoin another from wharfing out into a harbor, it was decided that equitable relief for the invasion of a private right could not be had at the suit of an individual

the nuisance, excepting where an immediate and irreparable injury be threatened, or the complainants are deprived of the use of property long enjoyed by them without question or interruption. The answer to this objection is that the right of the complainants has been substantially and sufficiently settled by the law. To be sure, the legal controversy was commenced by an action of trespass, in which the allegation was that the respondents had encroached upon the land of the complainants (or their predecessors in title) by an erection thereon extending from high to low-water mark; but when the court settled the rights of the parties, so far as pertaining to land or flats above low-water mark, it settled their relative rights with each other beyond low-water mark. The one case settles the other. It is really but one controversy, nothing appearing to indicate the contrary. The presumption is that an owner of land fronting on the sea, has, as such owner, the right of egress and ingress from and to his land over deep water for the whole width of such frontage. The bill asserts such a legal right of the complainants, and the demurrer confesses it. Another objection against

the bill is that it discloses facts from which it is clearly perceivable that the complainants have a complete and adequate remedy at law for all supposable injury suffered by them. That is not so. Frequent annoyances may be occasioned by the encroachment which would be remediless at law. The injuries may be small, but would be many, and not easily measurable in damages; and the disfiguration caused by the overlapping structure, if allowed to remain, would be a blemish upon complainants' property. Furthermore, the complainants desire to have their premises clear of all unauthorized occupation or obstruction, and are entitled to have them so. Equity will restrain the continuance of a nuisance by injunction whenever substantial damages might be recovered at law, or when the nuisance is permanent, however small the damages. *Crump v. Lambert*, L. R. 3 Eq. 409; *Attorney-General v. Sheffield Gas. Co.*, 3 DeG. M. & G. 304; and see cases cited in note in last case."

33. *Whitmore v. Brown*, 102 Me. 47. 65 Atl. 516.

34. *Harlan & H. Co. v. Paschall*, 5 Del. Ch. 435.

except in the case of a loss or injury which was special and peculiar to the individual, and furthermore, that a complainant in such a case must come into court with clean hands.³⁵ And where a structure itself is lawful as a wharf and the injury or nuisance arises from acts of its owner, excluding the public from their right to its use, an injunction must be sought upon that ground and not upon the ground that the wharf is an obstruction to public navigation, as the two causes of action are declared to be distinct and even antagonistic in character.³⁶

§ 1088. **Nitro-glycerine; public nuisance.**—The owner of a gas well in a city will be enjoined from the accumulation and use of nitro-glycerine at the well in order to increase the flowage of the gas.³⁷ And the fact that the accumulation of nitro-glycerine within the corporate limits of a city is made a crime does not prevent a private citizen from having it enjoined, where in case of explosion he would suffer an injury in life or property not sustained by the public in general.³⁸

§ 1089. **Liquor nuisances; parties.**—While to some extent a statute can legalize what at common law would be a nuisance,³⁹ so also what was before legal at common law may by statute be converted into a nuisance.⁴⁰ This remark applies in several of the

35. *Lane v. Smith Bros.* (Conn. 1907), 67 Atl. 558. See *Jenks v. Miller*, 14 App. Div. (N. Y.) 474, 43 N. Y. Supp. 927.

36. *New York, New Haven & H. R. Co. v. Long*, 72 Conn. 10, 43 Atl. 559.

37. *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 59; *Greenfield Gas Co. v. People's Gas Co.*, 131 Ind. 599, 31 N. E. 61.

38. *People's Gas Co. v. Tyner*, 131 Ind. 277, 31 N. E. 59; *Greenfield Gas Co. v. People's Gas Co.*, 131 Ind. 599, 31 N. E. 61. That an individual may maintain an action for a public wrong if he thereby suffers a peculiar

injury, see *Powell v. Bunger*, 91 Ind. 64; *Ross v. Thompson*, 78 Ind. 90; *Cummins v. Seymour City*, 79 Ind. 491; *McCowan v. Whitesides*, 31 Ind. 235; *Fossion v. Landry*, 123 Ind. 136, 24 N. E. 96; *First Nat. Bank of Mt. Vernon v. Sarlls*, 129 Ind. 201, 28 N. E. 434; *Adams v. Ohio Falls Car Co.*, 131 Ind. 375, 31 N. E. 57.

39. *Titus v. City of Boston*, 161 Mass. 209, 36 N. E. 793; *Taft v. Commonwealth*, 158 Mass. 526, 548, 33 N. E. 1046; *Sawyer v. Davis*, 136 Mass. 239.

40. *Sawyer v. Davis*, 136 Mass. 239, 246.

States to prohibited sales of liquor. Under some of these liquor statutes the plaintiff in an action by a private citizen to enjoin a liquor nuisance is the proper party plaintiff in an action to make a fine, imposed on defendant therein for violation of the injunction, a lien on the property of the person who knowingly permitted such defendant to use it in violating the law and such injunction.⁴¹ A decree restraining a certain person from maintaining a liquor nuisance on certain premises does not apply to a tenant of such person, who is ignorant of the decree, so as to render him liable for contempt in maintaining the nuisance.⁴²

§ 1090. **Liquor nuisance.**—An injunction to abate a liquor nuisance will not lie against persons whose property was occupied by trespassers, who erected a shanty thereon, and illegally sold intoxicating liquors, all of which the owners had no knowledge

41. *Cameron v. Kapinos*, 89 Iowa, 561, 56 N. W. 677, per *Curiam*: "The statutes under which the action of *Cameron v. Frank Kapinos and Lena Kapinos* was brought provide that any citizen residing in the county where a liquor nuisance exists, may, after notice or information of such nuisance given to the county attorney, and neglect or refusal by him to bring suit, institute and prosecute, in the name of the State, an action in equity to enjoin the nuisance, or he may institute such an action in his own name. Chapter 143, Acts 20th Gen. Assem.; chap. 66, Acts 21st Gen. Assem. In either event it is held that the action so instituted is of a public nature, and for the public benefit. *Littleton v. Fritz*, 65 Iowa, 495, 22 N. W. 641; *Applegate v. Winebrenner*, 66 Iowa, 68, 23 N. W. 267; *Geyer v. Douglass* (Iowa), 52 N. W. 113. In *Conley v. Zerber*, 74 Iowa, 700, 39 N. W. 113, it is held that the right thus conferred by statute upon the citizen is a mere naked right to main-

tain the action; that the citizen is permitted to maintain the action for the public benefit. In *Dickinson v. Eichorn*, 78 Iowa, 710, 43 N. W. 620, it is said that in such cases 'the plaintiff, as a citizen of the county, stands for and represents the public.' We have held that a proceeding in such cases to punish for a contempt is properly brought under the title of the equity case. *Manderscheid v. District Court*, 69 Iowa, 242, 28 N. W. 501. It follows, then, that in a proceeding to make the fine imposed in the contempt proceeding a lien upon real estate of one who knowingly permits her premises to be used in thus violating the law, and the order or mandate of the court, it is proper that the same person be plaintiff as in the original equity action and in the contempt proceeding."

42. *Newcomer v. Tucker*, 89 Iowa, 486, 56 N. W. 499, per *Rothrock, J.*: "The case appears to be in all respects like *Buhlman v. Humphrey* (Iowa), 53 N. W. 318, where it was

till service on them of the petition, when they abated the nuisance; nor is the property subject to a lien for costs and attorneys' fees in respect to the injunction.⁴³ In an action to enjoin defendants from keeping a place for the sale of intoxicating liquors, the evidence showed that the saloon in question was frequently searched, and intoxicating liquors found there; that it was supplied with ordinary saloon furniture, and had concealed a place for keeping liquors; and that the lessor had been subpoenaed as a witness in a former prosecution. It was held sufficient to warrant a decree against the lessor, although the lease contained a stipulation against carrying on any unlawful business in the building, and although an affidavit made by him upon the hearing for a temporary injunction denied any knowledge of the matters set forth in the other affidavits.⁴⁴ As a nuisance cannot be abated, with or without legal process, if it has been discontinued, and has not been renewed when proceedings are begun against it,⁴⁵ an injunction cannot issue under the laws of New Hampshire to abate a liquor nuisance, unless the illegal use of the premises exists at the time of filing the

held that a subsequent purchaser of the premises, or his lessee, was not liable for the violation of the injunction, because he was not within the terms of the decree. In that case counsel for the attachment for contempt insisted that the case of *Silvers v. Traverse*, 82 Iowa, 52, 47 N. W. 888, was authority for sustaining the proceedings in contempt. But this position was not sustained by this court, because in the last-named case the decree enjoined 'all persons from using or occupying the premises for the unlawful keeping or traffic in intoxicating liquors.' The cases were therefore held to be distinguishable."

43. *State v. Lawler*, 85 Iowa, 564, 52 N. W. 490.

44. *Littleton v. Harris*, 73 Iowa, 167, 34 N. W. 800. Where, in an action for the abatement of a nuisance,

and to enjoin the defendants from maintaining and continuing the same, it is alleged in the petition that, in a building which is specifically described, the defendants had established and were maintaining a place for the sale of intoxicating liquors contrary to the statutes of the State, and that in said building they kept such liquors for sale contrary to law, and then sold the same unlawfully, the allegations, if not controverted, must be taken as true; and in such case it is not necessary, in order for the plaintiffs to recover, to introduce any evidence whatever. *Peisch v. Linder*, 73 Iowa, 766, 33 N. W. 133; *Bloomer v. Glendy*, 70 Iowa, 757, 30 N. W. 486.

45. *State v. Noyes*, 30 N. H. 279, 298. But see *Judge v. Kribs*, 71 Iowa, 324, 32 N. W. 324.

petition.⁴⁶ And where a statute provides certain remedies only in the case of a liquor nuisance and injunction is not one of them, such relief will not be granted.⁴⁷ Again, where a statute so provides, a proceeding in equity brought to enjoin a liquor nuisance is to be governed by the general rules of equity pleading, but it is not subject in every respect to the strictness of such pleading.⁴⁸ A judgment enjoining a liquor nuisance will not be disturbed if there is any evidence to sustain it, though an apparent preponderance of the testimony may be against the finding and judgment.⁴⁹

§ 1091. **Liquor saloons, etc.; pharmacy.**—A complaint alleged that plaintiff had located his home in a quiet part of a city, near numerous churches, schools, and female colleges, and among neighbors who were attendants on such places; that defendant lessee had opened and maintained a liquor saloon on the adjoining lot, within ten feet of plaintiff's residence; that people were invited to and did assemble there to drink intoxicants; that defendant lessor knew the premises were to be used for the sale of intoxicants by the drink; and that the maintenance of the saloon had reduced both the selling and the rental value of plaintiff's home nearly one-half, and had rendered such home odious and offensive to plaintiff. It was held that the complaint stated a cause of action

46. *State v. Saunders*, 66 N. H. 39, 25 Atl. 588. Code W. Va., ch. 32, § 18, provides that "all houses, buildings, and places of every description where intoxicating liquors are sold or vended contrary to law shall be held, taken, and deemed to be common and public nuisances, and may be abated as such upon the conviction of the owner or keeper thereof, as hereinafter provided; and courts of equity shall have jurisdiction by injunction to restrain and abate any such nuisance upon bill filed by any citizen." It was held that a court of equity cannot restrain by injunction a party charged with selling intoxicating liquors contrary to law, or abate the house, building or place

where such intoxicating liquors are alleged to be sold contrary to law, until the owner or keeper of such house or place has been convicted of such unlawful selling at the place named in the bill. *Hartley v. Hennessey*, 35 W. Va. 222, 13 S. E. 375; *Lutes v. Riley*, 35 W. Va. 222, 13 S. E. 375; *Stidger v. Keiley*, 35 W. Va. 222, 13 S. E. 375; *Dick v. Kull*, 35 W. Va. 222, 13 S. E. 375.

47. *Northern P. R. Co. v. Whalen*, 149 U. S. 157, 13 Sup. Ct. 822, 37 L. Ed. 686.

48. *Wright v. O'Brien*, 98 Me. 196, 56 Atl. 647.

49. *Sickinger v. State*, 45 Kan 414, 25 Pac. 868.

against both the saloon keeper and his lessor for damages for the maintenance of a nuisance, and that plaintiff was entitled to an injunction.⁵⁰ A pharmacist having a permit to sell intoxicating liquors for medical purposes, but who sells the same without re-

50. *Haggart v. Stehlin*, 137 Ind. 43, 35 N. E. 997, per McCabe, J.: "The complaint at bar makes the injury partake somewhat of a public or common nuisance, in that it shows injury probable to others in the neighborhood. But a nuisance may be both public and private. Wood, Nuis., § 674, 16 Am. & Eng. Enc. Law, 930, and authorities cited. But where the damage or injury to one is more than to the public, however slight, or where he sustains a special damage not common to all, he may maintain a private action. Wood, Nuis., §§ 14-16, 672. The facts stated in the complaint, and admitted by the answer and demurrer to be true, show the injury to be greater to appellants than to the public. It is to be observed that the facts alleged in the complaint, and admitted to be true by the demurrer and answer under consideration, do not bring the case within the definition of that sort of a nuisance by Mr. Wood. But he was speaking about what it would take to make a drinking saloon a nuisance in any and every locality. In section 9 he says: 'The locality, the condition of property, and the habits and tastes of those residing there, divested of any fanciful notions, or such as are dictated by dainty modes and habits of living, are the tests to apply in a given case. In the very nature of things, there can be no definite or fixed standard to control every case in any locality. The question is one of reasonableness or unreasonableness in the use of

property, and this is largely dependent upon the locality and its surroundings.' And in section 10 he says: 'The diminution of the market value of adjacent buildings by such use will not of itself make it a nuisance, but there is a limit to such a right. No man is at liberty to use his own property without reference to the health, comfort, or reasonable enjoyment of like public or private rights by others. Every man gives up some things of his absolute right of dominion and use of his own, to be regulated or restrained by law, so that others may not be hurt or hindered unreasonably in the use or enjoyment of their property. This is the fundamental principle of all regulated civil communities, and without it society could hardly exist, except by the law of the strongest. This illegal, unreasonable, and unjustifiable use to the injury of another or of the public, the law denominates a nuisance.' In *Hackney v. State*, 8 Ind. 494, in a prosecution of a nuisance in keeping a tenpin alley, it is said: 'Thus, anything offensive to the sight, smell, or hearing, erected or carried on in a public place where people dwell or pass, or have a right to pass, to their annoyance, is a nuisance at common law.' In *Baumgartner v. Hasty*, 100 Ind., at page 576, it is said: 'A wooden building is not in itself a nuisance, . . . but when erected where it endangers the safety of adjoining property, it may become a nuisance.' It is no mere fanciful notion, dictated by dainty

quiring the applicant therefor to make the statutory affidavit, may be enjoined, under the statute declaring all places where intoxicating liquors are sold in violation of the statute, to be nuisances which may be perpetually enjoined.⁵¹ But where there is no statute

modes and habits of living, that makes one who has located his home in a quiet, peaceful part of a city in the immediate neighborhood of numerous churches, Sunday schools, common schools, female colleges, and among neighbors who are attendants upon such places, and out of the reach of the busier haunts of the business part of the city, to protest and object to the maintenance of a saloon on the adjoining lot, and within ten feet of such residence, where drinking people are invited to and do assemble to drink intoxicating liquors, with all the incidents usually attendant upon such a place. There are very few people, indeed, who would not object and protest and be seriously annoyed thereat. Even the man who frequents such a place to drink would, as a general thing, object to the traffic obtruding itself within ten feet of his threshold; especially where it is alleged and admitted, as here, that it has so injured the appellants' property both for selling and rental purposes. We think, therefore, that the complaint stated facts sufficient as against Stehlin to constitute an actionable nuisance. Did it state a good cause of action against appellee Heidt? It states that he rented the property to appellee Stehlin for the purpose of being used for a saloon, and received \$50 per month because of that fact, and that the property would not rent for more than \$25 per month for any other use. The landlord is liable where he rents his premises for the

purpose of the establishment thereon of a nuisance. Wood, Nuis., §§ 30, 31. The court, therefore, erred in sustaining Heidt's demurrer to the complaint. Did the license set up in the answer of Stehlin constitute a justification? We are of opinion that it did not. It did not enlarge his rights, but restricted them within narrower limits than they were before, and without any statute on the subject. It was a certificate only that he had been put under bond to keep the peace, and paid the license fees, and was thereby permitted to sell. Notwithstanding his payment of the large sums of money for license fees both to the country and city, his license could be revoked without refunding his money. *State v. Bonnell*, 119 Ind. 494, 21 N. E. 1101; *Board v. Kreuger*, 88 Ind. 231; *Moore v. City of Indianapolis*, 120 Ind. 483, 22 N. E. 424. It is no contract; it is a mere permit given to sell in the exercise of the police power of the State, and may be withdrawn at any time. *McKinney v. Town of Salem*, 77 Ind. 213."

51. *State v. Davis*, 44 Kan. 60, 24 Pac. 73; *McClain's Code* (Iowa), § 2389, which provides that, where a place used for the unlawful manufacture and sale of intoxicating liquors is declared a nuisance, the court shall order the same to be securely closed "against the use and occupation of the same for saloon purposes," applies not only to such places as are used for retailing intoxicating liquors, but also to all

making unlawful sales of liquors a nuisance, it is held that even though the sales violate the law as to illegal selling, equity will not assume jurisdiction to enjoin a dispensary carrying on such business in a certain county.⁵²

§ 1092. Enjoining saloon where railroad workmen drink.—

A railroad company cannot, under general principles of equity or the provisions of the Code of Washington Territory, have an injunction as for a nuisance against the keepers of saloons near the line of its road at which its workmen are in the habit of getting drunk.⁵³ The only ground on which, independently of express statute, a court will grant an injunction in a private action for a nuisance at the suit of a corporation, is special injury to the plaintiff's property;⁵⁴ and the above-mentioned codal provisions are aimed at nuisances which affect the public morals or the public peace, and afford no countenance for a private action unless by an owner of property, the use or enjoyment of which is especially affected by the existence of such a nuisance in its immediate neighborhood.⁵⁵

§ 1093. Dumping board on city wharf.—The building of a dumping board by the street cleaning department of a city on the half of a public pier used by the city for the purpose of loading on vessels the refuse of the city, where it obstructs the loading and unloading of vessels on the other half of the pier, and reduces the amount of wharfage, inflicts on the owner of such other half a special injury different from that suffered by the public in general, which entitles him to an injunction. And a city, sheltering itself under authority of law from liability for acts which

places used for the unlawful manufacture, sale, or keeping for sale, of intoxicating liquors. *Craig v. Werthmueller*, 78 Iowa, 598, 43 N. W. 606. As to sufficient evidence of illegal sales of liquor, see *Tibbetts v. Burster*, 76 Iowa, 176, 40 N. W. 707; *Rice v. Schlopp*, 78 Iowa, 753, 41 N. W. 603; *State v. Matheison*, 77 Iowa, 485, 42 N. W. 377.

52. *Pike County Dispensary v. Town of Brundage*, 130 Ala. 193, 30 So. 451.

53. *Northern Pac. R. Co. v. Whalen*, 149 U. S. 157, 37 L. Ed. 686, 13 Sup. Ct. 822.

54. *Georgetown v. Alexandria Canal Co.*, 12 Pet. (U. S.) 91, 99; *Robinson v. Kilvert*, L. R. 41 Ch. D. 88.

55. *United States v. Columbus*, 5

between individuals would be a nuisance, must show an express or clearly implied authority from the powers conferred.⁵⁶

§ 1094. **Sewage and sewers.**—When a municipal corporation discharges, or threatens to discharge sewage directly upon private lands from the outlet of a permanent sewer without having acquired the right to do so the owner of the land is entitled to an injunction to restrain the nuisance and is not confined to a recovery of dam-

Cranch C. C. 304; *Meyer v. State*, 41 N. J. Law, 6; *Hamilton v. Whitridge*, 11 Md. 128; *Inchbald v. Robinson*, L. R. 4 Ch. App. 388.

56. *Hill v. Mayor, etc.*, 139 N. Y. 495, 34 N. E. 1090, per Finch, J.: "The witnesses tell us how the ashes and refuse fall off from the scows into the water, and nearly double the amount of dredging necessary to be done on the plaintiff's side of the pier, and how they are borne by the wind in clouds, thick, and not quite fragrant, over all the vicinity. It is apparent and beyond reasonable question that what the city has done and is doing on its half of the pier is something far removed from its proper and normal use, which, as between individuals, would be an undoubted nuisance, and which inflicts upon this plaintiff a special damage beyond that suffered by the public. But to this the city answers that what it has done has been under the authority of law; that, as a municipal corporation, engaged in the performance of a public duty, upon which the public health and comfort depends, and acting by express authority of the legislature, it is not liable for consequential injuries resulting to others, even though its acts would amount to a nuisance as between individuals. It cites abundance of authority for the general doc-

trine, running from *Radcliff v. Mayor*, 4 N. Y. 195, and *Bellinger v. Railroad*, 23 N. Y. 42, down to *Atwater v. Trustees*, 124 N. Y. 602, 27 N. E. 385. We need not discuss the cases, or consider how broadly the doctrine should be permitted to operate, since one condition or limitation has been firmly grafted upon it, which raises the final and ultimate question in the case before us. That limitation is that the authority which will thus shelter an actual nuisance must be express, or a clear and unquestionable implication from powers conferred, should be certain and unambiguous, and such as to show that the legislature must have contemplated the doing of the very act in question. For, consider what the proposition is. It upholds a positive damage to the citizen, and denies him any remedy; it infringes his normal and recognized rights with absolute impunity; it sets a nuisance at his door, utterly unbearable, and requires him to bear it. Surely, an authority which so results should be remarkably strong and clear. In *U. S. v. Fisher*, 2 Cranch, 390, Chief Justice Marshall said: 'Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible

ages in action of trespass.⁵⁷ And a parol license permitting a city to discharge the sewage from a particular district on private property does not authorize the discharge of the sewage from a much larger territory; and the licensor is entitled to an injunction against such increased discharge, and is not confined to a legal action for damages.⁵⁸ And where a sewer which drains the greater part of a village flows in an unnatural course, and empties upon a farm, creating such a stench that a person cannot work upon the farm in that locality without vomiting, such sewer constitutes a nuisance, which a court of equity will enjoin without a previous adjudication in an action at law.⁵⁹ And where a person as owner of a sewer has an exclusive right to its use, an injunction may be had against its use by another.⁶⁰ But where citizens are required to use a certain sewer, the construction of which has been author-

clearness to suppose a design to effect such objects.' In *Cogswell v. Railroad Co.*, 103 N. Y. 10, 8 N. E. 537, Judge Andrews said: 'But the statutory sanction which will justify an injury to private property must be express, or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury.' And in *Bohan v. Gaslight Co.*, 122 N. Y. 18, 25 N. E. 246, the same rule was asserted and applied."

57. *Stoddard v. Saratoga Springs*, 127 N. Y. 261, 27 N. E. 1030; *Chapman v. Rochester*, 110 N. Y. 273, 18 N. E. 88; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67; *Beach v. Elmira City*, 22 Hun, 158; *Poughkeepsie Gas Co. v. Citizen's Gas Co.*, 89 N. Y. 493.

Though the governor, as authorized by Laws N. Y. 1880, ch. 322, as amended by Laws 1882, ch. 308, has declared a discharge of sewage to be a nuisance to the public health, and has ordered its abatement by the city council, a proceeding to enjoin the council from diverting the sewage

does not fall within Code Civil Proc., § 605, providing that injunctions to restrain State officers from the discharge of their statutory duties shall only be granted at general term. *Vick v. City of Rochester*, 46 Hun (N. Y.), 607.

In an action to enjoin a city from discharging sewage into a creek, on the ground that it will pollute the ice in plaintiff's pond, 13 miles down the stream, a preliminary injunction will be set aside when the proof preponderates in favor of the absence of injury, and the case can be tried on its merits before another winter, and plaintiff's ice cannot be injured in the meantime. *Finger v. City of Kingston*, 9 N. Y. Supp. 175.

Nuisance must be clearly shown to exist.—*Robb v. La Grange*, 158 Ill. 21, 42 N. E. 77.

58. *New York Cent. R. Co. v. City of Rochester*, 127 N. Y. 591, 28 N. E. 416; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67.

59. *Dierks v. Commissioners*, 142 Ill. 197, 31 N. E. 496.

60. *Boyden v. Walkley*, 113 Mich. 609, 71 N. W. 1099.

ized by law, the fact that sewage is cast upon the land of an individual as a result of the manner in which the system was constructed, does not authorize the granting of an injunction restraining the citizens from using it.⁶¹ And where the connection of a drain does not appreciably affect the amount of sewage carried off by a sewer, the possibility that such drain will be followed by others that will eventually overtax the capacity of the sewer is too remote a danger to be the subject of equitable relief.⁶² And an injunction will not lie to restrain the trustees of a village from maintaining an iron grating at the opening of a sewer, used to convey the surface water away from the roadbed of a street, on the ground that the accumulation of sticks and leaves at such grating obstructs the flow of water, and causes it to overflow on plaintiff's land; for to remove the grate would endanger the safety of the traveling public, and the village would be liable in damages if guilty of neglect in not keeping the grate free and unobstructed.⁶³

§ 1095. **Party walls.**—Where a party wall is required by law to be a solid wall of brick or stone and without openings, a lot owner may be restrained by injunction from building a party wall with windows in it.⁶⁴ And one who has by user acquired the right to use an adjoining wall as a party wall may be enjoined from constructing a roof on the wall in such a manner as to shed water and ice onto plaintiff's premises.⁶⁵ In accordance with the familiar principle that he who seeks equity must do it, if plaintiff's wall projects over defendant's land, the defendant will not be enjoined from using it as a party wall.⁶⁶

§ 1096. **Nuisances to dwelling houses.**—A person who resides in a populous community or a manufacturing neighborhood cannot have an injunction to prevent all noise, and smoke, and jar, and

61. *Carmichael v. Texarkana*, 93 Fed. 561; *Brown v. Dunstable* (1899), 2 Ch. 378.

62. *Springer v. Walters*, 139 Ill. 419, 28 N. E. 761.

63. *Paine v. Village of Delhi*, 116 N. Y. 224, 22 N. E. 405.

64. *Vollmer's Appeal*, 61 Pa. St. 118.

As to party walls, see § 1012 herein.

65. *Brooks v. Curtis*, 4 Lans. (N. Y.) 283.

66. *Guttenberger v. Woods*, 51 Cal. 523.

vibration, and occasional odors, but must to a large extent surrender his tastes, pleasures, and preferences to the preferences and interests of the many. Personal enjoyment must often yield to the demands of trade and manufacture.⁶⁷ The maxim, *sic utere*

67. *Smelting Co. v. Tipping*, 11 H. L. Cas. 642; *Evans v. Reading Fertilizing Co.*, 160 Pa. St. 209, 28 Atl. 702, per *Curiam*: "Thus, in *Sparhawk v. Railway Co.*, 54 Pa. St. 401, the alleged nuisance consisted of the rumbling of the street cars in the city of Philadelphia, causing mental discomfort to the complainant. The injunction prayed for was refused in part, because the discomfort was of a mere personal character, incident to the surroundings. In *Richards' Appeal*, 57 Pa. St. 105, the facts found showed the use of a fuel in defendant's works which polluted the air with soot and smoke, annoying, in certain conditions of the atmosphere, the occupants of plaintiff's house and the operatives in his factory, and to a slight extent injuring his buildings. Page 108. This injury was such as to be deemed capable of compensation at law, and wholly inadequate to warrant a destruction of the defendant's business; and the former, being a mere personal inconvenience, inseparable from a manufacturing neighborhood, insufficient to ground an injunction. In *Rhodes v. Dunbar*, 57 Pa. St. 274, an injunction was sought against the erection of a building for a certain purpose, on the grounds of (a) probable pollution of the air by soot and smoke, (b) likelihood of personal discomfort resulting to complainant from the noise of the proposed business, and (c) apprehension of danger to neighboring buildings from fire capable of being communi-

cated to them in the event of the objectionable structure being burned. In the absence of all proof of actual present or certain future damage, it was held that the first of these grounds could constitute only a personal annoyance or inconvenience of a kind incident to the surroundings; the second, clearly of the same character, was unsustainable by the proofs; and the third, being a mere apprehension, speculative, eventual, and contingent, could not form the basis of equitable interference, even conceding the tendency of the possible prospect of danger from fire to diminish the value of complainant's property by increasing the rate of insurance, because 'mere diminution [of value], irrespective of any direct damage, is not a ground for injunction.' Page 290. Accordingly, the latter was refused. *Huckenstine's Appeal*, 70 Pa. St. 102, is another case in the same line. The allegation of injury to plaintiff's property was considered disproved, or at least too doubtful, under the evidence, to be of any weight. The remainder of the bill relied upon the annoyance arising from the smoke of brickkiln upon the outskirts of Allegheny City, 'whose every-day cloud of smoke from the thousands of chimneys and stacks hangs like a pall over it, obscuring it from sight' (page 107), with which 'the heat, smoke and vapor of a brickkiln cannot compare,' page 106. This was held personal discomfort, to which the complainant, in common with others who lived there, had voluntarily subjected

tuo ut alienum non laedas, is not to be construed in civilized society as meaning that one must never use his own so as to do any injury to his neighbor or his property. A city resident must patiently endure the dirt, smoke, odors, noise, and confusion incident to city life. A use of property in one locality and under some circumstances may be lawful and reasonable which in another place and other circumstances would be an insufferable nuisance.⁶⁸ The noise and vibrations of machinery, necessarily made in conducting a lawful business in a neighborhood exclusively devoted to manufacturing purposes, will not be enjoined because it disturbs the occupant of an adjoining building, where it is not shown that the latter's business has been injured.⁶⁹ And the operation of cement works located in a manufacturing district will not be restrained as a nuisance on account of the dust therefrom, it appearing that the dust from other factories and from the streets causes equally as much annoyance and injury as that from the works complained of.⁷⁰ And an injunction will not be granted against

himself. It is to be observed that this decision, as well as that in *Rhodes v. Dunbar*, *supra*, and in the later case at law of *Price v. Grantz*, 118 Pa. St. 402, 11 Atl. 794, largely relies upon and cites from *Smelting Co. v. Tipping*, *supra*. In *McCaffrey's Appeal*, 105 Pa. St. 253, the bill went no further than to allege annoyance and discomfort from noise and vibration, caused by defendant's machinery. The vibration was disproved, except as arising from the passage of vehicles in the street. The noise was shown to amount to little more than 'the breakers on a distant beach.' The place was in the heart of a large city. Of course, there was no injunction."

68. *Dorsey v. Allen*, 85 N. C. 358; *Hyatt v. Myers*, 73 N. C. 233; *Salvin v. North Brancepeth Coal Co.*, L. R. 9 Ch. App. 705, per James, L. J.: "If some picturesque haven opens its arms to invite the commerce of the

world it is not for this court to forbid the embrace, although the fruit of it should be the sights, and sounds, and smells, of a common seaport and ship-building town, which would drive the Dryads and their masters from their ancient solitudes." In *Tuttle v. Church*, 53 Fed. 422, Colt, J., said: "The inconvenience must not be fanciful, or one of mere delicacy, but an inconvenience interfering with the ordinary physical comfort of human existence. *Walter v. Selfe*, 4 DeG. & S. 315, 322; *Crump v. Lambert*, L. R. 3 Eq. 409; *Soltau v. DeHeld*, 2 Sim. (N. S.) 133; *Cooke v. Forbes*, L. R. 5 Eq. 166; *Ross v. Butler*, 19 N. J. Eq. 294; *Attorney-General v. Stewart*, 20 N. J. Eq. 415; *Duncan v. Hayes*, 22 N. J. Eq. 25; *Columbus Gas Co. v. Free-land*, 12 Ohio St. 392."

69. *Straus v. Barnett*, 140 Pa. St. 111, 21 Atl. 253.

70. *Roscoe Lumber Co. v. Stand-*

the operation of a furniture factory whose noise is alleged to be a nuisance as to plaintiff, living near by, where the evidence is conflicting, but shows that the locality is noisy from other causes as well, and an action at law for damages arising from the alleged nuisance is pending and to be tried by jury.⁷¹ But if a business is offensive to such a degree as to materially interfere with ordinary physical comfort, measured not by the standard of persons of delicate sensibilities and fastidious habits, but by the habits and feelings of ordinary people, and the damages are of a nature which cannot be adequately compensated for in an action at law, a court of equity will grant an injunction.⁷² So one who is operating a factory may be restrained from using soft coal in such a manner as to cause injury and annoyance to one who resides nearby, where the locality is one used for country homes. In such a case, however, it is held proper to grant the injunction subject to a modification permitting the defendants to burn soft coal upon proof of such a change of facts as to make such use of its property no longer unreasonable.⁷³ And baseball games may be conducted in such a manner as to be a nuisance, in which case an injunction against their being so conducted may be granted at the suit of one residing on adjoining property.⁷⁴ And where blasting is being done in an improper manner, and in such a way as to cause or threaten injury to adjoining property, its continuance in such a manner may be enjoined at the suit of the occupant of such property.⁷⁵

§ 1097. **Noise and vibration.**—There is a distinction between injuries which affect the air merely by way of noises and disagreeable gases, resulting in personal discomfort, and those which

and Silica Cement Co., 62 App. Div. (N. Y.) 421, 70 N. Y. Supp. 1130.

71. *Powell v. Bentley Furniture Co.*, 34 W. Va. 804, 12 S. E. 1085.

72. *Wente v. Commonwealth Fuel Co.*, 232 Ill. 526, 83 N. E. 1049.

73. *McCarty v. Natural Carbonic Gas Co.*, 189 N. Y. 40, 81 N. E. 549.

74. *Cronin v. Bloemcke*, 58 N. J. Eq. 313, 43 Atl. 605.

75. *Hill v. Schneider*, 13 App. Div. (N. Y.) 299, 43 N. Y. Supp. 1; *Seebeck v. Pucci*, 8 App. Div. (N. Y.) 628, 40 N. Y. Supp. 1149.

Where an independent contractor is doing the blasting the injunction should be directed against him and not the owner. *Hill v. Schneider*, 13 App. Div. (N. Y.) 299, 41 N. Y. Supp. 1.

injuriously affect the land itself, or structures upon it. As to the former, each person living in society must submit to a degree of discomfort depending in some measure upon the circumstances of his residence. As to the latter, the owner or occupant of land is entitled to enjoy it free from any direct injury which will appreciably affect its value, and to restrain by injunction any noise or vibration which is clearly shown to cause such injury.⁷⁶ And in

76. In *Sturges v. Bridgman*, L. R. 11 Ch. D. 852, where the injunction was granted, the case was one mainly of noise, and though the element of vibration was mentioned, the judges dealt altogether of noise. This same may be said of *Gaunt v. Fynney*, L. R. 8 Ch. App. 9, where the injunction was refused. *Hennessy v. Carmony*, 50 N. J. Eq. 616, per Pitney, V. C.: "The serious and troublesome question in the case is as to whether the vibration established is of such a degree as to entitle the complainant to the aid of this court. Upon reason and authority I think there is a clear distinction between that class of nuisances which affect air and light merely, by way of noises and disagreeable gases, and obstruction of light, and those which directly affect the land itself, or structures upon it. Light and air are elements which mankind enjoy in common, and no one person can have an exclusive right in any particular portions of either; and, as men are social beings, and by common consent congregate, and need fires to make them comfortable and to cook their food, it follows that we cannot expect to be able to breathe air entirely free from contamination, or that our ears shall not be invaded by unwelcome sounds. Thus, my neighbor may breathe upon my land from his, and the smoke from his house

fire and the vapor from his kitchen may come on to my land, or he may converse in audible tones while standing near the dividing line, and all without giving me any right to complain. So my neighbor and I may build our houses on the line between our properties, or have a party wall in common, so that we are each liable to hear and be more or less disturbed by the noise of each other's family, and cannot complain of it. In all these matters of the use of the common element air we give and take something of injury and annoyance, and it is not easy to draw the line between reasonable and unreasonable use in such cases, affecting, as they do, mainly the comfort, and, in a small degree only, the health, of mankind. In attempting to draw this line, we must take into consideration the character which has been impressed upon the neighborhood by what may be called the 'common consent' of its inhabitants. But when we come to deal with what is individual property, in which the owner has an exclusive right, the case is different. While my neighbor may stand by my fence on his own lot, and breathe across it over my land, and may permit the smoke and smell of his kitchen to pass over it, and may talk, laugh and sing or cry, so that his conversation and hilarity or grief is heard in my yard, he has no right

an action to restrain an electric light company from so operating its plant as to cause a nuisance by the noise and vibration to the lessee of adjoining premises, it was decided that there must be an injunction during the continuance of plaintiff's lease to restrain the defendant company, its servants, directors and agents from using or working or causing or permitting to be used or worked, in

to shake my fence ever so little, or to throw sand, earth or water upon my land in ever so small a quantity. To do so is an invasion of property, and a trespass, and to continue to do so constitutes a nuisance; and, if he may not shake my fence or my house by force directed immediately against them, I know of no principle by which he may be entitled to do it by indirect means. I think the distinction between the two classes of injury is clear. At the same time it would seem that it has, in appearance at least, been frequently overlooked by able and careful judges, and the same rules as to the degree of the injury which will justify judicial interference applied to each class. The distinction between the two classes of injuries was pointed out by Lord Westbury in *Smelting Co. v. Tipping*, 11 H. L. Cas. 642, 11 Jur. (N. S.) 785, 116 E. C. L. 1093. Looking at the instances in which a court of equity has granted relief in cases like the present, we have, in this State, the case of *Demarest v. Hardham*, 34 N. J. Eq. 469, in which the report shows a vibration probably somewhat greater than that shown by the evidence in this case. There the parties occupied adjoining buildings whose walls touched, and complainant manufactured harness, and defendant operated steam printing presses, and the vibratory force was not, as here, transmitted many feet through the

earth. But I think the right of action at law is quite as clear in the case in hand as it was in *Demarest v. Hardham*. In *Hurlbut v. McKone*, 55 Conn. 31, 10 Atl. 164, there was a vibration of the same character and degree, as near as may be, as that shown in this case. 'The windows rattle in the casings; dishes and other like things standing on the table or on shelves will shake and jolt together.' There was, however, in that case, an additional element of dense smoke, like that enjoined in *Ross v. Butler*, 19 N. J. Eq. 294, and there was proof that the health of a person living in the house was seriously affected by the general nuisance. In *McKeon v. See*, 51 N. Y. 300, the action was for both damages and an injunction under the New York Code, and the trial judge found that the action of the defendant's machinery, used to saw marble, produced a jarring and shaking of complainant's two houses, injuring the same, and amounting to a nuisance (the degree of vibration was not stated), and gave judgment for \$967—apparently for loss of rent—with an award of an injunction. The general term of the Supreme Court struck out the judgment for damages, but made the injunction perpetual. The Court of Appeals affirmed this judgment. A case similar in its circumstances to the last is *Goodall v. Crofton*, 33 Ohio St. 271. There the Superior

or upon their generating station and other works adjacent to the plaintiff's garden, any engines, dynamos, or other machinery, or for the carrying on the manufacture of gas or any other process, in such manner as, by the production of noise, noxious or offensive smells, vibration or otherwise, to be or occasion nuisance or injury to the plaintiff as lessee or occupier of the house, garden, and

Court of Cincinnati enjoined the operation of a marble and stone sawing and dressing mill, because it caused a jarring and vibration of complainant's house on the adjoining premises, and the Supreme Court, on error, reversed this judgment, on the ground that in Ohio the court will not interfere by injunction when a party had an adequate remedy at law in damages, which they held he had in this case. I have already shown, to my own satisfaction at least, the vice of that position, and cannot but think that the judgment of the lower court was correct. Several other instances of relief against noise combined with vibration are given in Wood on Nuisances, sections 553-556; and in section 769 *et seq.* he treats of the remedy in this court. It was said in the Ohio case that it was argued here that, if this court is to enjoin a vibration of this character, then it must also enjoin the passage of vehicles on the street, which shake the dwellings or the adjoining houses. But the case is quite distinguishable. A man builds his house on the street subject to the right of the public to pass upon it with all its annoyance of noise and jar from passing vehicles. This right of passage is a public necessity and benefit, as well as an advantage to the dwellers thereon, and, where the land has been taken by condemnation proceedings, the injury, if any, to result from its proximity to the street is presumed to

have been taken into consideration. Where it has been dedicated, of course there can be no cause of action. Another objection taken was that, if the fact that the vibration as felt in this case is due to the presence of an underlying layer of quicksand, then the defendant should not be held responsible for it. I am unable to discover any strength in that position. I do not see how the fact that nature has provided a very convenient medium through which my neighbor may injure my property should be held to give him the right to injure it. Nor do I think that the presence of this quicksand renders it impracticable for the defendant to remedy the nuisance without stopping his works. Capt. Ward suggests that he should drive piles for a foundation to his machines. There was no proof as to whether it was impossible to reach solid ground with masonry, but it seems to me probable from the evidence that there will be no difficulty in so doing, and that, at a comparatively trifling expense, the defendant may so arrange matters that his neighbors will not be annoyed by his machinery. The result of a careful review of the evidence upon my mind is to lead me to the conclusion that the degree of injury is such as to entitle the complainant to damages in an action at law, with the result that he is entitled to an injunction in this court. The injury, to be actionable, must be sensible

premises comprised in her lease.⁷⁷ And the carrying on of a business at unreasonable hours which produces noise to the annoyance and substantial discomfort of residents in the neighborhood, constitutes a nuisance which a court of equity will restrain.⁷⁸

§ 1098. **Same subject.**—Noise incident to lawful trade or business will not ordinarily be enjoined as a nuisance, unless it is ill-timed or unusual in the locality where it occurs, and causes discomfort to persons who are not supersensitive to noise. This rule is applied to the noise and vibration of machinery in an adjoining building, and in such case an injunction should not be granted until after a trial upon the merits.⁷⁹ But, though the noise from

and appreciable, as distinguished from one merely fanciful, and in a case like this I assume, for present purposes, that it must have the effect of rendering the premises less desirable, and so less valuable for ordinary use and occupation. Now, it seems to me that a vibration that causes the windows and doors of a house to rattle in their casings, and dishes on the shelves to rattle and move on one another, and the walls to crack, and is distinctly felt by persons in the house, would have such effect, and is therefore actionable; while smoke and noise might have a similar effect in rendering the house less desirable without being actionable, because the degree of discomfort would not be sufficiently great to reach the standard (if, indeed, any standard has been established) applied to that class of injuries. See *Walter v. Selfe*, 4 DeG. & S. 318, 20 Law J. Ch. 434, 15 Jur. 416; *Ross v. Butler*, 19 N. J. Eq. 294, 299, 306. There is evidence tending to show that complainant made little or no complaint with regard to this vibration until about the time the bill was filed, when the invasion of his

property rights by hanging the stay wire over his land, by driving the filthy stream from the sewer into his kitchen, and the sprinkling of spray over his back yard, seemed to combine to exasperate him. This apparent acquiescence can only be used as evidence that the complainant did not consider the vibration as serious, but I think that is not sufficient in that regard to overcome the weight of the evidence that his house is injured. I will advise a decree that the defendant be restrained from so using his machines as to cause the complainant's house to vibrate, and also from allowing the water and spray from the exhaust of his engines to come onto the complainant's lands."

77. *Knight v. Isle of Wight Elec. L. & P. Co.*, 73 L. J. Ch. 299, 90 Law T. N. S. 410, 68 J. P. 266. Per Joyce, J.

78. *Dennis v. Eckhardt*, 3 Grant Cas. (Pa.) 390; *McCann v. Strang*, 97 Wis. 551, 72 N. W. 1117; *Rushmer v. Rolsue* (1906), 1 Ch. 234.

79. *McGuire v. Bloomingdale*, 8 Misc. R. (N. Y.) 478, 29 N. Y. Supp 580, per Bookstaver, J.: "The plaintiff

the operation of a manufacturing plant may be an inconvenience and discomfort, yet, where it is of the class incident to the neighborhood into which the complainant voluntarily went and re-

seeks to obtain a preliminary injunction pending this action, which shall restrain and enjoin the defendants from running the engines, machinery and electric light plant in their premises; also, from running the pneumatic blower used for the conveying of cash receptables in tubes to and from the rooms and counters in defendants' place of business, and also from loading and unloading goods in front of plaintiff's premises, and also from allowing their employees to stand in front of plaintiff's premises. From the papers it appears that the defendants are drygoods merchants, occupying a large building on the corner of Third avenue and Fifty-ninth street, covering the entire front on Third avenue, and six or eight houses on Sixtieth street, down to the plaintiff's premises. It also appears that the machinery, the running of which the plaintiff seeks to enjoin, is necessary for the proper lighting and heating of their premises. The dynamos complained of are shown by defendants' affidavits to be noiseless, and do not cause vibration of the buildings in which they are used, and that the pneumatic blower creates but little noise. The defendants also deny that they load or unload their wagons in front of plaintiff's premises, or that their employees congregate in front of the same. They show, on the contrary, that all goods are delivered on Fifty-ninth street and not on Sixtieth street. Under all the facts in this case, I do not think the noise, if any, or the vibration are sufficient to constitute a nuisance. Whether noise alone constitutes a nuisance de-

pends upon circumstances. Trifling or occasional noises, dependent upon the ordinary use of property or in pursuance of an ordinary trade or calling, do not ordinarily constitute a nuisance, although those in the neighborhood are disturbed. The quality or character of the noise may be an important element in determining the question of nuisance or no nuisance. The fact that certain persons annoyed are supersensitive is not to be taken into account, the average susceptibility being the test. The matter of locality has much to do with whether it is a nuisance or not. In the case under consideration, the plaintiff's premises are within a few doors of Third avenue, where the elevated railroad and cable railroad are in constant operation, and it is a notoriously busy thoroughfare; and the same is true of Fifty-ninth and Sixtieth streets. In fact, it was claimed on the argument that the lower portion of the plaintiff's premises was itself used for business purposes. One would not choose such a place for quiet or peaceful enjoyment. One dwelling in the midst of a crowded commercial center cannot have or claim the same quiet and freedom from noise or jarring that he could in a quiet country district. Every one taking up his abode in the city must encounter some of the inconveniences and annoyances incident to such communities. As was said by Lord Westbury in *Tipping v. St. Helen's Smelting Co.* (116 E. C. L. R. 608): 'If a man live in a town, of necessity he must submit himself to the consequences of the operation of trade

mained, there is no ground for an injunction.⁸⁰ In Louisiana the location and operation of factories and other works likely to disturb neighbors by reason of smoke, smells, etc., must be determined by the rules of the police or the customs of the place.⁸¹ And where

which may be carried on in his immediate neighborhood, which are actually necessary to trade and commerce, also for the enjoyment of property and for the benefits of the inhabitants of the town. If a man lives in a street where there are numerous shops, and a shop is opened next door to him and is carried on in a reasonable and fair way, he has no ground for complaint because to himself there may arise much discomfort from the trade carried on in that shop.' Hence it is said the production of mere inconvenience resulting from the exercise of trade will not be restrained. *Wood, Nuis.*, 175, 1175. In the case of *Huckenstine App.*, 70 Pa. St. 102, it was held that a court of equity will not restrain the exercise of a trade producing a smoke and injurious vapor where there are similar establishments in the same locality, and I think the same is true of noise. A party may rightfully and lawfully prosecute a lawful business upon premises adjoining his neighbor, without interference from his neighbor, unless the mode of conducting this business has been, or threatens to be, such as to materially injure the plaintiff's property or to interfere with the comfortable existence of such of their tenants as are reasonable people, able and willing to enjoy life 'subject to the inconvenience necessarily resulting from the reasonable use by a neighbor of his own land.' 'It is essential that noise to constitute a nuisance must be unusual ill-timed

or deafening.' The noise produced by the machinery of the defendants in the case under consideration is not, I think, unusual. It is such as is ordinarily incidental to the operation of similar machinery used in the conduct of like business in other parts of the city. So it has been recently held in this court that a blacksmith's forge will not be interfered with because it is not pleasant for the neighbors. *Smith v. Ingersoll Sergeant Rockdrill Co.*, and cases there cited; opinion by Judge Bischoff at equity term, filed February 2d, 1894. And the same was held in *Doeliner v. Tynan*, 38 How. Pr. 182. On the other hand, it appears from the papers that the defendants would be put to much expense and great inconvenience if they were prohibited from using the pneumatic delivery. It would almost stop trade in the store for a considerable period of time, and it is doubtful whether anything could be devised which would be less annoying to the plaintiff than the system now adopted. For all these reasons, I think the injunction should be refused at present, and only granted if, after a full hearing of both sides upon the trial of the merits, it should appear that the noise complained of and the vibration is really caused by the machinery, and is detrimental to the proper use of the plaintiff's premises."

80. *Austin v. Converse* (Pa. St. 1907), 67 Atl. 921.

81. Civ. Code, Art. 669.

a plaintiff was operating an ice plant under a permit from the municipal authorities, to the granting of which no opposition was made by the plaintiff, it was held that the permit carried with it the privilege of using all machinery necessary for the particular work. And it was declared that the owner of such a plant must take all proper precautions to prevent noise, smoke, etc., from becoming a nuisance and to that end, must comply with the requirements of all the police regulations on the subject matter, and that this being done unavoidable noise and smoke must be considered¹ as an inconvenience to which the neighbors must submit for the public good.⁸²

§ 1098a. **Noisome smells.**—The test as to whether a smell is a nuisance which will be restrained by injunction, is not whether it is so strong and disagreeable as to be offensive to any sensitive nose, but whether it is so bad and continuous as to seriously interfere with the comfort and enjoyment of ordinary people.⁸³ A real and not a fanciful injury must be shown. The fact that odors are unpleasant and disagreeable is not sufficient ground for invoking the aid of a court of equity. A substantial annoyance must be caused thereby or physical discomfort to a person or an injury to health or property, and where a discomfort is claimed it must not be one which depends merely upon a fanciful taste or the

⁸². *Le Blanc v. Orleans Ice Mfg. Co.*, 121 La. , 46 So. 226.

⁸³. *Rapier v. London Tramways Co.* (Ct. of App.), 69 L. T. Rep. 361, per Lindley, L. J.: "If the defendants are right in saying that they cannot concentrate their stables to such an extent as is desirable without committing a nuisance to the neighborhood, then they cannot concentrate their horses to such a degree. That is all. It is a mere question of money; it is nothing but economy which requires them to crowd their horses together. If they cannot keep 200 horses together, even when they take proper precautions,

without committing a nuisance, all I can say is they cannot have so many horses together. No doubt it is a serious matter to them, but I cannot disagree with the court below." A complaint which charges an injury to the use and enjoyment of plaintiff's dwelling, and the depreciation in value consequent upon the dust, smoke and offensive odors resulting from the operation of a steam engine by defendant company in pulling logs, shows an injury distinct from that of the general public, entitling the plaintiff to relief by injunction. *Adams v. Ohio Falls Car Co.*, 131 Ind. 375, 31 N. E. 57.

imagination.⁸⁴ To entitle the complainant, however, to the aid of a court of equity it is not necessary that the odors complained of should actually produce diseases or be unwholesome. It is sufficient if they are offensive and disagreeable in such a manner as to render life uncomfortable.⁸⁵ And though a business is lawful in itself, yet this is not an element which controls, for if it causes noxious, offensive and injurious smells it may be restrained at the suit of one who has been injured thereby.⁸⁶ So, though the business of manufacturing a fertilizer from the bodies of dead animals and from other matter may be lawful, it may be enjoined at the suit of an adjoining owner where the occupancy of his property has been rendered inconvenient, annoying and unhealthy on account of noxious odors arising therefrom.⁸⁷ Again, one may be enjoined from permitting the refuse from a creamery to flow onto the land of another where it becomes thickened and emits a stench.⁸⁸ And the discharge of refuse from a canning factory into a stream of water may be enjoined as a nuisance where it is offensive in smell and dangerous to the health of the public.⁸⁹

§ 1098b. **Undertakers.**—The business of an undertaker is not a nuisance *per se*. The proprietor of such a business, however, has no right to so conduct it that the occupant of an adjoining dwelling is injured in his health or his home rendered uncomfortable either by noxious vapors or the germs and seeds of disease. But where such a business is complained of as a nuisance, the burden

84. Massachusetts.—Wood v. Miller (1905), 73 N. E. 849; Downing v. Elliott, 182 Mass. 28, 64 N. E. 201.

Missouri.—Beckley v. Skroh, 19 Mo. App. 75.

North Carolina.—Duffy v. Meadows Co., 131 N. C. 31, 42 S. E. 460.

Pennsylvania.—Price v. Grantz, 118 Pa. St. 402, 11 Atl. 794, 4 Am. St. R. 601.

Wisconsin.—Tiede v. Schneidt, 105 Wis. 470, 81 N. W. 826; Pennoyer v. Allen, 56 Wis. 510, 14 N. W. 609, 43 Am. Rep. 728.

85. Meigs v. Lister, 23 N. J. Eq. 199.

86. Barkan v. Knecht, 9 Ohio Dec. 66, 10 Wkly. Law Bull. 342; Ducktown Sulphur C. & I. Co. v. Barnes (Tenn. 1900), 60 S. W. 593.

87. Barkan v. Knecht, 9 Ohio Dec. 66, 10 Wkly. Law Bull. 342.

88. Price v. Oakfield Highland Creamery Co., 87 Wis. 536, 58 N. W. 1039, 24 L. R. A. 333.

89. Butterfoss v. Board of Health, 40 N. J. Eq. 325.

of proof rests on the complainant to establish the fact, and the carrying on of the business will not be enjoined merely because it is obnoxious or offensive to an individual who is peculiarly sensitive and has an extraordinary repugnance to anything connected with death.⁹⁰

§ 1099. **Considerations of public utility.**—As to an establishment of public utility in a city, the rule is that its lawful use will not be perpetually enjoined when, by the use of scientific appliances, such alterations may be made as will remedy the evils complained of.⁹¹ In such cases the court will sometimes go no further than to require such appliances to be introduced, or in some cases will direct a reference to ascertain if the evils can be thus remedied.⁹² The fact that the work sought to be enjoined is of a public nature, affecting the public convenience, as, for example, a bridge across a river within city limits, and that the defendant is abundantly able to respond in damages, are important matters to be considered in determining the right to an injunction.⁹³ And where the defendant's business is of public utility but a nuisance to plaintiff, the injunction decree may be so framed as

90. *Westcott v. Middleton*, 43 N. J. Eq. 478, 11 Atl. 490.

91. In a suit to enjoin defendant from maintaining a nuisance by operating an electric light plant adjoining complainants' dwelling house the evidence showed that the plant was of great public utility, and the machinery of the best quality; that the officers and agents were skillful; and that the annoyances from smoke, soot, noise, and vibrations had been materially lessened during defendant's ownership—one witness testifying that they were not one-hundredth part as great as formerly. The evidence in regard to the vibrations of the house, caused by the engine, was conflicting; and one witness testified that they were not greater than those usually caused by a passing dray. It

was held that the evidence did not prove more annoyance than is usually incident to a residence in a city, or such annoyances as could not be prevented by labor and money, for which there was redress at law. *English v. Progress Electric Light & Motor Co.*, 95 Ala. 259. See, also, *Rosser v. Randolph*, 7 Porter (Ala.), 238; *Kingsbury v. Flowers*, 65 Ala. 479; *Rouse v. Martin*, 75 Ala. 510 (cotton-gin).

92. *Green v. Lake*, 54 Miss. 540.

93. *Bigelow v. Los Angeles*, 85 Cal. 614, 24 Pac. 778; *Payne v. English*, 79 Cal. 540; *Real Del Monte Min. Co. v. Pond Min. Co.*, 23 Cal. 84; *Logansport v. Uhl*, 99 Ind. 531; *Crawford v. Bradford*, 23 Fla. 404; *Omaha R. Co. v. Cable Co.*, 32 Fed. 727.

to allow defendant reasonable time for removal, and thus interfere as little as possible with his own and the public interests.⁹⁴

§ 1100. Abating filth on adjacent premises; privies.—Where water and filth from defendant's premises penetrate into the plaintiff's cellar and render it unwholesome and unfit for occupancy, a court of equity will enjoin the nuisance; and, having assumed jurisdiction for the purposes of the injunction, may incidentally award damages for the injury already sustained by the plaintiff.⁹⁵

94. Defendant operated an electric light station before plaintiff purchased the adjoining houses, but later erected an extension, and placed therein a 400-horse power engine and a 16-foot cog-wheel. The machinery could have been driven with smaller engines and belts, with little injury to plaintiff's property, but the large engine and wheel caused a jar and annoying noises after night, without causing permanent injury to the building. The extension and engine were properly constructed, and the business carefully conducted. Smaller engines would occupy more space, and require greater expense. Defendant had invested about \$200,000, and furnished light to the city and many merchants. New buildings were under construction, into which defendant intended removing, when the station complained of would be discontinued. It was held that, while defendant's business was a nuisance and should be restrained, in view of the fact that compensation in damages could be made, and that great loss to defendant and inconvenience to the public would result from its immediate suspension, time should be given defendant to remove its plant before judgment should take effect. *Braender v. Harlem Lighting Co.*, 2 N. Y. Supp. 245.

95. *Fleischner v. Citizens Real Est. Co.*, 25 Or. 119, 35 Pac. 174, per Moore, J.: "Section 333, Hill's Code, in substance, provides that any person whose property is affected by a private nuisance, may maintain an action at law for damages therefor, and, if judgment be given for the plaintiff in such action, he may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate such nuisance; and, if it appear that such remedy is inadequate, the plaintiff may proceed in equity to have the defendant enjoined. From this the appellant contends that the statute furnishes a complete and adequate remedy at law, and for that reason a court of equity could acquire no jurisdiction, except as an auxiliary remedy in aid of the legal action. Section 380 of said Code further provides that the enforcement or protection of a private right, or the protection from or redress for an injury thereto, shall be obtained by a suit in equity in all cases where there is not a plain, adequate and complete remedy at law, and may be obtained thereby in all cases where courts of equity have been used to exercise concurrent jurisdiction with courts of law, unless otherwise specially provided in this

And the repeated use of one's premises by another for the deposit

chapter. The chapter containing this section nowhere provides that courts of equity shall not entertain jurisdiction to enjoin a nuisance, and this court has, upon the theory that courts of equity have been used to exercise concurrent jurisdiction with courts of law in such cases, fully established the rule that when a person has sustained irreparable injury, or would be compelled to bring a multiplicity of actions to recover the damage, he may invoke the aid of a court of equity, and obtain an injunction to prevent the continuance of a private nuisance. *Parrish v. Stephens*, 1 Or. 73; *Luhrs v. Sturtevant*, 10 Or. 170; *Walts v. Foster*, 12 Or. 247, 7 Pac. 24; *Esson v. Wattier*, 25 Or. 7, 34 Pac. 756. Courts of equity, then, have concurrent jurisdiction with courts of law in certain cases to prevent the maintenance or continuance of a nuisance. It should only be invoked, however, where the injury complained of is irreparable, such as the destruction of property, or when it menaces the life or health of the plaintiff or of his family, or where the guilty party is not able to respond in damages for the injury. But when compensation for injury caused by a private nuisance is the gist of the complaint, the remedy is by an action at law for the damages. In the case at bar it is alleged that the water, slops, filth, and other matter from the sinks, closets, and urinals penetrated the plaintiff's cellar wall, and caused noxious and offensive pools to form in the cellar, and a slimy substance to gather along the walls, thereby tainting and corrupting the premises, and rendering them unfit for occupancy. This alle-

gation is fully supported by the evidence, and was sufficient to warrant the court in granting the injunction. The court, then, having jurisdiction of the cause for the purpose of granting the injunction, could it, in view of section 17 of article 1 of the Constitution, which provides that 'in all civil cases the right of trial by jury shall remain inviolate,' award damages for the injury resulting from the nuisance? The English rule was that the Court of Chancery, having jurisdiction for the purpose of granting the injunction, will prevent the circuit and expense of a trial in equity for an injunction and at law for damages, and, although it cannot decree damages for the plaintiff's loss, will substitute an account of the defendant's profits (*Adams Eq. 219*); and that this rule applied to cases of nuisance (*Id. 208*). This rule probably proceeds upon the theory that the tort has been waived, the defendant treated as an involuntary trustee for plaintiff's benefit, and required to account for the profits he has made out of the maintenance of the nuisance; and yet there must be many cases in which no profit has been realized by the defendant, and for that reason the plaintiff would be without remedy in equity. The better rule, though not universal, seems to be embraced in the doctrine that if a court of equity acquires either exclusive or concurrent jurisdiction it may go on to complete adjudication and establish purely legal rights and grant legal remedies, which would otherwise be beyond the scope of its authority. *Pom., Eq. Jur., § 181*. This principle has been applied to cases in which a court of equity had

of refuse and filth will be enjoined both as a nuisance and as a

obtained jurisdiction for the purpose of granting an injunction to restrain a private nuisance, and, having obtained jurisdiction for the purpose of awarding the special relief, the court retained the cause, and decreed full and final relief, including damages and abatement of whatever caused the nuisance. *Id.*, § 237. 'As an incident to the relief by injunction, courts of equity will, in proper cases, consider and settle the question of damages; but no bill will be entertained merely for the purpose of settling damages, that being regarded as the proper practice of the courts of law.' *Bassett v. Manufacturing Co.*, 43 N. H. 249. 'A court of equity,' says Orton, J., in a suit to abate a nuisance, 'having otherwise jurisdiction of the case, can award the damages as well as a court of law.' *Mills Co. v. Henry*, 73 Wis. 229, 40 N. W. 809. Courts of equity, in this State, prior to the adoption of the Constitution, had exercised concurrent jurisdiction with courts of law in cases of private nuisance. *Parrish v. Stephens*, 1 Or. 73. In *Tribou v. Strowbridge*, 7 Or. 156, Boise, J., interpreting this section of the Constitution, said: 'This language of the Constitution indicates that the right of trial by jury shall continue to all suitors in courts in all cases in which it was secured to them by the laws and practices of the courts at the time of the adoption of the Constitution,' and held that, as the practice prior to the adoption permitted a court of law to refer long accounts for computation, right to do so continued, notwithstanding the prohibition of the Constitution. In *Phipps v. Kelly*, 12 Or.

213, 6 Pac. 707, it was held that, where a court of equity originally had jurisdiction of any class of cases for which the proceedings at common law did not then afford an adequate remedy, such jurisdiction will not be lost by reason of subsequent legislation conferring jurisdiction on a court of law to decide such cases, unless there are negative words excluding the jurisdiction of equity. It is true that there was a complete remedy at common law in cases of private nuisance prior to the adoption of section 333, *supra*, but, since that section has no words negating the jurisdiction of equity, and as, in certain cases, equity had jurisdiction to enjoin a private nuisance prior to the adoption of the Constitution, it follows that the court had authority to render judgment for the damages as an incident to the suit for an injunction. The appellant, then, is liable in damages for some amount, and, as this is difficult of ascertainment, and as no positive rule can be established as a measure, we see no error in the court's allowance of the amount awarded, and for that reason the decree is affirmed." Defendant, an upper riparian owner, kept some 3,700 head of cattle, the droppings from which were conveyed to the stream by means of sewers, and carried by the stream down on plaintiff's land, immediately adjoining. The stream was simply an ordinary creek, and its waters were thereby rendered unfit for use, and an atmospheric nuisance was created. It was held, that defendant would be enjoined from continuing such nuisance. *Barton v. Union Cattle Co.*, 28 Neb. 350, 44 N. W. 454.

trespass causing irreparable injury.⁹⁶ And a privy will be a nuisance which may be enjoined where it clearly appears from the facts that persons in the neighborhood are rendered uncomfortable to a substantial degree by the smells therefrom; but if the evidence does not show that it has been so kept as to render it a nuisance, the maintenance thereof will not be enjoined.⁹⁷ And injunction will lie to prevent an adjoining landowner from building a privy within ten feet of plaintiff's well, and within thirteen feet of the dining room and family bedroom, where she and her two daughters, one of whom is an invalid, eat and sleep.⁹⁸ But the unauthorized erection of a public urinal will not be enjoined where it is not shown that it will constitute a nuisance.⁹⁹

§ 1101. **Burial places; jails.**—Burial places for the dead are indispensable and are not in themselves a nuisance to those living in their vicinity. Future burials in a burying ground will not be enjoined because of some apprehended danger which can readily be avoided by improved drainage;¹ or, in the absence of special circumstances to show that such burials must necessarily result in irreparable injury to health or property.² A cemetery being indispensable will not be enjoined merely because of the superstitious

96. *Lowe v. Holbrook*, 71 Ga. 563.

97. *Iliff v. School Directors*, 45 Ill. App. 419.

98. *Miley v. O'Hearn*, 13 Ky. Law Rep. 834, 18 S. W. 529, per Holt, C. J.: "The privy was erected when the action was brought. It is obnoxious in itself. Its use was calculated to make the residence of the appellee almost, if not quite, unbearable as well as unhealthy. The danger was probable and threatening. It would be continuous, and the appellee without legal remedy. The appellee could have built the structure at other points on his lot, which is a good-sized one, where it would not have been annoying to his own family

or that of the appellee, or dangerous to the health of any one." And see *Kenopsky v. Davis*, 27 La. Ann. 174; *DeGivie v. Seltzer*, 64 Ga. 423.

99. *Biddulph v. St. George Vestry*, 3 DeG. J. & S. 493.

1. *Kingsbury v. Flowers*, 65 Ala. 479, 486.

The facts relied on must be stated in a proceeding to enjoin the establishment of a cemetery on the ground that it will be a nuisance, as the bare allegation that it will be a nuisance is not sufficient. *Begein v. City of Anderson*, 28 Ind. 79.

2. *Lake View v. Letz*, 44 Ill. 81; *Lake View v. Rose Hill*, 70 Ill. 191; *Begein v. Anderson City*, 28 Ind. 79;

fears which are associated with a graveyard,³ or because it depreciates the marketable value of property in its vicinity.⁴ But it has been decided that where it appears that wells on the land of people residing in the vicinity of a cemetery and which are used by them, will probably be polluted, the interment of dead bodies may be enjoined.⁵ And a breach of a statutory prohibition as to the location of a cemetery is held to be ground for an injunction.⁶ A jail is a public necessity and will not be enjoined as a nuisance, though by its erection and management property in its vicinity may be rendered less valuable.⁷ And the provision of the Georgia Constitution providing that private property shall not be taken or damaged for public purposes without compensation, does not entitle a property owner to an injunction to restrain the building of a jail near his land on the ground that the value of the land will be lessened.⁸

§ 1102. **Dangerous and hurtful trades; fertilizers.**—There are many useful trades and occupations which are so dangerous to life, and so injurious to health and property, that they must not be allowed to be carried on near to dwelling houses or in a thickly settled community. Thus, a factory for making fertilizers from carrion and refuse will be enjoined from being carried on in a farming community so near to a dwelling house as to decrease its value and to render it unfit for occupation by reason of the stench.⁹ And it has been decided that a party will not be deprived

Ellison v. Commissioners, 5 Jones, Eq. (N. C.) 57.

Cemetery not a nuisance per se. Kingsbury v. Flowers, 65 Ala. 479, 39 Am. Rep. 14.

3. Musgrove v. St. Louis Church, 10 La. Ann. 431.

4. New Orleans v. Wardens, 11 La. Ann. 244.

5. Lowe v. Prospect Hill Cem. Assn., 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237.

6. Henry v. Perry Township Trustees, 48 Ohio St. 671, 30 N. E. 1122.

7. Burwell v. Commissioners, 93 N. C. 73.

8. Bacon v. Walker, 77 Ga. 336.

9. Evans v. Reading Fertilizing Co., 160 Pa. St. 209, 28 Atl. 702, per *Curiam*: "The public usefulness of an enterprise 'is no reason why private right should be infringed.' Rogers, J., in Howell v. McCoy, 3 Rawle (Pa.), 256, 269. In Rhodes v. Dunbar, 57 Pa. St. 274, 291, the then chief justice enumerated twenty-nine useful establishments which, from time to time, had been declared nuisances. Doubtless, the development of industries and manufactures is a matter of concern to the public in the furtherance of which the in-

of his right to an injunction restraining the carrying on of a fertilizer business by acts on his part or conversations between him

dividual must put up with a reasonable degree of inconvenience inseparable from their prosecution. On the other hand, the right of every citizen of 'possessing and protecting property' (Const. 1874, art. 1, § 1), and the preservation of the health and lives of the inhabitants of any neighborhood, are also matters of public concern, as opposed to which mere facilities for multiplying dollars and cents may be deemed insignificant. The requirement to surrender a portion of one's personal comforts in aid of public enterprise is a necessity to the existence of any civilized community. The requirement to surrender one's property, without adequate redress, for the benefit of the public, would savor of a kind of socialism which finds no countenance in the Constitution, laws, or judicial decisions of this commonwealth. Of course, where, as in *Com. v. Miller*, 139 Pa. St. 77, 21 Atl. 138, the question is whether or not the defendant is guilty of the maintenance of a public nuisance as an offense against the public, considerations of the magnitude and importance of the enterprise, as measured by the capital invested in it, and by its influence upon the prosperity of the community, are altogether legitimate. That is a public, and not a private, question, to be viewed from the standpoint of the public, not of a private owner; and the annoyance to the public on the one hand may properly be balanced by the benefits to the public on the other. But, as was decided in *Sparhawk v. Railway Co.*, 54 Pa. St. 401, the public aspect of a case before the criminal law has nothing to do with the private remedy in a court of

equity. The application of these principles to the record before me lies upon the surface. Whilst the use made by the plaintiff of her property is the ordinary one to which property in that locality is put, viz., farming and residence, the employment by defendants of theirs is not a 'natural use and enjoyment' of it, within the meaning of the phrase in *Coal Co. v. Sanderson*, 113 Pa. St. 126, 146, 6 Atl. 453. It is not an employment indicated as necessary or appropriate, either by the natural resources or the surroundings of the place. The latter is, therefore, not a suitable or convenient one for this business, in the legal sense of those words, meaning 'not a place which may be convenient to the party himself, looking at his interest merely, but a place suitable and convenient when the interests of others are considered.' *Bamford v. Turnley*, 3 Best & S. 65, 75, per Williams, J., quoted in *Cooley, Torts*, 597. The injury complained of does not arise from operations having any necessary relation to the nature or location of the land, but from substances artificially brought upon it, and employed in a business which, carried on amidst surroundings similar to these, has been uniformly, in this and other cities, held to be, or referred to, as a nuisance *per se*. *Smith v. Cummings*, 2 Pars. Eq. Cas. 92; *Rhodes v. Dunbar*, 57 Pa. St. 274, 286; *New Castle v. Raney*, 130 Pa. St. 546, 564, 18 Atl. 1066; *Czarniecki's Appeal* (Pa. Sup.), 11 Atl. 660; *eMigs v. Lister*, 23 N. J. Eq. 199; *State v. Luce* (Del.), 6 Cent. Rep. 862; *Fertilizer Co. v. Malone* (Md.), 20 Atl. 900. Such being its character, there can

and the defendant which in no way influenced him in the erection

be no pretense that the business is a 'lawful one.' Proof of the mere act is proof of the wrong. Ray, Neg. Imp. Dut., 14. Nor does the evidence leave its result in doubt. It was recently held in *State v. Neidt* (N. J. Ch.), 19 Atl. 318, that when offensive smells compel citizens to retire from their porches, and close their doors and windows, cause nausea and sickness of the stomach, produce retching and vomiting, and oblige them to forego their meals, a case of nuisance is made out. The condition of affairs thus stated very clearly describes what is proven to exist here. That the nuisance is not constant, but only when the wind is in one direction, is immaterial. *Meigs v. Lister*, *supra*. It is not rare and exceptional, within the meaning of *Price v. Grantz*, 118 Pa. St. 402, 413, 11 Atl. 794. That it sensibly diminishes the capacity of the plaintiff's property for ordinary use and enjoyment, and materially impairs its value by destroying physical comfort and menacing health, and is, therefore, actionable at law, cannot be reasonably questioned, being, indeed, involved in the declaration that it is a nuisance *per se*. That the injury is continuous, and that, therefore, the remedy at law could not be made effective except by a multiplicity of suits, is manifest. Hence there is shown every element calling for equitable interference—wrong, nuisance, and injury to property rights, irreparable at law. Neither, though this nuisance would seem clearly to be a public one, can it be pretended that the injury to plaintiff is not special, but such only as the public in general sustains. True, persons trav-

eling on the near-by turnpike road and railway are nauseated and annoyed much in the same manner as the plaintiff is in her dwelling, though, of course, not as frequently or continuously. But the traveler is not thereby injured, as the plaintiff is, in his property rights; and no matter how many property holders besides her sustain a like injury to their properties, their injury is special to them, and each of them, as hers is special to her. Equally irrelevant seems the fact that the injury proved is due to the escape of gases resulting rather from the use of chemicals in the manufacturing and drying process than of highly putrid matter. The former is fully within the allegations of the bill. Nor is it easy to understand upon what theory an ascertained injury to land should be more justifiable, the proved deleterious effect of noxious vapors less objectionable, or recurring fits of vomiting more pleasurable, for the reason that these results, caused by the admixture of chemicals, were, in *Fertilizer Co. v. Malone*, *supra*, held to constitute an actionable nuisance. Nor does equity defer the granting of relief until the complainant has been driven from his property (*Fish v. Dodge*, 4 Denio, 311), or until his health has been destroyed (*Walter v. Selfe*, 4 Eng. Law & Eq. 22), or until somebody is killed (*Dennis v. Eckhardt*, 3 Grant, Cas. 393). I may conclude with the words of Mr. Justice Thompson in the last-cited case, as entirely applicable to the present one: 'I do not forget the admonition against using the strong arm of the chancellor, but that strength was given, and intended to

or conduct of the establishment.¹⁰ Where, however, the evidence is conflicting and leaves the question in doubt as to whether such a factory constitutes a nuisance, and the complainant has resided for years in the same place with knowledge of improvements by defendants, and has made no objection to the establishment, and it appears that the injury to the complainant is slight, if any, and that the defendant has a large capital invested in his business, which will be ruined if the injunction asked for is granted, the court will refuse to grant it.¹¹ Again, an oil company may be enjoined from keeping kerosene and gasoline in a storehouse and tanks so near a pre-existing residence as to render the air so offensive as to materially interfere with the comfort of a person of ordinary sensibility.¹²

be used in proper cases, and I think this is one of them as it now stands before us.'” In *Tuttle v. Church*, 53 Fed. 422, an injunction was denied to restrain the operation of a factory for making oil and fertilizers from fish, as the factory had been in operation for about thirty years, there was no regular or serious pollution of the water caused by it and the offensive odors had decreased by the use of improved processes so as to be seldom troublesome in the summer. Defendant, in a growing part of a city, conducted a business of rendering tallow from butcher's offal, etc. After rendering, the bones were stacked for shipment, the hair barreled, and the blood thrown on the manure pile, which was removed once a week. From twenty-five to forty hogs were kept in an inclosure of 1½ acres, and fed with meat from the bones, and corn meal. The offal, more or less rotten when collected, was tried out in open kettles over stoves, without special ventilation. The entire neighborhood was nauseated by the stench. It was held that, to spare defendant useless outlay, he would be enjoined from prosecuting business in that location altogether after a reasonable

time, and meantime would be required to prevent accumulations of offal, and remove refuse every day. *Grand Rapids v. Weiden* (Mich.), 56 N. W. 233, per *Curiam*: “Some question has been raised with reference to this form of proceeding, but complainant has followed the suggestion of this court in *People v. Lead Works*, 82 Mich. 471, 46 N. W. 735.” La. Acts, 1869, p. 170—giving to a certain company the exclusive privilege of slaughtering, within New Orleans, animals for food—is absolutely abrogated by the subsequent constitutional prohibition of monopolies; and an abattoir located therein by another company in conformity to the regulations of the municipal authorities will not be enjoined as a nuisance, unless actually shown to be one. *Howell v. Butchers Union Slaughter-house, etc., Co.*, 36 La. Ann. 63.

10. *Barkan v. Knecht*, 9 Ohio Dec. 66, 10 Wkly. Law Bull. 342.

11. *Tuttle v. Church*, 53 Fed. 422. See *Sellers v. Parvis & Williams Co.*, 30 Fed. 164.

12. *Waters Pierce Oil Co. v. Cook* 6 Tex. Civ. App. 573, 26 S. W. 96.

§ 1103. **Same subject.**—The rule above laid down applies also to trades which are attended with incessant and distressing noise, and which are dangerous because of the use of explosives.¹³ And

13. *Fish v. Dodge*, 4 Denio (N. Y.), 311 (boiler manufactory); *Evans v. Reading Fertilizing Co.*, 160 Pa. St. 209, 28 Atl. 702, per *Curiam*: "Thus, in *Dennis v. Eckhardt*, 3 Grant, Cas. (Pa.) 390, the maintenance of a shop by a tinsmith and sheet-iron worker, the noise of the hammering and pounding in which made it impossible for the plaintiff to enjoy his property without danger to the health of himself and family, was enjoined. Of the same character, in *Ladies' Decorative Art Club's Appeal* (Pa. Sup.), 13 Atl. 537. In *Pennsylvania Lead Co.'s Appeal*, 96 Pa. St. 110, an injunction issued on proof that the smoke and vapors from the defendant's establishment settling upon the plaintiff's land, lessened its fertility, poisoned its vegetation, destroyed animals grazing upon it, nauseated its inhabitants, and diminished its value for selling and renting. In *Wier's Appeal*, 74 Pa. St. 230, the erection of a powder house was restrained, without proof of antecedent damage, but to prevent further injury certain to result to complainant's property by making its enjoyment unsafe and depreciating its value. In *Czarnecki's Appeal* (Pa. Sup.), 11 Atl. 660, defendants were enjoined from using their building for the purpose of boiling bones and carcasses of horses and other animals in the manufacture of neat's foot oil and fertilizers, on the allegation that the smoke, gases, vapors, and stenches resulting from these operations would injure the health and comfort of plaintiffs upon their prop-

erty, and depreciate the value of the latter. Again, in *Rhodes v. Dunbar*, *supra*, it is said, at page 290, that certain establishments, such as powder magazines, nitro-glycerine depots, may be enjoined, not only on the ground of their liability to fire, primarily or even secondarily, but on account of the injury with which they menace alike property and persons in their vicinity. It is needless, however, to multiply decisions and dicta to the same general purpose. The rule seems clear that, as soon as a court of equity comes to deal with injuries to property rights, the decision proceeds upon a different plan from that upon which mere personal discomfort and annoyance stand. As to the treatment of these respective classes of cases in courts of law, the same distinction is unmistakably announced by Mr. Justice Williams in the very recent case of *Robb v. Carnegie*, 145 Pa. St. 324, 340, 22 Atl. 649, in these words: 'If the individual is thereby deprived of his property without fault on his part, he is entitled to compensation; but, if he is affected only in his tastes, his personal comfort or pleasure or preferences, these he must surrender for the comfort and preferences of the many.' Where, however, he is entitled to compensation at law, there, if the injury be continuous, and remediable at law only by a multiplicity of suits, that is to say, irreparable at law (*Pennsylvania Lead Co.'s Appeal*, 96 Pa. St. 116, 123), equity will intervene for his protection by exercising its restraining power, *Scheetz's Appeal*, 35 Pa. St. 88, 95;

a dyeing establishment which is not located in a district given up to factories will be restrained from so operating its machinery as to cause the doors and windows in complainant's dwelling house to rattle, the dishes on the shelves to shake and jolt together, and the walls to crack.¹⁴ In those cases where health or life is threatened such facts and circumstances should be stated in the bill as will enable the court to form an intelligent opinion for itself as to whether or not the acts complained of, if established, would amount to a nuisance and irreparable injury ensue, and if there is a doubt arising from the averments, it will be resolved against the sufficiency of the bill for the reason that the courts proceed with great delicacy in cases where the injury is only threatened, instead of the nuisance established.¹⁵

§ 1104. **Fat rendering; jurisdiction.**—Where it appears that the odors and gases from a fat-rendering establishment produce

Dennis v. Eckhardt, 3 Grant, Cas. 390, 392; *Pennsylvania Lead Co.'s Appeal*, 96 Pa. St. 124; *Haugh's Appeal*, 102 Pa. St. 42, 45; *Bitting's Appeal*, 105 Pa. St. 517, 521; *Hennessy v. Carmony* (N. J. Ch.), 25 Atl. 374, 377. That is the very test and foundation of chancery jurisdiction." And see *Booth v. Rome, etc., R. Co.*, 140 N. Y. 267, 279; *Heeg v. Licht*, 80 N. Y. 579; *Myers v. Malcolm*, 6 Hill, 292; *Tiffin City v. McCormack*, 34 Ohio St. 638; *Scott v. Bay*, 3 Md. 431. In *Daw v. Powder Mfg. Co.*, 28 Atl. 841, it was held that the dissolution of a preliminary injunction to restrain the maintenance of a powder magazine would not be disturbed on the showing by defendant's affidavits that the building was of stone and iron and absolutely fireproof; that only blasting powder which could not be exploded by concussion, was to be stored there; that the powder was to be packed in cartridges, which in turn were to be packed in fireproof iron cases and would not be opened while stored in

the building. It was also shown that there were other similar magazines in the same borough and not one of them had ever exploded. As to the effect of a city ordinance prohibiting a powder magazine, see *Hazard Powder Co. v. Volger*, 58 Fed. 152, per *Coldwell, J.*: "The maintenance of a powder magazine within city limits in violation of a city ordinance was a nuisance which rendered the defendant liable for the injury. It is no defense that the magazine was properly constructed, the powder carefully stored, and that the explosion was not due to negligence. It is liable for the injuries resulting from the explosion from any cause, because its location under the ordinance made it a nuisance. *Lafin Powder Co. v. Tearney*, 131 Ill. 322; *Cheatham v. Shearon*, 1 Swan (Tenn.), 213."

14. *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374.

15. *Mason v. Deitering* (Mo. App. 1908), 111 S. W. 862.

headache, nausea, vomiting, and compel citizens to close their doors and windows, both by day and at night, and interfere with them in the enjoyment of their meals and of sleep, such establishment is a nuisance, the continuance of which is properly enjoined at the suit of a duly authorized board of health.¹⁶ And the

16. *Board of Health v. Lederer*, 52 N. J. Eq. 675, 29 Atl. 444, per Bird, V. C.: "The board of health did their duty in filing the bill, and in asking the aid of the court. They are the guardians of the public health, and the action of the legislature would be quite superfluous, in creating boards of health, if they were not obliged to wait until it should be demonstrated by actual experiment to what extent such odors were capable of affecting health, or destroying life. After what has been said in the case of *Butterfoss v. State* (which has the sanction of the Court of Errors and Appeals), 40 N. J. Eq. 325, and in the case of *Board v. Neidt* (N. J. Ch.), 19 Atl. 318, it will be sufficient for me to say that, in all these cases where boards of health ask the aid of this court, they do so by virtue of the statute which extends its powers so far as to inquire whether nuisances, sources of foulness, or causes of sickness, hazardous to the public health, exist or not. The interpretation given to the statute by these cases shows that the inquiry is limited to the determination of questions relative to the public health and that there must be proof of danger, peril, or risk, or something equivalent thereto, to justify the court in lending its aid, and that when this is made manifest the statute prescribes what the court shall do. In addition to the cases cited, see, also, *People v. Detroit White-Lead Works*, *supra*; *Hurlburt*

v. McKone (N. J. Err. & App.), 10 Atl. 164. Until very recently, the defendants did their rendering in uncovered cauldrons; and, since the fat could only be effectually separated by the highest possible degree of heat, the escape of the noxious odors and gases was, in the highest degree, excessive. They sought to entirely overcome this by the introduction of such devices or improvements as from time to time have been suggested. The separation of the fat therefrom is accomplished by putting the crushed bones and other matter in an inclosed vat or cauldron. This greatly, if not entirely, prevents the escape of the odors or gases during the steaming process. But all this matter, while it is still at a very high temperature, is exposed to the air, in passing from such vat or cauldron to other receptacles for the more thorough separation of the fat from the solid; and, after this exposure, other mechanical contrivances, of recent discovery, are used to perfect the work of rendering, and which do, to a large extent, accomplish the objectionable odors and gases. But it is undoubtedly true that, while the mass is passing from the first receptacle to the second, it is so exposed as to throw off an incalculable amount of odor, most offensive because of the intense heat to which it has just been necessarily subjected. The defendant called two experts as witnesses, who testified that in their judgment the defend-

board of health in the township in which the nuisance exists, or is carried on, has the authority to abate such nuisance, either on its own motion, or by the aid of the court, though it is hazardous only to the health of individuals residing in another township.¹⁷ And

ants might introduce additional improved machinery, which would greatly reduce the escape of gas and odors. Having come to the conclusion above expressed, it certainly follows that, as long as this condition of things continues, the establishment must be considered a nuisance, a source of foulness, a cause of sickness, and hazardous to public health, and should be enjoined until it can be carried on without disclosing these objectionable features. But the testimony discloses another condition, already alluded to, resulting from the operation of this fat rendering, which is equally if not decidedly more hazardous to public health, which will necessarily continue to threaten the health of the community, even though the foul odors just spoken of, and which are directly engendered by the process of rendering fat, should be entirely overcome. I refer to the condition of the brook spoken of, produced by the discharge of so much solid matter, together with the refuse liquid which is carried into the brook, and which lodges along its banks, and upon the stones and rough places at the bottom, and forms large sheets wherever the water eddies, or is at rest. If the presence of such an immense mass of corruption, of decaying animal matter, which process is always hastened by the heat of the sun, be not hazardous to the public health, then all our sanitary legislation and all municipal regulations to that end are simple works of supererogation. While this

mass may be, from time to time, carried away with high water, yet, when drought continues, it accumulates day by day, and necessarily, for long periods of time, the exhalations therefrom are extremely offensive. Therefore it is manifest that the use made of this brook by the defendants is as certainly subject to the condemnation of the law as the rendering establishment itself, if not more so, and that it will not satisfy the demands of the public to effectually obviate the generation of the odors at the establishment itself, but that such demands extend to the prevention of the use of the brook in question, as a conduit for the refuse matter discharged in the process of rendering."

17. *Board of Health v. Lederer*, 52 N. J. Eq. 675, 29 Atl. 444, per Bird, V. C.: "The business of the defendants, which the complainant seeks to restrain, is what is commonly called 'fat rendering.' It is carried on in the township of North Brunswick, in the county of Somerset, and within a short distance of the line dividing the said county from the county of Middlesex. There are only three or four houses within a few hundred feet of the establishment in the county of Somerset, and two or three several hundred feet further away, while there are a great many dwelling houses, occupied as such, in the county of Middlesex, and in the city of New Brunswick, within a few hundred feet of the place where this business is carried on. It is in-

where an injunction was sought against the maintenance of a crematory for the disposal of garbage and other offensive matter, it was decided that it would not be denied on the ground of laches where it appeared that at first the amount of offensive matter dealt with was small and the resultant nuisance correspondingly slight, but that subsequently the odors and smoke therefrom, owing to the increase of business, rendered dwelling houses uncomfortable for habitation.¹⁸ But the fact that an establishment of such a character is maintained in violation of a penal statute, is not ground for an injunction where it is not shown to be an actionable nuisance.¹⁹ And, as a general rule, to justify the granting of an injunction on the ground that such an establishment is a nuisance, the injury complained of must be a substantial one.²⁰ Again, in a suit to enjoin the carrying on of such a business the record of a conviction on an indictment for a nuisance is *prima facie* evidence on behalf of the plaintiff.²¹

sisted that the board of health of the township of North Brunswick has no authority to proceed against the defendants for any nuisance hazardous to public health, in case it appears that the threatened mischief is only likely to affect the inhabitants residing in the said county of Middlesex. This is put upon the ground that jurisdiction is statutory, and is limited to the township which creates the board of health. It is true that its jurisdiction is so limited. The board of health of any township can only proceed to abate a nuisance existing or carried on within its own boundaries. But to my mind it is very clear that, whenever the public health is threatened by such a nuisance, whether those who comprise the public live upon one side of an imaginary line or another, the board of health in the township where such nuisance is located has committed to it the duty of removing the nuisance,

or of asking the aid of the court to that end. But in this particular case the judgment of the court is not dependent upon any such question of jurisdiction; for the half dozen or more dwelling houses within the township of North Brunswick are sufficiently within the reach of the mischief, not only to claim, but to demand, the attention of the public authorities. Whether they be many or few, no higher obligation can rest upon the court than to protect them in their health, in case it be ascertained that it is in danger."

18. *Laird v. Atlantic Coast Sanitary Co.* (N. J. Ch. 1907), 67 Atl. 387.

19. *Tiede v. Schneidt*, 99 Wis. 201, 74 N. W. 798.

20. *Tiede v. Schneidt*, 105 Wis. 470, 81 N. W. 826.

21. *Peck v. Elder*, 3 N. Y. Super. Ct. 126.

§ 1105. **Pleasure garden; theatre.**—A bill by neighboring residents in a large city alleged the former use of premises as a pleasure resort garden, with tenpins, dancing and band music till early morning; that the noise kept the neighbors awake, to the detriment of their health and comfort; that crowds of idle, disorderly persons were attracted, and became a nuisance in the streets; that all this was not due to mismanagement, but inhered in the business; that defendants proposed to reopen the place. It was held that the nuisance was not clearly made out, and, being only threatened, could not be enjoined.²² And the fact that the

22. *Pfingst v. Senn*, 15 Ky. Law Rep. 325, 23 S. W. 358, per *Curiam*: "We observe first that it is not an actual, existing nuisance of which complaint is made; nor are the things about to be done in themselves nuisances. There can be beer gardens, and pleasure resorts, music, and dancing, and yet no nuisance set up. Admittedly, the conduct of such exercises or the running of such a business may result in inconvenience and annoyance to neighbors not participating. It may render the location less eligible as a place of residence for people who pay high rents, or are of 'dainty modes and habits of living' (Wood, Nuis., § 800), but, nevertheless, these places and modes of amusement are not to be condemned or denounced as nuisances in themselves. 'Injunctions against threatened nuisances,' says Mr. Wood (section 797), 'will seldom be granted except in extreme cases, where the threatened use of property is clearly shown to be such as leaves no doubt of its injudicious results.' The learned author, in support of this view, refers to the case of *Dumesnil v. Dupont*, 18 B. Mon. 804, where this court quotes with approval this language of Lord Brough-

ham in the case of the *Earl of Ripon v. Hobart*, 1 Coop. t. Brough. 333: 'If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial. But when the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, then the court will refuse to interfere. . . . It is also very material to observe that no instance can be produced of the interposition, by injunction in the case, of what we have been regarding as an eventual or contingent nuisance.' And the court declined to interfere with the erection of a powder house within a few hundred yards only of the dwelling of complainants, notwithstanding the plaintiffs' case was strongly fortified by the argument that 'the electric fluid, the irresistible effects of which are disclosed in every thunder storm, may, in defiance of every precaution, at any moment cause it to explode. It cannot be doubted that, if five hundred kegs were stored in a magazine in the heart of the city, every thunder storm would awaken a universal alarm and consternation in the

noise caused by the removal of scenery and baggage from a theatre at night disturbs the sleep of persons living near by is not sufficient to justify the setting aside an order refusing the issuance of a preliminary injunction restraining such removal, where the theatre has been in use for fifteen years.²³ But a disorderly and disreputable theatre may be enjoined, though a common nuisance.^{23a}

§ 1105a. **Skating rink.**—A skating rink erected within a short distance of a dwelling is properly enjoined when the noise from the skating and the crowd attending it are such as materially to interfere with the comfort and enjoyment of the inmates of the dwelling.²⁴ And where a suit was brought to enjoin the operation of a roller skating rink upon a lot adjacent to church property, and it appeared from the affidavits that the noise from the operation of the rink was so great that at times it prevented the members of the church from hearing the words of the preacher or the prayers which were offered, that it was impossible to hold service on certain evenings in the main audience room of the church, and that the pastor was often compelled on account of the noises to leave the parsonage, which was adjacent to the church, it was held that the facts clearly showed a substantial invasion of a legal right, justifying the granting of an injunction *pendente lite*.²⁵

§ 1106. **House of ill fame.**—The unlawful use of property as a house of ill fame which renders the premises of a neighbor unfit

minds of inhabitants.' *Cheatham v. Shearon*, 1 Swan. 213. A much stronger appeal was thus presented to the court than we have in this case. It is at best but the fear or apprehension of danger or injury that is being urged." A bowling alley, billiard room or like place of amusement kept for gain, may or may not be a nuisance according to the nature of the amusement, the manner in which the place is conducted, and its location. A tenpin alley kept for public use in a village in connection with a large beer saloon was held not a nuisance *per se*.

State v. Hall, 32 N. J. Law Rep. 158. See, also, *Wood, Nuis.*, § 43. That the chancellor will not interfere by injunction where the nuisance is eventual or contingent, see *Hahn v. Thornberry*, 7 Bush. 403; *Coffin Co. v. Warren*, 78 Ky. 400.

23. *Penrose v. Nixon*, 140 Pa. St. 45, 21 Atl. 364.

23a. *Reeves v. Territory*, 13 Okla. 396, 74 Pac. 951.

24. *Snyder v. Cabell*, 29 W. Va. 48.

25. *First Methodist Episcopal Church v. Cape May Grain & C. Co.* (N. J. Ch. 1907), 67 Atl. 613.

for respectable occupation and enjoyment, may be enjoined as a private nuisance, though such use also constitutes a public nuisance and though the perpetrator be also amenable to the penalties of the criminal law.²⁶ But the continuance of a bawdy house cannot be enjoined by an owner of property in the same locality merely because it renders his property less desirable or valuable; it must also cause some physical injury to his property or be offensive to his senses.²⁷

§ 1107. **Schools and churches; ringing of bells.**—It has been held that the word nuisance in a restrictive covenant entered into by a purchaser of a lot of land could not be applied to a national school, and that he could not be restrained from establishing such a school on his lot at the suit of the owner of a dwelling house on an adjoining lot, though the latter's property would be thereby depreciated in value.²⁸ And where plaintiffs and defendants jointly leased a two-story building, the lower story for school purposes and the upper room for a church, it was held that plaintiffs could not restrain defendants from using the upper room for religious services during school hours, as it was not shown that the school was disturbed by the preaching in the upper room.²⁹ But

26. *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Hamilton v. Whitridge*, 11 Md. 128, 69 Am. Dec. 184. In *State v. Currier*, 19 Atl. 1000, Carpenter, J., says: "Houses resorted to for prostitution, lewdness or illegal gaming are public nuisances at common law. 1 Hawk. P. C. 198, 225, 4 Black. Comm. 167. The jurisdiction of equity to restrain the maintenance of public as well as private nuisances is of ancient date. *Eden, Inj.*, 262. See, also, *Redway v. Moore*, 2 Ida. 1036, 29 Pac. 104; *Blögen v. Smith*, 34 Oreg. 394, 56 Pac. 292, 46 L. R. A. 522; *Ingersoll v. Rousseau*, 35 Wash. 92, 76 Pac. 513. Compare *Neaf v. Palmer*, 20 Ky. Law Rep. 176, 45 S. W. 506, 41 L. R. A. 219.

27. *Anderson v. Doty*, 33 Hun

(N. Y.), 160. See *Lansing v. Smith*, 8 Cow. (N. Y.) 146, 167.

In *Marsan v. French*, 61 Tex. 173, the owner of a house which was notoriously kept for purposes of prostitution was enjoined from continuing to rent it for such purposes at the instance of a neighbor whose family consisted of several children and young women.

See *Neaf v. Palmer*, 20 Ky. Law Rep. 176, 45 S. W. 506, 41 L. R. A. 219.

28. *Harrison v. Good*, L. R. 11 Eq. 338. That a school may be an annoyance in some neighborhoods, see *Doe v. Keeling*, 1 Maule & S. 95; *Kemp v. Sober*, 1 Sim. (N. S.) 517.

29. *Miller v. Nelson*, 14 Ky. Law Rep. 829, 21 S. W. 875.

the ringing of church bells at unseasonable hours in the morning, and the frequent ringing of chimes during the day, so as greatly to disturb near residents, had been enjoined after a trial at law.³⁰ And the habitual ringing of a heavy factory bell at an early hour in the morning in order to rouse the operatives, and which disturbs the sleep of residents in the neighborhood, constitutes a nuisance which will be enjoined.³¹ But the question whether the ringing of bells constitutes a nuisance is to be determined by the effect upon ordinary persons, and the ringing of church bells in a thickly populated locality has been held not to be a nuisance merely from the fact that it causes annoyance to the person who is peculiarly susceptible to noise on account of a sunstroke sustained by him.³²

§ 1108. **Same subject; where nuisance is legalized.**—Where, after a final injunction was issued restraining the ringing of a bell on a mill before a certain hour in the morning, a statute was passed authorizing the ringing of bells and the use of whistles and gongs of such size and at such hours as the municipal authorities should designate, it was held, on a bill of review brought by the mill-owner, that the statute was constitutional and that the injunction should be modified.³³ And even without such a statute an increase of the defendant's business, and a general increase of manufacturing and other business in the vicinity might render it very

30. *Soltau v. DeHeld*, 2 Sim. (N. S.) 133. And see *Martin v. Nutkin*, 2 P. Wms. 266; *Harrison v. St. Mark's Church*, 12 Phila. (Pa.) 259.

31. *Davis v. Sawyer*, 133 Mass. 289, 43 Am. Rep. 519, holding also that evidence of a custom to ring bells in other places for such a purpose is inadmissible.

32. *Rogers v. Elliott*, 146 Mass. 349, 15 N. E. 768, 4 Am. St. R. 316.

33. *Sawyer v. Davis*, 136 Mass. 239, per Allen, J.: "The method of procedure to which the plaintiffs have resorted (*i. e.*, bill of review), is the usual and proper one in such circumstances. *Story, Eq. Pl.*, § 404, *et seq.*; *Clapp v. Thaxter*, 7 Gray, 384. And

for authorities tending to show that the plaintiffs are entitled to the relief which they seek, in consequence of a subsequent statute changing the rights of the parties, see *Pennsylvania v. Wheeling, etc., Bridge*, 18 How. 421; *The Clinton Bridge*, 10 Wall. 454, 463, 19 L. Ed. 969; *Gilman v. Philadelphia*, 3 Wall. 713, 732, 18 L. Ed. 96; *South Carolina v. Georgia*, 93 U. S. 4, 12, 23 L. Ed. 782; *Bridge Co. v. United States*, 105 U. S. 470, 480, 26 L. Ed. 1143; *Commonwealth v. Old Colony R. Co.*, 14 Gray (Mass.), 93, 97; *Bartholomew v. Harwinton*, 33 Conn. 408."

See § 1049 herein as to legalized nuisances.

unreasonable to continue an injunction, which it was, in the first instance, entirely reasonable and proper to grant.³⁴

§ 1109. **Bee hives.**—Bees may from the manner of keeping them, or by reason of location or otherwise, cause such annoyance and injury as to constitute a nuisance against which relief may be had by injunction.³⁵ So where the evidence showed that defendants had maintained, and were still maintaining, a large number of hives of bees, kept in an open lot immediately adjoining plaintiff's dwelling house, and that at certain seasons they were a source of constant annoyance and discomfort to plaintiff and his family, greatly impairing the comfortable enjoyment of the property; also that the bees could be removed, without material injury, to a locality where neighbors would not be disturbed by them, it was held that it was a proper case for a permanent injunction.³⁶ In such action the issue is not as to defendant's motives in keeping the bees, nor whether they had knowledge of any vicious propensities of the bees, but simply whether the condition of things, as then and previously existing, constituted a nuisance.³⁷

§ 1110. **Nuisance to pleasure resorts.**—The owner of property on the shores of a lake, which is valuable as a pleasure resort on account of its nearness to the lake and easy access to the water for boating and fishing, may maintain a suit to restrain a corporation from drawing water out of the lake so as to lower its level and leave a wide margin of bog exposed around its banks, which is repulsive in appearance, and unhealthy, and so injurious to plaintiff's property.³⁸

§ 1111. **Polluting water; general rules.**—All streams which flow through cultivated fields and populous regions, or are utilized

34. *Sawyer v. Davis*, 136 Mass. 239, 247.

35. *Olmstead v. Rich*, 53 Hun (N. Y.), 638, 6 N. Y. Supp. 826.

36. *Woodyear v. Schaefer*, 57 Md. 1.

37. *Olmsted v. Rich*, 53 Hun (N. Y.), 638, 6 N. Y. Supp. 826. And see

Mahan v. Brown, 13 Wend. (N. Y.) 261; *Pickard v. Collins*, 23 Barb. (N. Y.) 444.

38. *Cedar Lake Hotel Co. v. Cedar Creek Hydraulic Co.*, 79 Wis. 297, 48 N. W. 371.

for mechanical and manufacturing purposes, must to some extent become impure, and for such pollution there is no remedy by injunction.³⁹ It is only when the owner in the stream below is materially affected in his right to use the water, by reason of its impurity as it enters his premises, that he has a remedy against the upper proprietor by whose use the quality of the water is impaired. For a slight impairment of quality, necessarily resulting from a reasonable use of the stream or of the land abutting on it there is no liability.⁴⁰ But any particular use of the water of a running stream which so pollutes it as to render it unfit for the ordinary purposes of life, may be enjoined at the suit of a lower riparian owner, so as to preserve it in its ordinary natural state of purity.⁴¹ A party is entitled to an injunction restraining the unnecessary discharge of polluting substances into a stream in quantities that appreciably affect the purity of the waters when they reach his premises below and render them materially less fit for domestic or other uses to which they may be put than they were when they came to the land of the owner who polluted them.⁴² And as between independent wrongdoers there is no contribution and it will not avail as a defense that others with whom the complainant, in an injunction bill to restrain a nuisance, have no concern, have contributed to cause the pollution of the waters against which relief is sought.⁴³

39. *Wood v. Sutcliffe*, 2 Sim (N. S.), 163.

40. *MacNamara v. Taft* (Mass. 1908), 83 N. E. 310.

41. *Forman v. Ford*, 6 Del. Ch. 47, 33 Atl. 617; *Woodall v. Cartersville M. & M. Co.*, 104 Ga. 156, 30 S. E. 665; *Woodyear v. Schaefer*, 57 Md.1.

"We regard it as settled that no riparian proprietor has the right to use the waters of a natural stream for such purposes or in such a manner as will materially corrupt it to the substantial injury of a lower proprietor, or to cast or discharge into it noxious and deleterious sub-

stances which will tend to defile the water and make it unfit for use." *Parker v. American Woolen Co.* (Mass. 1907), 81 N. E. 468. Per Sheldon, J.

A threatened pollution may be enjoined. *Jessup & M. Paper Co. v. Ford*, 6 Del. Ch. 52, 33 Atl. 618.

42. *MacNamara v. Taft* (Mass. 1908), 83 N. E. 310; *Townsend v. Bell*, 42 App. Div. (N. Y.) 409, 59 N. Y. Supp. 203; *Rarick v. Smith*, 17 Pa. Co. Ct. R. 627, 5 Pa. Dist. R. 530.

43. *Doremus v. Mayor of Patterson* (N. J. Eq. 1905), 62 Atl. 3, 4.

§ 1111a. **Same subject; application of rules.**—The owners of a saw mill cannot lawfully throw the dust from their mill into a non-navigable stream, if the effect will be to pollute the water so as to render it unfit for farm purposes by lower riparian owners, or to clog the bed of the stream so as to cause its water to overflow and deposit large quantities of sawdust upon the lands of the lower owners, where such overflow and deposits will impair the value of the land.⁴⁴ So one who appropriates water for domestic purposes may have a prior appropriator for mining purposes enjoined from rendering the water unfit for use by increasing the capacity of the stream from the mining waters.⁴⁵ And where mining debris is deposited in and washed down the tributaries and creeks of a river, it constitutes a public nuisance, and the owner of property specially injured thereby may maintain an action to enjoin the same.⁴⁶ And if water filled with sediment is discharged into a stream, polluting it, the person responsible therefor may be enjoined at the instance of another in whom a right to fish in a certain portion of the stream is vested.⁴⁷ And if a pond and the waters of a stream running into it are taken for the purpose of supplying a city with pure water, it is no defense to a petition for an injunction to restrain a person from polluting the stream that the city has by means of a dike prevented the waters of the stream from running into and polluting the water of the pond.⁴⁸ But in a case in Maryland it is decided that in the exercise by a person of the right to the reasonable and beneficial use of his land the permitting of cattle to enter a stream of water from pasture land, and to befoul the stream, even though a water company is injured thereby as to its use of the water, is not a ground for an injunction even though the water company is incorporated.⁴⁹

44. *Horton v. Fulton*, 130 Ga. 466, 60 S. E. 1059.

45. *Travis Placer Min. Co. v. Mills*, 94 Fed. 909, 33 C. C. A. 536.

46. *County of Yuba v. Kate Hayes Min. Co.*, 141 Cal. 360, 74 Pac. 1049.

47. *Fitzgerald v. Firbank*, C. A.

(1897), 2 Ch. 96, 66 L. J. Ch. N. S. 529, 76 Law T. Rep. 584.

48. *Martin v. Gleason*, 139 Mass. 183.

49. *Helfrich v. Catonsville Water Co.*, 74 Md. 269, 22 Atl. 72, 13 L. R. A. 117, 28 Am. St. R. 245.

§ 1111b. **Same subject; prescriptive right.**—A plaintiff may be entitled to an injunction to restrain a defendant from continuing to pollute a stream, in order to prevent such defendant from gaining a prescriptive right even though such pollution does not interfere with the use of the water which the plaintiff is making.⁵⁰ And after a taking of the waters of a stream for city purposes, a prescriptive right to pollute the stream cannot be acquired.⁵¹ So where a town took its water supply from a river by percolation into a filtering gallery and four thousand feet above its water works defendant carried on the business of wool-pulling, and cast daily into the stream decomposed animal matter and a small quantity of arsenic, which, however, made no perceptible difference in the quality of the water where the town took its supply, it was held, on the one hand, that defendant could not thus acquire a prescriptive right to pollute the river, and on the other that the town could not enjoin him from continuing his business.⁵² In such a case an injunction may be refused without prejudice to another application in the future on facts showing a pollution of the water.⁵³

§ 1112. **Same subject; sanitariums; percolation.**—When a business is dangerous, unhealthful, or otherwise greatly injurious to a community or to an individual, and it is possible to avoid the injury by a more careful management, or even, if necessary, by a removal of the works to a more secluded and less objectionable place, then the owners of the noxious business will be mulcted in damages, and, if necessary, restrained by the courts.⁵⁴ Where a

50. *Parker v. American Woolen Co.* (Mass. 1907), 81 N. E. 468.

51. *Morton v. Moore*, 15 Gray (Mass.), 573, 576; *Mills v. Hall*, 9 Wend. (N. Y.) 315; *Rhodes v. Whitehead*, 27 Tex. 304; *Staffordshire Canal v. Birmingham Canal*, L. R. 1 H. L. 254; *Mill v. Commissioner*, 18 C. B. 60; *Rochdale Canal v. Radcliffe*, 18 Q. B. 287.

52. *Brookline v. Mackintosh*, 133 Mass. 215.

53. *Fletcher v. Bealey*, L. R. 28 Ch. D. 688.

54. *Barnard v. Shirley*, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, per Howard, J.: "We have seen that in the case of *Parker v. Larsen*, 86 Cal. 236, 24 Pac. 989, when it appeared that the defendant could flow water from his artesian wells over his fields without injury to his neighbor, but did not do so, he was enjoined. In the case of *Indianapolis Water Co. v. American Strawboard Co.*, 53 Fed. 970, where there was a discharge of refuse matter from a strawboard factory into a non-navigable river used

work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care, so as to give as little annoyance as may be reasonably expected. Thus persons using the water of an artesian well to bathe persons at a sanitarium, the well and sanitarium being on their own premises, are not liable to an adjoining owner for allowing the water so polluted to flow into a stream which is the natural water-course of the basin in which the well is situated, and will not be enjoined if they use reasonable care to avoid injury to the adjoining owner.⁵⁵

by a water company as a source of supply for furnishing a city with water for domestic and other purposes, it was held that injunction would lie to restrain said pollution of the water supply. In *Kinnaid v. Oil Co.*, 89 Ky. 468, 12 S. W. 937, defendant had stored petroleum which leaked and percolated through the ground until it reached plaintiff's spring of water. *Gas-Light & Coke Co. v. Graham*, 28 Ill. 73, was a similar case, the offensive substances percolating from the gas works into plaintiff's well. Also, *Gas Co. v. Murphy*, 39 Pa. St. 257. Either of two courses could have been followed by the offending defendants in these last three cases. They could improve their works so that the oils would not leak or percolate through the earth to the fouling of the water, or they could remove their works to another locality. Accordingly, damages were assessed in each case for the injury. So of various kinds of dangerous or offensive mills, factories, or other establishments or occupations. If they are conducted in such a manner as to materially and essentially injure adjoining proprietors, the owners may be subject to suits for damages, or,

in case the injury is continuous, the business may be enjoined. But in this class of cases either a change in the method of conducting the business, so as to avoid the injury, or else a total removal of the works to another and safer locality, may be had."

55. *Barnard v. Shirley*, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, per *Curiam*: "In cities and towns, with their numerous inhabitants and diversified business, with their mills, shops, and manufactories, with their streets and sewers, all the products and means of a high civilization, it would be impossible that the pure streams that flow in from the farm-sides should remain uncontaminated; and those that live upon the lower banks of such streams must, for the general good, abide the necessary results of such causes. *Merrifield v. City of Worcester*, 110 Mass. 216. That it is not, under all circumstances, an unreasonable and unlawful use of a stream to throw or discharge into it waste or impure matter, and that whether, in any given case, such use would be reasonable or not, is a question for the jury. See *Ang., Water Courses* (7th Ed.), § 140d. In the case before us the

And yet more in such a case should an injunction be denied where plaintiff stood by without objection while the sanitarium was being erected and acquiesced for more than a year in the flow of

stream flowed through the heart of the city of Martinsville before it reached the lands of appellee. Will it be said that there is any lability for contamination from the refuse of the city? Must it be that one who lives on the lower lands on the banks of a stream shall forbid forever the founding of a city on the lands above, forbid the grading of streets, the building of sewers, the erection of mills, factories, hospitals, or other means of livelihood, comfort, and convenience of the inhabitants? A case in many of its features resembling that now before the court is the well-considered case of *Coal Co. v. Sanderson*, 113 Pa. St. 126, 6 Atl. 453. That was a mining case, and the chief question was as to the liability of the mine owners for the flowage of foul water from the mine into a stream which was the natural water course of the basin in which the mine was situated. The plaintiff in that case, Mrs. Sanderson, had purchased a tract of land in the city of Scranton, on Meadow brook, near its mouth. The existence of the stream, the purity of its water, and its utility for domestic and other purposes, it is said, was a leading inducement to her purchase of the land. She erected a house, threw dams across the brook to form a fish and ice pond and to supply a cistern, and the water was forced by hydraulic pressure from the cistern to a tank in the house, and was used for domestic purposes and for a fountain. The plaintiff alleged in her complaint that the large volume of mine water which the defendant company poured

into the brook above had corrupted the stream to such an extent as to render it totally unfit for domestic use; that the fish were destroyed, the pipes corroded, and her entire apparatus for utilizing the water rendered worthless. She brought her action to recover damages for such pollution of the stream. In the course of the opinion the court says: 'It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property. He may cut down the forest trees, clear and cultivate his land, although in so doing he may dry up the sources of his neighbor's springs, or remove the natural barriers against wind and storm. If, in the excavation of his land, he should uncover a spring of water, salt or fresh, acidulated or sweet, he will certainly not be obliged to cover it again, or to conduct it out of its course, lest the stream, in its natural flow, may reach its neighbor's land. . . . In sinking his well he may intercept and appropriate the water which supplies his neighbor's well. *Acton v. Blundell*, 12 Mees. & W. 324; *Wheatley v. Baugh*, 25 Pa. St. 528; *Haldeman v. Bruckhart*, 45 Pa. St. 514. Or, if his own well is so close to the soil of his neighbor as to require the support of a rib of clay or of stone on his neighbor's land to retain the water in the well, no action will lie against the owner of the adjacent land for digging away such clay or stone, which is his own property. *Whart., Neg.*, 939. So, also, each of two owners of adjoining mines has a natural right to work

the water.⁵⁶ The rule applicable to the percolation of water from a natural water-course does not apply to water brought upon the land by artificial means. Thus, a landowner who permits the water taken from artesian wells on his lands and carried through a ditch for the purpose of irrigating his fields, to percolate through the ditch and thus saturate his neighbor's land to its injury, when it might have been drained from the ditch, may be restrained from continuing the injury.⁵⁷

§ 1112a. **Same subject; parties; pleading.**—Several lower riparian owners have such a community of interest and right in the enjoyment of a non-navigable stream that they may join in a petition to restrain an upper proprietor or a stranger from causing it to overflow and injure their lands or from adulterating its water.⁵⁸ But an injunction will not be granted to restrain the discharge of refuse water from a factory into a lake, where the bill does not state with certainty with what and to what extent

his own mine in the manner most convenient and beneficial to himself, although the natural consequence may be that some prejudice may occur to the owner of the adjoining mine. *Smith v. Kenrick*, 7 C. B. 515. One mine owner may thus permit water naturally flowing in his own mine to pass off by gravitation into an adjoining or lower mine, so long as his operations are carried on properly and in the usual manner. *Bainb., Mines*, 297. To the same effect are *Wilson v. Waddell*, L. R. 2 App. Cas. 95; *Crompton v. Lea*, L. R. 19 Eq. 115. The defendants, being the owners of the land, had a right to mine the coal. It may be stated as a general proposition that every man has the right to the natural use and enjoyment of his own property, and if, while lawfully in such use and enjoyment without negligence or malice

on his part, an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*, for the rightful use of one's own land may cause damage to another without any legal wrong. . . . "It is established," says Cotton, L. J., in *Iron, etc., Co. v. Kenyon*, 11 Ch. Div. 783, "that taking out mineral is a natural use of mining property, and that no adjoining proprietor can complain of the result of careful, proper mining operations."''

56. *Barnard v. Shirley*, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117; *Logansport City v. Uhl*, 99 Ind. 531; *Hulme v. Shreve*, 4 N. J. Eq. 116; *Howell v. Butcher's Slaughterhouse Co.*, 36 La. Ann. 63.

57. *Parker v. Larsen*, 86 Cal. 236, 24 Pac. 989.

58. *Horton v. Fulton*, 130 Ga. 466, 60 S. E. 1059.

such refuse water is impregnated, and the quantity discharged, and the distance of the factory from the lake.⁵⁹

§ 1113. **Diverting water from natural channel.**—A person who has wrongfully diverted running water from its natural channel may be compelled by mandatory injunction to restore it to its natural channel at the suit of one whose lands include either the whole or a part of such channel. *Aqua currit, et debet currere, ut currere solebat.*⁶⁰ A riparian proprietor has no property in the water of a stream but a simple usufruct while it passes along, and he must return it to its ordinary channel when it leaves his estate. The reasonable use of the water as it passes on its onward course so that no considerable damage to others is done by detaining it is the rule by which the rights of riparian owners are regulated.⁶¹ But an injunction will not be granted to restrain defendant from a contemplated diversion of water for the purpose of gold-washing operations upon an allegation that such diversion will cause future injury to lower proprietors on the same stream when they are ready to engage in similar operations.⁶² The owner of lands drained by a stream or other natural water-course may change and

59. *Baltimore v. Warren Mfg. Co.*, 59 Md. 96.

60. *Corning v. Troy Iron Factory*, 40 N. Y. 191, per Graves, J.: "The plaintiffs are entitled to the flow of the stream in its natural channel. Legal remedies cannot restore it to them and secure them in the enjoyment of it. Hence, the duty of a court of equity to interpose for the accomplishment of that result. A further ground requiring the interposition of equity is to avoid multiplicity of actions. If equity refuses its aid the only remedy of the plaintiffs whose rights have been established will be to commence suits from day to day, and thus endeavor to make it the interest of the defendant to do justice by restoring the stream to its

channel. If the plaintiffs have no other means of recovering their rights, there is a great defect in jurisprudence. But there is no such defect. The right of plaintiffs to the equitable relief sought is established by authority as well as principle. *Webb v. Portland Mfg. Co.*, 3 Sumn. (N. S.) 190; *Tyler v. Wilkison*, 4 Mason, 400; *Townsend v. McDonald*, 12 N. Y. 381.

See §§ 1033-1036 herein as to diverting waters.

61. 3 Kent, Com. 439, 440; *Pugh v. Wheeler*, 2 Dev. & Bat. 50; *State v. Glen*, 7 Jones, 321. And see *Mason v. Hill*, 5 B. & Ad. 1; *Embrey v. Owen*, 6 Exch. 369.

62. *Walton v. Mills*, 86 N. C. 280.

control the natural flow of the surface water on his lands and by means of ditches or other means in the reasonable use of his lands accelerate the flow and increase the volume of water which reaches the stream; and he may by injunction restrain a lower proprietor from interfering with the flow of water in the stream and compel him to remove any obstructions he has placed in the channel by which he has thrown the water back on plaintiff's land.⁶³ But one owner cannot, to the damage of other owners, concentrate surface water by artificial arrangements on his land and discharge it into the stream beyond the natural capacity of the stream to carry it off.⁶⁴

§ 1114. **As to subterranean water.**—The construction of a tunnel on defendant's own land for a necessary purpose, and with an expensive plant already established thereon, without malice or negligence, should not be enjoined *in limine* on the ground that it threatens to cut off a subterranean flow from a neighbor's tunnel, since the latter, to make good his right, would have to prove at least a well defined and discerned stream, not merely a percolation.⁶⁵

63. McCormick v. Horan, 81 N. Y. 86. And see Waffle v. N. Y. Central R. Co., 53 N. Y. 11; Miller v. Laubach, 47 Pa. St. 154.

64. Noonan v. Albany, 79 N. Y. 470.

65. Williams v. Ladew, 161 Pa. St. 283, 29 Atl. 54, per Dean, J.: "In Lybe's Appeal, 106 Pa. St. 626—a case in which Lybe prayed for an injunction to restrain one Herr from digging a well upon his own land, whereby a subterranean flow of water would be cut off from a certain spring to which plaintiff had a right—there was a most thorough examination of the whole subject, and a review of the law in this State and in England, and it was decided: 'That the owner of land is not entitled to recover for

injuries to wells and springs situated thereon, if caused by the acts of the adjoining owner, if done in the exercise of his lawful rights on his own soil, and if such rights are exercised without malice or negligence.' It is further held that, as to subterranean waters, 'the great preponderance of authority supports the doctrine that an injury caused to a subterranean supply of water by the lawful acts of an owner is, unless the stream be well defined, and its existence known or easily discernible, or unless the injury be caused by negligence or malice, *damnum absque injuria*.' It is said in this case that the question was first discussed at length in Wheatley v. Baugh, 25 Pa. St. 528. In the case last named it appeared that Baugh, the plaintiff,

§ 1115. **Railroad embankment without culvert.**—An action to restrain a railroad company from flooding plaintiff's land by the construction of an embankment across a stream, with an insufficient culvert to permit the passage of the water, is not prematurely brought because no damages have as yet accrued to plaintiff, where

occupied about an acre of ground, on which he carried on a tannery. He procured his supply of water for tannery purposes from a spring upon his own land. The defendant, for the purpose of mining copper ore upon the land adjoining, at the distance of 550 yards from Baugh's spring, sank a shaft, which, while operated, stopped the subterranean flow into the spring. This court decided against the plaintiff on the ground that the source of the spring was percolations, and the interruption of these was no cause of action. But the court says: 'We have treated the stream as depending on percolations alone at the point where mining operations are carried on, because the evidence does not show that any distinct water course leading to it has been cut off. If this should be shown, and it should also appear that it could have been preserved without material detriment to the owner of the land through which it flowed, the destruction of it might be attributed to malice or negligence.' In *Haide-man v. Bruckart*, 45 Pa. St. 514, it is decided, 'that a proprietor of land may, in the proper use of his land for mining, quarrying, building, or any other useful purpose, cut off or divert subterraneous water flowing through it to the land of his neighbor, without any responsibility to that neighbor.' We have called attention to the law as stated in these cases, because counsel for both parties

cite and rely on them. The plaintiffs aver that defendants' construction of a tunnel on their own land will tap subterranean waters under that land, which now run into a defined stream on plaintiff's land. But this stream, in the most favorable view, is no better defined than Lybe's spring, in the case cited, the subterranean flow to which was cut off. Besides, it is disputed that the stream on plaintiff's land is such a natural stream, the flow of which cannot be lawfully diminished by them as adjoining owners; but, putting aside this question, the defendants have the right to construct a tunnel upon their own land to obtain a water supply from percolations or subterranean flow upon that land, so long as their operations are not negligently or maliciously conducted; or, if defendants attempt to interfere directly with the body of water in the stream on plaintiff's land, before the determination of their right, the court may properly, on application, restrain such interference. But so long as their operations are confined for a useful purpose to their own land, we think at this stage of the case they should not be restrained by injunction. Therefore the decree of the court below continuing the injunction is reversed at the costs of the appellees, and the injunction is dissolved, so far as it restrains defendants from necessary and useful operations on their own land."

he does not ask for any money judgment; and the injunction restraining the railroad company from constructing the embankment is properly modified by permitting it to go on with the construction, except as to specified openings to insure the free flow of the water.⁶⁶

66. *Lake Erie & W. R. R. Co. v. Young*, 135 Ind. 426, 35 N. E. 177, per Howard, J.: "It is for the prevention of a future injury actually threatened, and to prevent the perpetration of a legal wrong, for which no adequate remedy can be had in damages. In the case of *Mohawk Bridge Co. v. Utica & S. R. Co.*, 6 Paige (N. Y.), 554, Chancellor Walworth said: 'If the magnitude of the injury is great, and the risk so imminent that no prudent person would think of incurring it, the court will not refuse its aid, for the protection of the complainant's right by injunction, on the ground that there is a bare possibility that the anticipated injury from the noxious erection may not happen.' The erection of a milldam, as said in *High on Injunctions* (section 839), in such a manner that the inundation caused by the back flowage of the water lessens the value of complainant's land, destroys his timber, and imperils the health of the neighborhood, will be enjoined. In *Stone v. Lumber Co.*, 59 Mich. 24, 26 N. W. 216, it was held that injunction would lie to prevent the flooding of the plaintiff's land, if it appeared that the threatened injury is of a character to render the property comparatively worthless for the purposes to which it was best adapted, and for which it was intended by the owner, without regard to the amount of the immediate damage sustained; that the fact that annual freshets, in some

degree, impeded the growth of hay on the land, would not relieve the defendant from liability for erecting a dam in such a manner as to flood such land, thereby destroying its value for the purposes to which it was best adapted; that a person will not be allowed to destroy the property of another by a series of threatened trespasses, and then remit him to his remedy at law to recover damages sustained, but equity will interfere to enjoin the threatened injury at any period of its perpetration, and thus prevent a multiplicity of suits. *Bemis v. Upham*, 13 Pick. 169, was a case where an injunction was sought to prevent the keeping up of a milldam which set back the water so as to overflow the plaintiff's dam, higher up. It was admitted by the defendant in that case that the grievance complained of was a nuisance, but it was objected that there was an adequate and complete remedy at law. The court held that a decree in equity was the only sufficient remedy, inasmuch as such decree could extend to all parties having an interest, and bind them, effectually, forever; that, instead of requiring an entire prostration of the nuisance, the decree might be modified, and adapted to the just rights of the parties. It might order an abatement in part, determine the height to which the dam might be kept, the terms on which it might be kept up, the mode of using the water, and other incidents. So, in the case before us, the restraining

§ 1116. **Enjoining dams; obstruction of stream.**—If a person, by artificial means, raises a volume of water above its natural level, and, by percolation or by overflow, injures neighboring lands, without license, prescription, or grant from the proprietor, the latter may invoke the interposition of a court of equity, and obtain an injunction to prevent it, when otherwise he would sustain irreparable injury, or be compelled to bring a multiplicity of actions to recover the damages as they accrued.⁶⁷ So it is said in a recent case that, “The character of the injury caused by the unlawful obstruction of a water-course whereby the lands of riparian owners are flooded, is usually such as to bring the matter within the jurisdiction” of a court of equity.⁶⁸ So in an action

order forbidding the filling up of the trestlework with earth might be, and in fact was, so modified that the appellant might be allowed to fill up the whole space, except that occupied by the culvert, and an additional space of fifteen feet, and thus adapt the decree to the just rights of the parties, giving to the appellees all the relief necessary to allow the floods to escape readily, and so protect their land from the overflow, and at the same time enable the appellant, with the least inconvenience, to put its road in good condition. We think the relief by injunction was the only adequate and complete remedy, and that the complaint is good for that purpose. *McGoldrick v. Slevin*, 43 Ind. 522; *Clark v. Railroad Co.*, 44 Ind. 248; *Cox v. Railroad Co.*, 48 Ind. 178; *Owen v. Phillips*, 73 Ind. 284; *Patoka Twp. v. Hopkins*, 131 Ind. 142, 30 N. E. 896; *Wilmarth v. Woodcock*, 58 Mich. 482, 25 N. W. 475; *Railway Co. v. Tait*, 63 Tex. 223; *Moore v. Railway Co.*, 75 Iowa, 263, 39 N. W. 390, 10 Am. & Eng. Enc. Law, pp. 835-977.”

67. *Esson v. Wattier*, 25 Or. 7, 34 Pac. 756, per Moore, J.: “In *Fletcher v. Rylands*, L. R. 1 Exch.

265, L. R. 3 H. L. 330, Mr. Justice Blackburn, in the court of exchequer chamber, thus illustrates a rule applicable in this case: ‘If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril.’ This principle, thus established, has since been applied to injuries resulting to adjoining land from the percolation of an artificial reservoir. *Gould, Waters*, § 296. If a dam be erected across a stream, and the water raised above the natural flow, it forms a reservoir which necessarily creates an artificial pressure (*Wilson v. New Bedford*, 108 Mass. 261); and if the effect be to force the water through the earth from the reservoir to neighboring lands, causing them to produce poorer crops, damages can be recovered for such injury. *Manufacturing Co. v. Fuller*, 15 Pick. 554. And, if damages be occasioned by raising a pond so as to injuriously affect neighboring lands, no distinction is made whether it be by overflowing or by percolation. *Fuller v. Manufacturing Co.*, 16 Gray, 46; *Pixley v. Clark*, 35 N. Y. 520.”

68. *Cloyes v. Middlebury Elec. Co.* (Vt. 1907), 66 Atl. 1039.

by a riparian owner to enjoin the maintenance of a dam on the ground that it sets back the water in the river so as to flow his land and injure his water power and saw mill, it was held that, as the facts showed an injury not only from the essential nature of it, but also from its continuous character, the legal remedy was inadequate and that an injunction against its maintenance should issue.⁶⁹ So where a dam by its back-water renders adjacent land comparatively worthless, and by causing an artificial head of water to become stagnant so corrupts the atmosphere as to impair the health, it thereby becomes a nuisance and is ground for relief by injunction to those who suffer special injury from it, either to their health or property.⁷⁰ And where the stagnant water of a pond in the city of Yonkers was found to be so poisonous as to be dangerous to life and health, and the owner of the pond insisted upon rebuilding the dam which formed it after it had been partially torn down by the board of health, a judgment restraining him from so rebuilding was affirmed on appeal, as he had disobeyed the official order to keep the pond clean and safe.⁷¹ So a court of equity has power to restrain one from increasing the height of his mill-dam, if such increase of height will be productive of loss of health in the family of another residing in the neighborhood of the mill.⁷² And in an action to enjoin the obstruction of a stream whereby the lands of a riparian owner are flooded, it is not necessary that the right should be first established at law, but, the title to the riparian lands being admitted by demurrer, the right to have the waters of the stream flow through them free

Obstruction of stream by fish traps may be enjoined. *Morris v. Graham*, 16 Wash. 343, 47 Pac. 752.

69. *Royce v. Carpenter* (Vt. 1907), 66 Atl. 888.

70. *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Holsman v. Boiling Spring Co.*, 14 N. J. Eq. 335. And see *Ogle-tree v. McQuaggs*, 67 Ala. 580; *Nelms v. Morgan*, 44 Ga. 617; *Hahn v. Thornberry*, 7 Bush (Ky.), 403.

71. *Board of Health v. Copcutt*, 140 N. Y. 12, 35 N. E. 443, 23 L.

R. A. 485, citing and distinguishing *Wenzlick v. McCotter*, 87 N. Y. 127; *Babcock v. Buffalo*, 56 N. Y. 268; *Rochester v. Simpson*, 57 Hun. 36. See, also, *De Vaughn v. Minor*, 77 Ga. 809, 1 S. E. 433.

72. *Minor v. De Vaughn*, 72 Ga. 208; *Norwood v. Dickey*, 18 Ga. 528; *Cook Co. v. Beard*, 108 Mich. 17, 65 N. W. 518. See *Scheurich v. Southwest Missouri L. Co.*, 109 Mo. App. 406, 84 S. W. 1003.

from unlawful obstruction is clear and the necessity for immediate action urgent.⁷³

§ 1117. **Obstructing navigable stream.**—One who seeks to abate an obstruction in a navigable stream and for an injunction must allege and show that the commerce for which he would utilize the stream is lawful.⁷⁴ And where large interests are involved, and the obstructions to navigation which are complained of have been constructed under color of legislative authority, and have been used in promoting commerce and acquiesced in for a long time, equity will not interfere by perpetual injunction until the complainant's right has been established at law, and it appears that no adequate compensation can be afforded in damages.⁷⁵

§ 1117a. **Dam authorized by Legislature; navigable stream.** In the absence of legislation by Congress, a State has power to improve its lands and promote the general health by authorizing a dam to be built across its interior streams, though they were previously navigable to the sea by vessels engaged in the coastwise trade. And where the construction of a dam across such a stream is authorized by a legislative act which provides for compensation to a landowner who is damaged thereby, an injunction restraining the construction of the dam until the payment of damages will not be granted at the suit of a landowner who claims that there will be an interference with his right of access and a flooding of his

73. *Cloyes v. Middlebury Elec. Co.* (Vt. 1907), 66 Atl. 1039.

74. *Spokane Mills Co. v. Post*, 50 Fed. 429, per Beatty, J.: "One asking this extraordinary relief should first establish beyond question that he is entitled to it that no fault lies with him, that his hands are clean; and this too by direct and not by inferential averments. It is very certain that if in this case it positively appeared the logs in question were unlawfully cut from the public lands

of the government, the complainant's request would without hesitation be refused. The contrary should, I think, be manifest by allegations and proof."

75. *Burnham v. Kempton*, 44 N. H. 78; *Wason v. Sanborn*, 45 N. H. 169, 172; *Eastman v. Amoskeap Mfg. Co.*, 47 N. H. 71; *Remington v. Foster*, 42 Wis. 608; *Delaware, etc., Canal Co. v. Lawrence*, 2 Hun, 163, 168; *Irwin v. Dixon*, 9 How. 10, 25; *Weller v. Smeaton*, 1 Cox, 102.

land unless dikes are raised to prevent it, especially where there is no allegation that the defendant is not financially responsible.⁷⁶

§ 1118. **Increasing natural flow of water.**—Where a ditch, which has been extended a part of the distance only intended by an agreement of the owners of land, is allowed to fill up for many years, and its reopening would increase the flow of water on and over the lower ground beyond the natural flow, to the injury of such grounds, injunction will lie, at the suit of a subsequent purchaser of the lower grounds, to prevent its reopening.⁷⁷ But where complainant's vendor consented to the original digging of the ditch, and at the time of the purchase by complainant small quantities of water were passing through it, the owners of the upper land cannot be compelled to stop the flow of water altogether, but only to refrain from cleaning the ditch out.⁷⁸ It is the degree of flowage, rather than the use to which it is subservient, which bears upon the question of its being a nuisance.⁷⁹ A change in the mode of use or the purpose for which it is used, or an increase in capacity of the machinery which is propelled by the water, will not affect the right if the quantity used is not increased and the change is not to the prejudice of others.⁸⁰

§ 1119. **Surface drainage.**—The respective rights and liabilities of adjoining owners of land cannot be precisely determined in advance by a mathematical line or a general formula, and each of them in turn must often put up with some damage, though

76. *Manigault v. Ward Co.*, 123 Fed. 707, *aff'd* *Manigault v. Springs*, 199 U. S. 473, 26 Sup. Ct. 127, 50 L. Ed. 274.

Consent of commissioners of land office in New York not defense in action by State to enjoin construction of dam across a navigable river. *People v. Page*, 39 App. Div. (N. Y.) 110, 56 N. Y. Supp. 834.

77. *Miller v. Hayden*, 91 Ky. 215, 15 S. W. 243. And see *Livingston v. McDonald*, 21 Iowa. 160.

78. *Miller v. Hayden*, 91 Ky. 215, 15 S. W. 243.

79. *Saunders v. Newman*, 1 B. & Ald. 258. And see *Potier v. Burden*, 38 Ala. 651.

80. *Hale v. Oldroyd*, 14 Mees. & W. 789; *Baxendale v. McMurray*, L. R. 2 Ch. App. 790; *Casler v. Shipman*, 35 N. Y. 533; *Whittier v. Cocheco Mfg. Co.*, 9 N. H. 455. And see *Davis v. Brigham*, 29 Me. 391; *Stackpole v. Curtis*, 32 Me. 383.

the other plainly foresees it before bringing it to pass.⁸¹ An owner of land upon the slope of a hill running down to a mill pond will not be restrained from cultivating and fertilizing it in the ordinary way for garden purposes, because the water power of the pond is diminished by the large amount of solid matter constantly carried into the pond by surface drainage.⁸² And one who, in the ordinary course of husbandry, causes surface water to flow on the land of an adjoining owner with slightly increased velocity, without materially increasing the volume, or diverting the flow from its natural course, or causing material injury to the adjoining owner, commits no wrong, and will not be restrained by injunction.⁸³ But a landowner may be enjoined from conducting water power from a sag hole on his land by means of tile drain, open ditches, and furrows and precipitating such water upon the land of an adjoining proprietor in a body more rapidly than it would flow if the artificial courses were not made.⁸⁴

81. *Rideout v. Knox*, 148 Mass. 368, 19 N. E. 390.

82. *Middlesex Co. v. McCue*, 149 Mass. 103, 21 N. E. 230, per Holmes, J.: "If the plaintiff were complaining of offensive drainage from a vault, it would be entitled to recover upon proof of the fact. *Ball v. Nye*, 99 Mass. 582. If it complained that the surface drainage was made offensive by the nature of the substance spread by the defendant upon his land, the case would be nearer the line, and the right to recover possibly might depend upon further circumstances, such as whether the substances were usual and reasonable fertilizers, or refuse, etc. See *Brown v. Illius*, 27 Conn. 84, and 25 Conn. 583. In this case it complains, not that the substances brought down are offensive, but that the defendant causes any solid substance to be brought down at all. Practically, it would forbid the defendant to dig his land, at least without putting up a guard, since the

surface drainage necessarily carries more of the soil along with it if the earth is made friable by digging. This would cut down the defendant's right of surface drainage to a very small matter indeed. We are of opinion that a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in a plain, and that damage to the lower proprietor of the kind complained of is something that he must protect himself against as best he may. The plaintiff says that a wall would stop the trouble. If so, it can build one upon its own land. *Dickinson v. Worcester*, 7 Allen, 19; *Flagg v. Worcester*, 13 Gray, 601, 607; *Parks v. Newburyport*, 10 Gray, 28; *Casidy v. Old Colony Railroad*, 141 Mass. 174, 5 N. E. 142."

83. *Peck v. Goodberlett*, 109 N. Y. 180, 16 N. E. 350, where *McCormick v. Horan*, 81 N. Y. 86, is followed.

84. *Page v. Huckins*, 150 Mich. 103, 113 N. W. 577.

§ 1120. **Same subject; surface water.**—Under the Wisconsin statutes, an action to restrain defendant from maintaining a ditch through which water from his land is discharged on that of plaintiff is, if the injury is “continuous and constantly recurring,” an equitable action, and it is immaterial that damages for past injuries resulting from such overflow are claimed and awarded.⁸⁵ And in a suit to restrain a discharge of water on plaintiff’s land, where it appeared that there was a basin on defendant’s land in which water from rain and melting snow collected, and that ditches were dug which conducted water from springs to such basin; that defendant also dug a fountain, which increased the water therein; and that he dug a ditch through an elevation on his own land, and through it precipitated the water from such basin on plaintiff’s land, which was greatly injured by such discharge, it was held that an injunction was properly awarded.⁸⁶ The rule is different as to surface water. An owner of a lot upon a public city street cannot restrain the city from constructing drains along the side of the street, or across it, or from grading or otherwise improving the street, because the flow of surface water upon his land will be thereby greatly increased.⁸⁷ But a city or township may be enjoined from collecting surface water from its highway into an artificial channel and causing it to flow in a greatly increased quantity upon the lands of an adjoining owner.⁸⁸ And in a recent case in New York it was decided that where a private

85. *Wendlandt v. Cavanaugh*, 85 Wis. 256, 55 N. W. 408. Such an action is properly brought in equity. *Denner v. Railroad Co.*, 57 Wis. 218, 15 N. W. 158; *Fraedrich v. Flieth*, 64 Wis. 184, 25 N. W. 28; and none the less so that past damages are claimed by reason of the nuisance. *Cedar Lake Hotel Co. v. Cedar Creek Co.*, 79 Wis. 297, 48 N. W. 371.

86. *Wendlandt v. Cavanaugh*, 85 Wis. 256, 55 N. W. 408, following *Pettigrew v. Evansville*, 25 Wis. 223.

87. *Heth v. Fond du Lac*, 63 Wis. 228, 23 N. W. 495; *Waters v. Bay*

View, 61 Wis. 642, 21 N. W. 811; *Allen v. Chippewa Falls*, 52 Wis. 430; *Hoyt v. Hudson*, 27 Wis. 656; *Turner v. Dartmouth*, 13 Allen, 291; *Barry v. Lowell*, 8 Allen, 127; *Flagg v. Worcester*, 13 Gray, 601; *Parks v. Newburyport*, 10 Gray, 28. And see as to the more general application of the rule in respect to surface water. *O'Connor v. Fond du Lac, etc.*, R. Co., 52 Wis. 526; *Eulrich v. Richter*, 37 Wis. 226; *Fryer v. Warne*, 29 Wis. 511; *Gannon v. Hargadon*, 10 Allen, 106.

88. *Patoka Township v. Hopkins*.

owner sued to restrain the city of New York from turning surface drainage into a natural stream flowing through his lands, and it appeared that the stream was not overtaxed, and that the condition complained of had existed since the annexation of the district to the city of New York in 1895, he was not entitled to an injunction *pendente lite*.⁸⁹

§ 1121. **Same subject.**—Where a municipality deliberately enters upon a scheme of drainage, in pursuance of which it will collect water from a large area, and by artificial means cast it upon private property through which the land from which the water is to be collected would not otherwise be drained, it will be enjoined.⁹⁰ And that this private property is already lawfully subjected to a considerable burden in the drainage of other lands is no justification of such an additional imposition.⁹¹ In a bill for an injunction, it appeared that complainant and defendant owned adjoining farms of nearly the same level; that on the defendant's lands were large ponds; and that defendant, in order to drain his land, cut a ditch at a place which was higher than the surrounding land, and known as the "divide" between the two farms, causing water to flow from its natural course on complainant's land. Complainant brought an action at law for damages, but consented to a nominal verdict on defendant's agreeing to fill up the ditch. Subsequently defendant frequently threatened to reopen it. It was held that complainant was entitled to an injunction.⁹²

§ 1122. **Floating logs.**—Where defendants threatened to float logs on a stream that ran through plaintiff's land so as to cause damage to the banks of the stream and to plaintiff's land, and

131 Ind. 142, 30 N. E. 896; Paddock v. Sones, 102 Mo. 226. And see Ryckie v. St. Louis, 98 Mo. 497.

89. Penfield v. City of New York, 115 App. Div. (N. Y.) 502.

90. Soule v. City of Passaic, 47 N. J. Eq. 28, 20 Atl. 346; Field v.

West Orange, 36 N. J. Eq. 118, 37 N. J. Eq. 600; Miller v. Mayor, etc., 47 N. J. Eq. 62, 20 Atl. 61.

91. Noonan v. Albany, 79 N. Y. 470.

92. Anderson v. Henderson, 124 Ill. 164, 16 N. E. 232.

claimed the right to do so whenever he pleased, it was held that plaintiff was entitled to an injunction to prevent the threatened injury, and to quiet his title and settle his rights.⁹³ But where the right to transport logs on a stream is protected by law it must continue, and will not be restrained so long as the public have any need of its exercise or it is abrogated by law.⁹⁴

§ 1123. **Hydraulic mining debris.**—A corporation was enjoined from hydraulic mining, which carried debris down a river on to lands below. The corporation built a dam to restrain the debris, and then sought a modification of the injunction. Expert testimony was conflicting on the question of whether the dam afforded an adequate protection. It was held that, in view of the doubt, the injunction should not be modified.⁹⁵ An injunction will be granted, at the suit of the United States, to restrain hydraulic mining operations, when it appears that the dam constructed in connection with the impounding works is of wood, standing in the bed of a torrential mountain stream, and is liable

93. Haines v. Hall, 17 Or. 165, 20 Pac. 831; Meyer v. Phillips, 37 N. Y. 485; Curtis v. Keesler, 14 Barb. 511; Holsman v. Boiling Spring Co., 14 N. J. Eq. 335; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Johnson v. Rochester, 13 Hun, 285; Swindon Water Co. v. Canal Co., L. R. 7 H. of L. 697; Clowes v. Staffordshire Potteries, L. R. 8 Ch. App. 451.

94. Heerman v. Beef Slough Mfg. Co., 1 Fed. 145.

95. Hardt v. Liberty Hill Mining Co., 27 Fed. 788. And see Woodruff v. North Bloomfield, etc., Co., 18 Fed. 753. A complaint alleged the carrying on of hydraulic mining on a certain river, which filled the bed of the river and destroyed the channel, and rendered plaintiff's (a county's) bridge and highways unsafe; that defendant was selling water, knowing

that it was to be used in hydraulic mining on such river, and was thereby assisting in conducting such hydraulic mining, and filling the channel of the river, to the injury of plaintiff's property, etc.; and prayed for an injunction. It was held that the hydraulic mining was not of itself unlawful or necessarily injurious to others; that the neglect to properly care for the debris resulting therefrom only was unlawful; that the sale of the water was not unlawful; and that, as the complaint did not show that it was sold with knowledge that it was to be used in such manner as to injure plaintiff, it stated no cause of action. Yuba County v. Cloke, 79 Cal. 239, 21 Pac. 740.

See § 1111 *et seq.* herein as to mining debris.

to be carried away by freshets, so as to discharge all the impounded debris into the lower streams, thereby causing injury to navigation.⁹⁶

§ 1124. **Brick kilns.**—A brick kiln is not a nuisance *per se* though it may become a nuisance where by reason of its location the smoke and noxious gases therefrom cause material discomfort to the occupants of neighboring houses.⁹⁷ So the maintaining of a brick kiln by one upon his premises so as to be materially offensive to his neighbors, or to injure the property of another, or to expose it to danger, constitutes a nuisance which may be enjoined.⁹⁸ So where the process of brick making constitutes a private nuisance by the communication of smoke and vapor which become mixed with the air supplied to the house of another, and constitute such an inconvenience as to materially interfere with the ordinary comfort of human existence, an injunction will be granted to restrain the further burning of bricks so as to occasion such inconvenience.⁹⁹ And a person manufacturing brick on his land may be enjoined from using a process by which noxious gases are generated and which are borne by the winds upon adjacent lands, injuring trees and vegetation; and it is immaterial that the injury is to ornamental trees only, as articles of luxury are protected as well as articles of necessity.¹ In such a case it is immaterial also that the injury is only occasional. It is sufficient to authorize an injunction that injury may be expected whenever a kiln is burning,

96. United States v. Lawrence, 53 Fed. 632.

97. Kirchgraber v. Lloyd, 59 Mo. App. 59; State v. St. Louis Board of Health, 16 Mo. App. 80.

98. Fuselier v. Spalding, 2 La. Ann. 773; Kirchgraber v. Lloyd, 59 Mo. App. 59; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, *aff'd* 2 Thomp. & C. 231; Walter v. Selfe, 4 DeG. & S. 315, 20 L. J. Ch. 433, 15 Jur. 416; Roberts v. Clarke, 18 L. T. N. S. 49. Compare Huckenstine's Appeal, 70 Pa. St. 102, 10 Am. Rep. 609; Hole v. Barlow, 4 C. B. N. S.

334, 4 Jur. N. S. 1019, 27 L. J. C. P. 207, 6 W. R. 619.

99. Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Walter v. Selfe, 4 Eng. L. & Eq. 315; Cavey v. Ledbitter, 13 C. B. (N. S.) 470; Roberts v. Clarke, 18 L. T. N. S. 49.

1. Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, per Earl, J.: "The law will protect a flower or vine as well as an oak. Cook v. Forbes, L. R. 5 Eq. 166; Broadbent v. Imperial Gas. Co., 7 DeG. M. & G. 436. These damages are irreparable, too, because the trees

unless the poisonous gases are blown away from plaintiff's land.² So burning bricks near a lunatic asylum was restrained by injunction on the ground that the smoke and vapors would be injurious to the patients and injure the trees and shrubs;³ and was similarly restrained within six hundred and fifty yards of a private dwelling, though the bricks were to be used in the erection of governmental fortifications.⁴ In Pennsylvania an injunction was denied to restrain the burning of bricks in the outskirts of the small town of Allegheny, though it injured plaintiff's residence and vineyard. It was considered that brick-making was a useful business and necessarily carried on near towns where the bricks were used, and that in such a case a court of equity would take into account the customs of the people, the characteristics of their business, the common uses of property, and the peculiar circumstances of the place.⁵

and vines cannot be replaced, and the law will not compel a person to take money rather than the object of beauty and utility which he places around his dwelling to gratify his taste or to promote his comfort and his health." The use of a process in burning brick by which noxious gases are generated and wafted on the adjoining land, injuring and destroying the growing crops, is such a nuisance as will support an action for damages. *Fogarty v. Junction City Press Brick Co.* (Kan.), 31 Pac. 1052.

2. *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567. And see *Ross v. Butler*, 19 N. J. Eq. 294; *Meigs v. Lister*, 23 N. J. Eq. 200; *Mulligan v. Elias*, 12 Abb. Pr. (N. S.) 259; *Clowes v. Potteries Co.*, L. R. 8 Ch. App. 125.

3. *Pollock v. Lester*, 11 Hare, 266.

4. *Beardmore v. Tredwell*, 31 L. J. (N. S.) 892. And see the similar cases of *Bamford v. Turnley*, 31 L.

J. (N. S. Q. B.) 286; *Cavey v. Led-bitter*, 13 C. B. (N. S.) 470; *Bareham v. Hall*, 22 L. T. (N. S.) 116; *Roberts v. Clarke*, 18 L. T. (N. S.) 49; *Luscombe v. Steer*, 17 L. T. (N. S.) 229. The adverse case of *Hole v. Barlow*, 4 C. B. (N. S.) 336, has been overruled in *Beardmore v. Tredwell*, *supra*. See, also, analogous cases where useful industries which produced smoke and noxious gases or odors were held to be nuisances. *Catlin v. Valentine*, 9 Paige, 575; *Peck v. Elder*, 3 Sandf. (N. Y.) 129; *Taylor v. People*, 6 Parker, Crim. 352; *Davis v. Lambertson*, 56 Barb. 480; *Hutchins v. Smith*, 63 Barb. 251; *Whitney v. Bartholomew*, 21 Conn. 213; *Cooper v. Randall*, 53 Ill. 24; *Cook v. Forbes*, L. R. 5 Eq. 166; *Sampson v. Smith*, 8 Sim. 272; *Crump v. Lambert*, L. R. 3 Eq. 409.

5. *Huckenstine's Appeal*, 70 Pa. St. 102. And see *Attorney-General v. Cleaver*, 18 Ves. 219.

AGAINST TRESPASS.

CHAPTER XXXIX.

AGAINST TRESPASS.

SECTION 1125. General rule.

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Section 1125. General rule.—It is said that, originally, courts of equity did not grant injunctions to restrain trespasses in any case, but, whether in analogy to the remedy to prevent waste, or to prevent injuries supposed not to be adequately recompensed by damages in the legal form, it is now firmly settled that injunctions will be granted to restrain trespasses under certain conditions. The inadequacy of the legal remedy is the foundation and indispensable prerequisite for the interposition of chancery in such matters, for the obvious reason that a legal remedy has been devised to redress such wrongs, and, so long as the law provides an adequate remedy, equity has no right to interfere. The general rule, as has often been stated, is that, in order to give the court of equity jurisdiction to enjoin torts to property, two conditions must concur: First, the complainant's title must be admitted, or established by a legal adjudication; and, second, the threatened injury must be of such a nature as will cause irreparable damage, not susceptible of complete pecuniary compensation.¹ And where it

1. *Carney v. Hadley*, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 100, per Mabry, J.: "The courts have generally accepted the statement of the rule here given as correct, although they have encountered considerable difficulty in its application to the facts of the various cases that have arisen. *Jerome v. Ross*, 7 Johns. Ch. 315; *Gause v. Perkins*, 3 Jones, Eq. 177; *McMillan v. Ferrell*, 7 W. Va. 223; *Citizens' Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 299; *Echelkamp v. Schrader*, 45 Mo. 505; *Hamilton v. Ely*, 4 Gill. 34; *Catching v. Terrell*, 10 Ga. 576; *Mayor, etc., v. Groshon*, 30 Md. 436; *Indian River Steamboat Co. v. East Coast Transp.*

Co., 28 Fla. 387, 10 So. 480. To authorize the issuance of the writ of injunction by a court of chancery, the injury threatened must be of such a peculiar nature that compensation in money cannot atone for it. The view expressed by Chancellor Kent is that 'it must be a strong and peculiar case of trespass, going to the destruction of the inheritance, or where the mischief is remediless, to entitle the party to the interference of this court by injunction.' *Jerome v. Ross*, *supra*. In *Shipley v. Ritter*, 7 Md. 408, the trespass complained of went to the destruction of that which was essential to the value of the estate, and to the destruction of the estate

appears that the trespass which it is sought to restrain will cause

itself, in the character in which it had been enjoyed. When such an injury is inflicted, it is irreparable, in the meaning of the rule, and cannot be compensated by the legal remedy; and hence a court of chancery, ever ready to prevent an injustice, steps forward with its restraining power to prevent the threatened injury. The character of the injury, as being capable of compensation, or such as is irreparable in its nature, is the distinguishing feature, in determining the jurisdiction of chancery in such cases. *West v. Walker*, 3 N. J. Eq. 279; *Thompson v. Williams*, 1 Jones, Eq. 176; *Powell v. Rawlings*, 38 Md. 239; *Thatcher v. Humble*, 67 Ind. 444; *Hatcher v. Hampton*, 7 Ga. 49; *Thomas v. James*, 32 Ala. 723; *Hillman v. Hurley*, 82 Ky. 626. And, in many of the cases where injunctions have been granted to restrain trespasses, the insolvency of the trespasser has been an important element. Our court has said that insolvency, alone, of the defendant, will not be sufficient to authorize an injunction. *Railroad Co. v. Spratt*, 12 Fla. 26. Under the proof in the record before us, insolvency cannot be claimed in support of the decree. The showing is that one of the respondents, and who is the real party in interest in the subject-matter of this suit, owns considerable property within the jurisdiction of the court, and liable to any judgment for damages that may be recovered against him."

While the courts will not ordinarily restrain a trespass, the rule is not without its well-defined exceptions. *Sooy Oyster Co. v. Gaskill*

(N. J. Eq. 1908), 69 Atl. 1084.

Threatened irreparable injury must be shown.

Alabama.—*Boulo v. New Orleans. M. & T. R. Co.*, 55 Ala. 480.

Florida.—*Woodford v. Alexander*, 35 Fla. 333, 17 So. 658.

Illinois.—*Chicago Public Stock Exchange v. McClaughry*, 148 Ill. 372, 36 N. E. 88.

Indiana.—*Anthony v. Sturgis*, 86 Ind. 479.

Iowa.—*Wilson v. Hughell*, 1 Morris, 461.

Maryland.—*Pfeltz v. Pleftz*, 14 Md. 376.

Massachusetts.—*Washburn v. Miller*, 117 Mass. 376.

Minnesota.—*Schurmeier v. St. Paul & P. R. Co.*, 8 Minn. 113, 83 Am. Dec. 770.

Missouri.—*Echelkamp v. Schrader*, 45 Mo. 504.

New Hampshire.—*Hodgman v. Richards*, 45 N. H. 28.

New Jersey.—*Deveney v. Gallagher*, 20 N. J. Eq. 33.

New York.—*Mapes v. Charles*, 55 Hun, 611, 8 N. Y. Supp. 665; *Gentil v. Arnoud*, 31 N. Y. Super. Ct. 641; *Hart v. Albany*, 9 Wend. 571, 24 Am. Dec. 165; *Livingston v. Livingston*, 6 Johns. Ch. 497, 3 Am. Dec. 353.

North Carolina.—*Frink v. Stewart*, 94 N. C. 484.

Ohio.—*Ross v. Page*, 6 Ohio, 166.

Pennsylvania.—*Clark's Appeal*, 62 Pa. St. 447.

Vermont.—*Smith v. Pettingill*, 15 Vt. 82.

West Virginia.—*Cresap v. Kemble*, 26 W. Va. 603.

As to plaintiff's title, see §§ 1139-1141 herein.

an injury of such a character an injunction will be granted.² And the securing of an order or an injunction against further trespass and injury, will not deprive a plaintiff in an action of trespass *quare clausum fregit*, from the right to recover compensatory damages for the injury done to his property before the order or injunction was obtained, or for the period covered by its restraint.³

§ 1126. **Simple trespass not usually enjoined.**—A court of equity will not ordinarily grant an injunction against a trespass which is merely a technical one, either causing no injury to the premises or only a slight injury, for which the complainant has an adequate remedy at law.⁴ And the almost invariable rule is that

Where by answer and affidavit an intention or threat to commit a trespass is denied and the right to is disclaimed a temporary injunction will not be granted. *Hagenmeyer v. St. Michael*, 70 Minn. 482, 73 N. W. 412.

2. United States.—*Nichols v. Jones*, 19 Fed. 885; *Chapman v. Toy Long*, Fed. Cas. No. 2610, 4 Sawy. 28.

Alabama.—*Wilson v. Meyer* (Ala. 1905), 39 So. 317.

Arkansas.—*Mooney v. Cooledge*, 30 Ark. 640.

Illinois.—*Edwards v. Haeger*, 180 Ill. 99, 54 N. E. 176.

Kentucky.—*Musselman v. Marquis*, 1 Bush. 463, 89 Am. Dec. 637.

Maryland.—*Gilbert v. Arnold*, 30 Md. 29.

Michigan.—*Brassington v. Waldron* (Mich. 1906), 107 N. W. 100.

Mississippi.—*Coulson v. Harris*, 43 Miss. 728.

Nebraska.—*Sillasen v. Winterer* (Neb. 1906), 107 N. W. 124; *Peterson v. Hopewell*, 55 Neb. 670, 76 N. W. 451.

New Hampshire.—*Winnipisiogee Lake Co. v. Worster*, 29 N. H. 433.

New Jersey.—*Southmayd v. Mc-*

Laughlin, 24 N. J. Eq. 181; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694.

New York.—*Stevens v. Beckman*, 1 Johns. Ch. 318.

Oregon.—*Mendenhall v. Harrisburg Water Power Co.*, 27 Ore. 38, 39 Pac. 399.

Pennsylvania.—*Westmoreland & Cambria N. G. Co. v. De Witt*, 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731.

Tennessee.—*Parker v. East Tennessee V. & G. R. Co.*, 13 Lea, 669.

Wisconsin.—*Bracken v. Preston*, 1 Pin. 584, 44 Am. Dec. 412.

Where a trespass may ripen into an easement an injunction will be granted. *Harrington v. McCarthy*, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298.

No injunction in case of past trespasses only. *O'Brien v. Murphy*, 189 Mass. 353, 75 N. E. 700.

3. Miller v. Rambo (N. J. L. 1906), 64 Atl. 1052.

Right of action for damage does not prevent granting of injunction. *Hammond v. Martin*, 15 Tex. Civ. App. 570, 40 S. W. 347.

4. United States.—*Kennedy v. Elliott*, 85 Fed. 832.

a trespass for which there is an adequate remedy at law is not subject to the control of equity by injunction.⁵ Thus an injunction will not issue to restrain a trespasser from removing trees from a limestone mining claim, upon the owner's averments that he intends to work it, and that the trees are necessary for fuel, and that fuel is very scarce and difficult to obtain by reason of remoteness from a railroad, when the trespasser is solvent, and able to respond in damages; since such removal will not destroy or materially alter the character of the premises, but will only increase the cost of

Alabama.—Wilson v. Meyer (Ala. 1905), 39 So. 317.

Iowa.—Hull v. Harker (Iowa, 1906), 106 N. W. 629.

Massachusetts.—Gates v. Johnston Lumber Co., 172 Mass. 495, 52 N. E. 736.

West Virginia.—Lazzell v. Garlow, 44 W. Va. 466, 30 S. E. 171.

Injunction will not lie to restrain a single act of trespass where irreparable damage to plaintiffs therefrom is neither alleged nor proved. Mapes v. Charles, 8 N. Y. Supp. 665.

5. *Georgia.*—Bethune v. Wilkins, 8 Ga. 118.

Iowa.—Cowles v. Shaw, 2 Iowa, 499.

Maryland.—Davis v. Reed, 14 Md. 152; Shipley v. Ritter, 7 Md. 408; Green v. Keen, 4 Md. 98.

Missouri.—Weigel v. Walsh, 45 Mo. 560.

Montana.—Heaney v. Butte Commercial Co., 10 Mont. 590, 27 Pac. 379.

New Jersey.—Citizens' Coach Co. v. Camden Horse R. Co., 29 N. J. Eq. 299; Kerlin v. West, 4 N. J. Eq. 449.

New York.—Jerome v. Ross, 7 Johns. Ch. 315; Livingston v. Liv-

ingston, 6 Johns. Ch. 497; Stevens v. Beekman, 1 Johns. Ch. 317.

Virginia.—Anderson v. Harvey, 10 Gratt. 398.

West Virginia.—Schoonover v. Bright, 24 W. Va. 698; Western, etc., Co. v. Virginia Coal Co., 10 W. Va. 296; McMillan v. Ferrell, 7 W. Va. 223.

As to adequate legal remedy, see § 26-32 herein.

In Miller v. Burket, 132 Ind. 469, 475, 32 N. E. 309, McBride, C. J., says: "An injunction will never be awarded to restrain the commission of a mere trespass where it is not shown that the threatened injury will be irreparable and that full and adequate compensation cannot be held in an action at law. Whitlock v. Consumers Gas. Co., 127 Ind. 62; Anthony v. Sturgis, 86 Ind. 479; Caskey v. Greensburgh, 78 Ind. 233; Indianapolis, etc., Co. v. Indianapolis, 29 Ind. 245."

The unintentional encroachment of a foundation wall will not be enjoined where only slight, the damage small, and defendant willing to pay. Harrington v. McCarthy, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298.

fuel for which there can be compensation in damages.⁶ The general rule laid down by Chancellor Kent that an injunction will not be granted to prevent a threatened trespass unless there are special facts which bring the injury under the head of quieting possession or make out a case of irreparable mischief, or where the substance of the inheritance is put in jeopardy has been somewhat relaxed in many jurisdictions;⁷ but has been strictly adhered to in Connecticut.⁸ The objection to the injunction in cases of private trespass, except under very special circumstances, is that it would be productive of public inconvenience by drawing cases of ordinary trespass within the cognizance of equity, and by calling forth, upon all occasions, its power to punish by attachment, fine, and imprisonment for a further commission of trespass, instead of the more gentle and common law remedy by action and the assessment of damages by a jury.⁹

§ 1127. **Where injury trifling, doubtful, etc.**—Where the damages caused by acts of trespass are trivial and susceptible of ascertainment, equity will not interfere.¹⁰ So the drilling of an oil or gas well through a part of a coal mine from which all the coal has been extracted except what is necessary for the props does not by its mere physical damage to the mine, or its effect as an obstruction, threaten such an injury to one owning the coal and the right to mine it as will warrant the issuance of a preliminary

6. *Heaney v. Butte Commercial Co.*, 10 Mont. 590, 27 Pac. 379.

7. *Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804; *Wilcox v. Wheeler*, 47 N. H. 488; *Allen v. Martin*, L. R. 20 Eq. 462; *Goodson v. Richardson*, L. R. 9 Ch. App. 221; *Winter v. Easum*, 2 DeG. J. & S. 272.

8. *Smith v. King*, 61 Conn. 511, 23 Atl. 923; *Goodwin v. New York, etc., R. Co.*, 43 Conn. 494; *Hawley v. Beardsley*, 47 Conn. 571. In *Whittlesey v. Hartford, etc., R. Co.*, 23 Conn. 421, the court said: "Writs of injunc-

tion are not to be granted for every trifling cause or made substitutes for every action of trespass or ejection. They ought not to be issued except for the prevention of great and irreparable mischief, and, in the language of our present statute, in cases only in which adequate relief cannot be had in the ordinary course of law."

9. *Jerome v. Ross*, 7 Johns. Ch. 315, 333, per Kent, Ch.

10. *Vernam v. Palmer*, 5 N. Y. Supp. 71.

See § 1126 herein.

injunction. And such an injunction will not issue to restrain interference with certain deep-lying veins, where on the affidavits it appears doubtful whether those veins extend under the tract.¹¹ And where complainant, as holder of bonds secured by mortgage on a tract of land, applied for a preliminary injunction restraining defendants from committing any injury to the land, and nothing appeared to show that defendants were interfering with the land except by claiming title to it, and the affidavits disclosed a conflict of testimony, it was held that a preliminary injunction should be denied.¹² But a landowner may have an injunction against a stranger, who, under claim of right, is taking water from his canal by means of a ditch across his land, even though the amount of water taken is inappreciable, since its continued use would ripen into an easement in the land.¹³ And though the injury caused by a trespass is a trivial one and a recovery of nominal damages would compensate therefor, a court of equity will restrain repetitions of the trespass where they will interfere with the proper use and enjoyment of the property.¹⁴

§ 1128. **Trespasser not protected; clean hands.**—Though an injunction to restrain a threatened trespass is sometimes refused where the remedy at law is adequate, and the damages likely to arise from the trespass trivial as compared with the interests to be affected by the injunction, yet the writ will not issue to protect

11. *Rend v. Venture Oil Co.*, 48 Fed. 248.

An injunction to restrain an alleged trespass will not issue where plaintiff's right to the subject-matter is in dispute, and subject to reasonable doubt. *Harper v. McElroy*, 42 N. J. Eq. 280, 10 Atl. 879.

12. *Marshall v. Turnbull*, 32 Fed. 124.

13. *Walker v. Emerson*, 89 Cal. 456, 26 Pac. 968, per McFarland, J.: "There is no principle by which a mere intruder can go upon the land of another and take water from an artificial ditch. The right to an in-

junction therefore in such a case does not depend upon the extent of the damage measured by the money standard; the maxim *de minimis* does not apply. *Learned v. Castle*, 78 Cal. 461, 18 Pac. 872, 21 Pac. 11. . . . This threatened act of appellants disturbs the plaintiff's possession and if permitted to continue will ripen into an easement. That of itself is sufficient to entitle him to an injunction. *Richards v. Dower*, 64 Cal. 64, 28 Pac. 113."

14. *O'Brien v. Murphy*, 189 Mass. 353, 75 N. E. 700.

a confessed trespasser in his occupancy of his neighbor's premises upon the ground that his interests are large and his neighbor's small.¹⁵ So an injunction will not issue to restrain an interference with the possession of one who is himself a naked trespasser on land dedicated to public use.¹⁶ And where a pipe line had been constructed across a person's premises without any right or privilege or color of right to so construct and maintain it, the court refused to grant a preliminary injunction restraining the owner of the premises from either cutting or removing such line.¹⁷ And it is not an abuse of discretion to deny an injunction in favor of one who refuses a right of way to a city for a work of public utility, where the city offers to pay him damages and to have the amount assessed by arbitration.¹⁸ And where complainants have gained possession of premises by purchasing the right of tenants with the purpose of repudiating the lease and disputing the title of defendant as landlord of their grantors, they will be relegated to such legal rights as they may have acquired, and equity will not aid them

15. *Garth Lumber & Shingle Co. v. Johnson*, 151 Mich. 205, 115 N. W. 52.

16. *Central Trust Co. v. Wabash, etc., R. Co.*, 25 Fed. 1. A person having an option to purchase land may be enjoined as a trespasser if he enters after he has become estopped from exercising the option. *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536.

17. *Windfall Natural G. M. & O. Co. v. Terwilliger*, 152 Ind. 364, 53 N. E. 284.

18. In a suit to enjoin a city from constructing a sewer through plaintiffs' residence lot, it appeared from defendants' affidavits that, on petition of some of the residents of the block, who agreed to pay the costs, the city council ordered the sewer to be built, and that it could only be constructed by crossing part of plain-

tiffs' lot. The affidavits on behalf of plaintiffs showed that there was no necessity for the sewer, that it would be of benefit only to a few individuals, and that it would injure plaintiffs' lot for residence purposes. The affidavits for defendants showed the sewer was necessary to the health of the public generally; that it would be constructed in such a manner as not to injure plaintiffs; that defendants had offered plaintiffs \$200 for a right of way, but they demanded \$650; and that defendants then selected an arbitrator, and requested plaintiffs to select another, as provided by law, to assess the compensation to be paid, but that plaintiff failed to select one. It was held that there was no error in refusing an injunction. *McDaniel v. City of Columbus*, 87 Ga. 440, 13 S. E. 745.

by enjoining the defendant from regaining possession even by force.¹⁹

§ 1129. **Continuous and repeated trespass.**—An injunction is often the more convenient and only adequate remedy in cases of continued and repeated trespass where the legal remedy would require a multiplicity of suits. And a court will generally grant this relief in the case of a trespass of such a character.²⁰ Thus, where a bill alleges the exclusive right in plaintiffs to mine coal in certain lands, and that defendant is taking it out and shipping it in such quantities that he will soon exhaust the mines, a con-

19. *Latham v. Northern Pac. R. Co.*, 45 Fed. 721.

20. *United States.*—*United States Freehold L. & E. Co. v. Gallegos*, 89 Fed. 769, 32 C. C. A. 470, 61 U. S. App. 13.

Arkansas.—*Terry v. Rosell*, 32 Ark. 478.

California.—*Smithers v. Fitch*, 82 Cal. 153, 22 Pac. 935.

Illinois.—*Owens v. Crossett*, 105 Ill. 354.

Indiana.—*Cox v. Louisville, N. O. & C. R. Co.*, 48 Ind. 178.

Iowa.—*Ladd v. Osborne*, 79 Iowa, 93, 44 N. W. 235.

Kentucky.—*McCloskey v. Doherty*, 97 Ky. 200, 30 S. W. 649.

Maryland.—*Gilbert v. Arnold*, 30 Md. 29.

Michigan.—*Saginaw Lumber & S. Co. v. Griffore* (1906), 108 N. W. 681; *Davis v. Frankenlust*, 118 Mich. 494, 76 N. W. 1045.

Minnesota.—*Kern v. Field*, 68 Minn. 317, 71 N. W. 393.

Missouri.—*Heman v. Wade*, 74 Mo. App. 339.

Montana.—*Musselshell Cattle Co. v. Woolfolk* (1906), 85 Pac. 874.

Nebraska.—*Hornung v. Herring* (1905), 104 N. W. 1071.

New Jersey.—*Kerlin v. West*, 4 N. J. Eq. 449; *Society for Establishing Useful Manufactures v. Morris Canal & B. Co.*, 1 N. J. Eq. 157, 21 Am. Dec. 41.

New York.—*Sadlier v. New York*, 185 N. Y. 408, 78 N. E. 272; *Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451, 51 N. E. 301, *aff'd* 24 App. Div. 273, 48 N. Y. Supp. 511; *Valentine v. Schreiber*, 3 App. Div. 235, 38 N. Y. Supp. 417.

North Carolina.—*Long v. Beard*, 4 N. C. 684.

Ohio.—*Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. 686, 21 Am. Rep. 828, 8 L. R. A. 578.

Oregon.—*Norton v. Elwert*, 29 Oreg. 583, 41 Pac. 926.

Pennsylvania.—*Appeal of Stout*, 35 Pa. St. 88.

South Carolina.—*McClellan v. Taylor*, 54 S. C. 430, 32 S. E. 527.

Vermont.—*Murphy v. Lincoln*, 63 Vt. 278, 22 Atl. 418.

Washington.—*Rigney v. Tacoma Light & W. Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425.

Compare *Carney v. Hadley*, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233; *Coulson v. Harris*, 43 Miss. 728.

tinuous trespass is alleged which may be restrained by injunction.²¹ And the destruction of a fence, and threatened repetition thereof, by a trespasser as often as the fence may be replaced, entitles the owner to relief by injunction against the invader even though the latter may not be insolvent.²² And the principle has also been applied in the case of a wrongful diversion of water,²³ of a trespass to riparian and fishing rights;²⁴ of a trespass by the flooding of lands;²⁵ by the driving of cattle upon another's land;²⁶ and by the forcible entry of a dwelling.²⁷ Equity will also interfere to prevent the defendant's commission of threatened acts where a court of law has adjudged similar acts by another to be trespass and awarded damages to plaintiff; the evidence showing that an injunction is the more appropriate remedy for quieting plaintiff's title and enjoyment of his property.²⁸ And one who, after being put off land under a writ of assistance, insists on returning, is properly enjoined. The plaintiff will not be remitted to his action or to another writ of assistance.²⁹ And a bill which alleges that

21. *Jennings v. Beale*, 158 Pa. St. 283, 27 Atl. 948; *Duffield v. Hue*, 136 Pa. St. 602, 20 Atl. 526; *Allison's Appeal*, 77 Pa. St. 221; *Scheetz's Appeal*, 35 Pa. St. 88. And see *Masson's Appeal*, 70 Pa. St. 26.

22. *Munger v. Yeiser* (Neb. 1907), 114 N. W. 166. See, also, *Bussier v. Weekey*, 4 Pa. Super. Ct. 69.

23. *United States Freehold L. & E. Co. v. Gallegos*, 89 Fed. 769, 32 O. C. C. 470, 61 U. S. App. 13.

24. *Saginaw Lumber & S. Co. v. Griffore* (Mich. 1906), 108 N. W. 681.

25. *Davis v. Frankenlust*, 118 Mich. 494, 76 N. W. 1045.

26. *Musselshell Cattle Co. v. Woolfolk* (Mont. 1906), 85 Pac. 874.

27. *Hornung v. Herring* (Neb. 1905), 104 N. W. 1071.

28. A small unnavigable stream flowed across the farm of W. and emptied into another stream, which during part of the year increased in volume so as to enable T. to float

logs down it by stationing men along its banks to break jams, by arranging logs so as to confine the waters at points where the banks were not sufficient to prevent spreading, and constructing reservoirs above and opening them to make a greater flow. Such use of the stream by T. resulted in destroying its banks, extending its width, diverting its waters, and causing them to overflow the land of W., which was in cultivation, and wash off the soil of his lands. T. claimed the right, and threatened to continue such practice, and W. had already sued a former party at law for attempting to exercise a similar right, and had recovered the sum of \$50 damages. It was held that equity should interfere and prevent T. from carrying his thrats into execution. *Haines v. Hall*, 20 Pac. 831, 17 Or. 165.

29. *Ten Eyck v. Sjoburg*, 68 Iowa, 625, 27 N. W. 785.

complainant, the owner of a sawmill, had acquired the legal title to land which was heavily timbered, and in the vicinity of the said mill, for the purpose of obtaining logs for his mill; that he had brought ejectment against defendant, who was cutting and removing the timber, but that, owing to the crowded state of the docket, the case would not be tried until the next term, and that by that time, if the defendant was not restrained, all the timber suitable for sawmill purposes would be taken,—makes a case for an injunction, since, although complainant might recover in an action at law for cutting and removing the timber, he could not recover for the loss to him of the use of the mill, or for the loss of the profit to be derived from converting the timber into lumber.³⁰ In such a case there should be an injunction against cutting and removing the timber pending the suit for the recovery of the land.³¹ So, where a road overseer insists on trespassing on plaintiff's land, cutting down his shade trees, and tearing down his fences, an injunction may issue.³² As in such a case the wrongful acts, if not enjoined, may become the foundation of adverse rights, and are in the nature of a private nuisance which may occasion a multiplicity of suits.³³

§ 1130. **To prevent multiplicity.**—In cases of repeated trespasses, where it is necessary to quiet a rightful, admitted, or established possession, chancery has often interposed, to prevent a multiplicity of suits, although there may be a remedy at law, and this is a well-recognized head of chancery jurisdiction, when a

30. *Wadsworth v. Goree*, 96 Ala. 227, 10 So. 848, per Stone, C. J.: "The injury suffered in being deprived of the profit to be derived from the conversion of the timber into lumber, or any other prospective enhancement of its value, would be classed as speculative and not recoverable in an action at law. *Pollock v. Gantt*, 69 Ala. 373; *City Nat. Bank v. Jeffries*, 73 Ala. 183."

31. *Chambers v. Ala. Iron Co.*, 67 Ala. 355; *Shreve v. Black*, 4 N. J.

Eq. 177; *Kane v. Vanderburgh*, 1 Johns, Ch. 11.

32. *Chadbourne v. Zilsdorf*, 34 Minn. 43. It has been held that where there is but one defendant in interest, equity will not enjoin repetition of trespass, if no circumstance arises tending to work irreparable mischief. *Roebeling v. Richmond Bank*, 30 Fed. 744; but this is not the ordinary rule.

33. *Johnson v. Rochester*, 13 Hun, 285; *Poirier v. Fetter*, 20 Kan.

proper case is presented.³⁴ The court will not, however, grant an injunction against one person merely because he is guilty of repeated trespasses, where the legal remedy affords an adequate and complete redress in damages.³⁵ But, in addition to the rule mentioned, it seems to be clearly settled that, whenever the complainant's title is disputed, a court of equity will not interfere by injunction, or make perpetual an injunction already granted, on the ground of a multiplicity of suits, until he has procured his title to be established by a successful trial at law. The ground upon which this rule is based is that, as a general thing, courts of equity do not try disputed legal titles to land.³⁶

§ 1131. **Where trespass continuous only in limited sense.**—When all the averments of a complaint seeking an injunction taken together charge a mere threatened trespass continuous only in a limited sense as, for instance, continuing only long enough to cut and remove the wheat mentioned in the complaint, and there is no averment of defendant's insolvency, there is not a sufficient showing to authorize an injunction, as the defendant may be able to respond in damages, and no injury is shown to be threatened for which ample compensation may not be made in damages.³⁷

47. And see *Wilson v. Mineral Point*, 39 Wis. 160.

34. *Kellogg v. Ring*, 114 Cal. 378, 46 Pac. 166; *Blondell v. Consolidated Gas Co.*, 89 Md. 732, 43 Atl. 817, 46 L. R. A. 187; *O'Brien v. Murphy*, 189 Mass. 353, 75 N. E. 700. See, also, § 1129 herein.

35. *Carney v. Hadley*, 32 Fla. 344, 14 So. 4, 37 Am. St. Rep. 101, 22 L. R. A. 233, per *Mabry, J.*: "The rule, as stated by many decisions, is that to justify the interference of a court of equity in cases of trespass, in order to avoid a multiplicity of suits, there must be several persons controverting the same right, and each standing upon his own claim or pretension. *Jerome v. Ross*, *supra*;

Hatcher v. Hampton, 7 Ga. 49; *Nicodemus v. Nicodemus*, 41 Md. 529; *Thorn v. Sweeney*, 12 Nev. 251; *Roebeling v. Bank*, 30 Fed. 744. See *Taylor v. Pearce*, 174 Ill. 9, 50 N. E. 1109, *rev'g* 71 Ill. App. 525.

36. 1 Pom. Eq. Jur. § 252; *Poyer v. Village of Des Plaines*, 123 Ill. 111, 13 N. E. 819; *Carlisle v. Cooper*, 21 N. J. Eq. 576; *Irwin v. Davidson*, 3 Ired. Eq. 311; *Caro v. City Co.*, 19 Fla. 766.

37. *Miller v. Burket*, 132 Ind. 469, 32 N. E. 309. In this case the complaint charged that "defendants unlawfully claim the right at all times and from day to day to tear down the fences and to enter the plaintiff's premises,"

§ 1132. **Aggravated trespass.**—Remedy by injunction is appropriate in cases of peculiar and aggravated trespass which go to the destruction of the inheritance.³⁸ So where a railroad company took possession of a city lot, and was using it for purposes connected with the construction of a tunnel, it was held, that the owner of the lot was entitled to an injunction, as the purpose to which the lot was applied by the railroad company was a trespass which went to the destruction of the property in the character in which it was enjoyed by such owner.³⁹ And equity will enjoin encroachments on a beach owned by plaintiff, and of which he requires possession in order to properly conduct his business of

but the complaint also showed that the only right which defendants claimed was to enter and cut and remove certain wheat. The court held that the complaint must be construed in accordance with its general scope and tenor, and not by isolated averments. *Platter v. Seymour City*, 86 Ind. 323; *Louisville, etc., R. Co. v. Thompson*, 107 Ind. 442, 8 N. E. 18, 9 N. E. 357; *Henry v. Stevens*, 108 Ind. 281, 9 N. E. 356. So construed it did not allege a continuous trespass.

38. *Jerome v. Ross*, 7 Johns. Ch. 315, 332, per Kent, Ch.: "The English court of chancery is now in the habit of granting injunctions in trespass when the case is peculiar and special; and even this practice came into use long subsequent to the date of our revolution. As late as 1786 in *Mogg v. Mogg*, 2 Dickens, 670, Lord Thurlow directed a search to be made to see if ever there was an instance of an injunction where a mere trespasser entered upon land and cut timber, and as no such precedent could be found, he denied it even in a case of trespass in cutting down timber. But since that time the practice has been introduced and

justly and reasonably applied to special cases, where irreparable ruin would have followed the refusal to enjoin the trespass. It was allowed in *Mitchell's Case*, 6 Ves. 147, where the defendant had worked from his own land into the coal mine of plaintiff; and that case was followed by Lord Eldon in *Hanson v. Gardiner*, 7 Ves. 305, 307, on the principle that irreparable mischief and ruin of the property as a mine would be the consequence if the party was not stopped. On the same ground the injunction is granted against diverting a water course from a mill, *Robinson v. Lord Byron*, 1 Bro. C. C. 588; against the destruction of timber, *Courthope v. Mapplesden*, 10 Ves. 290; against the taking of stones of peculiar value, *Cowper v. Baker*, 17 Ves. 128; or stones from a quarry, *Thomas v. Oakley*, 18 Ves. 184. All these are cases of great and irreparable mischief which damages could not compensate, because the mischief reaches to the very substance and value of the estate and goes to the destruction of it in the character in which it is enjoyed."

39. *Baltimore B. R. Co. v. Lee*, 75 Md. 596, 23 Atl. 901; *Mayor, etc., v.*

keeping a hotel there, defendants being pecuniarily irresponsible.⁴⁰ And an injunction will lie to restrain defendant from erecting a part of a building on lands to which plaintiff asserts and proves title, and to compel the removal of so much of the foundation wall as had been constructed at the time the action was begun, and to restore the land to its former condition.⁴¹ And where complainant is seeking to enjoin an adjacent owner from building on his land he is entitled to the benefit of an actual location by fence erected twenty-five years before, and up to which he had been in continued possession during that period. In such a case the trespasser will be enjoined until he shall have established his right at law.⁴²

§ 1133. **Same subject; excluding light and air.**—The construction of a tunnel, permanent in its character, through a lot, is an injury irreparable in its nature, against which the owner is entitled to an injunction, without regard to the trespasser's solvency.⁴³

Groshon, 30 Md. 436. And see *Gilbert v. Arnold*, 30 Md. 29; *White v. Flannigan*, 1 Md. 525.

40. *Mulry v. Norton*, 100 N. Y. 424, 3 N. E. 581, per Ruger. C. J.: "Under similar circumstances the jurisdiction of a court of equity to interfere by injunction to quiet the title and prevent an injury for which no adequate remedy exists at law has been frequently exercised. *Watson v. Sutherland*, 5 Wall. 74; *Livingston v. Livingston*, 6 Johns. Ch. 497; *Lacustrine Fertilizer Co. v. Lake Guano Co.*, 82 N. Y. 476; *Hart v. Albany*, 3 Paige (N. Y.), 213.

41. *Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804, per Parker, J.: "In equity the obligation to remove can be placed directly on the party who caused the wall to be erected, and it frequently affords preventive relief against the commission of trespasses, such as the excavation of complainant's soil

by an adjoining owner, the destruction of his wall in building on adjacent premises, and the encroachment on his rights by the diversion of a stream of running water. *Creely v. Bay State Brick Co.*, 103 Mass. 514; *Corning v. Troy Nail Factory*, 40 N. Y. 191; *Wheelock v. Noonan*, 108 N. Y. 179; *Avery v. N. Y. Central R. Co.*, 106 N. Y. 142; *Fox v. Fitzsimons*, 29 Hun, 574.

42. *Southmayd v. McLaughlin*, 24 N. J. Eq. 181.

43. *Richards v. Dower*, 64 Cal. 62, 28 Pac. 113. In a suit to restrain a trespass the complaint alleged that defendant had entered on plaintiff's land, and had torn up the soil and destroyed the crops, threatening and intending to dig a ditch across it twenty feet wide and three or four feet deep; that such ditch would cut off from the main body of the tract some ten acres, which, thus separated, would have little or not value; and that

The right of the public in a street is limited to the easement of a public way with the incidental privileges, such as the right to use material found within the limits of the street for its repair and improvement. Municipal authorities cannot bestow on a stranger the right to take such material, and if he attempt to quarry and remove stone from the bed of the street he may be restrained by injunction at the suit of an abutting owner if his title extends to the center of the street.⁴⁴ And the removal by a trespasser of a clay-bed to the extent of exhausting it is an attack upon the substance of the inheritance which will be enjoined.⁴⁵ And where the grading of a street, which will cover part of complainant's lot with earth, and interfere with the use of the house, is begun without condemnation or compensation, complainant is not limited to his action of trespass, but is entitled to have the illegal acts perpetually enjoined.⁴⁶ Again, where defendant commenced the erection of a fence on plaintiff's land, the effect of which would be to close the windows of her house, excluding both light and air, it was held,

such ditch would divert a large quantity of water over plaintiff's land, and interfere with its cultivation. It was held, that the complaint makes out a case of irreparable injury. *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715.

44. *Althen v. Kelly*, 32 Minn. 280, per Dickinson, J.: "The case as presented is one for which a remedy by injunction may be granted, notwithstanding the defendant might be compelled to respond in damages, for the reason that a multiplicity of suits will thus be prevented and because the injury complained of appears to be destructive to the estate of plaintiff—the removal of its very substance. *Ryan v. Brown*, 18 Mich. 196." On motion for preliminary injunction to restrain defendant from laying its railroad tracks over lands to which both parties claimed title.

and from digging or removing gravel therefrom, the evidence showed that the chief value of the land was the gravel beneath its surfact, and that defendant's agents had expressed a determination to remove gravel from, and defendant had graded a roadway for a railroad across the land. It was held, that the acts of defendant would work an irreparable injury to and destroy the inheritance, and a preliminary injunction should issue until the titles are settled. *Newall v. Staffordville Gravel Co.* (N. J.), 11 Atl. 495, 13 Atl. 270.

45. *Bates v. Slade*, 76 Ga. 50. And see *More v. Massini*, 32 Cal. 590.

46. *Vanderlip v. City of Grand Rapids*, 73 Mich. 522, 41 N. W. 677. And see *Koopman v. Blodgett*, 70 Mich. 610, 38 N. W. 649; *Stone v. Lumber Co.*, 59 Mich. 24, 26 N. W. 216; *Ryan v. Brown*, 18 Mich. 212.

that equity would enjoin the threatened trespass, on the ground that the damage caused thereby would be irreparable.⁴⁷

§ 1134. **Adequate remedy at law; pleading want of equity.**—A court of equity will not enjoin the commission of threatened trespasses, where the injury is susceptible of computation, and the trespasser is not shown to be unable to respond in damages,⁴⁸ it being a general rule that where a party has an adequate remedy at law equity will not grant injunctive relief.⁴⁹ So where the

47. *Sankey v. St. Mary's Female Academy*, 8 Mont. 265, 21 Pac. 23. And see *Grant v. Crow*, 47 Iowa, 632; *Marion v. Johnson*, 22 La. Ann. 512.

48. *Chicago Stock Exchange v. McClaughry*, 148 Ill. 372, 36 N. E. 88, per Magruder, J.: "A court of equity will only entertain a bill to enjoin a trespass to prevent a multiplicity of suits, or to prevent irreparable injury. It will not interfere to prevent a trespass, upon the ground of irreparable injury, unless the facts and circumstances are alleged, from which it can be seen that irreparable injury will be the result of the act complained of, and that there is no adequate remedy at law. *Poyer v. Village of Des Plaines*, 123 Ill. 111; *Moses v. Mayor*, 52 Ala. 198; *Winter v. Fraenkel*, 39 La. Ann. 1059; *Goodell v. Lassen*, 69 Ill. 145. Where the injury is not irreparable, and is susceptible of perfect pecuniary compensation, an injunction will not be granted to restrain a mere trespass. *Schurmeier v. Railroad Co.*, 8 Minn. 115 (Gil. 88). To warrant interference upon the ground of a multiplicity of suits, there must be different persons assailing the same right, and not a mere repetition of the same trespass by the same person, 'the case being susceptible of compensation in damages.' 1 High, Inj. § 700.

'If the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed.' 2 Story, Eq. Jur. § 857. If the right claimed affects numerous parties, equity will sometimes enjoin a continuance of the litigation because the judgment against one of the parties would not be binding on the others. But where there are continued suits between two single individuals, arising from the separate repetition of trespasses, equity will not interfere by injunction, where the right has not been established at law, because a judgment in any one of the suits would be evidence in all the others. If the right has not been established at law, the necessity of intervention does not exist. *Moses v. Mayor*, *supra*; *Poyer v. Village of Des Plaines*, *supra*; *Pratt v. Kendig*, 128 Ill. 293, 21 N. E. 495. It is manifest from the allegations of the bill in the present case that the complainant is seeking to enjoin the repetition of trespasses by the same defendant, furnishing grounds for separate suits, so that there is not shown that multiplicity of suits which induces equity to interfere. *McCoy v. Chillicothe Corp.*, 3 Ohio, 379."

49. *Putney v. Bright*, 106 Ga. 199, 32 S. E. 107; *Warlier v. Williams*,

court refused to grant a mandatory injunction requiring an adjoining owner to remove a part of his foundation wall encroaching upon the plaintiff's premises, it was decided that there was no error, as this was a trespass for which the plaintiff had an adequate remedy at law.⁵⁰ Where a bill shows on its face that the complainant has an adequate remedy at law, the defect may be taken advantage of at the hearing, if such defense is specially set up in the answer.⁵¹ And the defendant, in order to avail himself

53 Neb. 143, 73 N. W. 539; Crocker v. Manhattan Life I. Co., 31 Misc. R. (N. Y.) 687, 66 N. Y. Supp. 84; Morganton Land & I. Co. v. Webb, 117 N. C. 478, 23 S. E. 458.

See, also, as to the general rule, §§ 26-34 herein.

50. Mrcantile Library Co. v. University of Pennsylvania (Pa. 1908), 69 Atl. 861.

51. Chicago Stock Exchange v. McClaughry, 148 Ill. 372, 36, N. E. 88, per *Curiam*: "The question then arises whether the want of equity upon the face of the bill, which shows a complete remedy at law, could be taken advantage of upon the hearing in this case; the hearing having been, not upon demurrer to the bill, but upon bill, answer, and replication, and upon proofs offered in open court. There being no certificate of evidence, it does not appear what the proof was upon the merits. The general rule is that the party seeking to sustain the decree should preserve the evidence. Marvin v. Collins, 98 Ill. 510. But here, if the complainant, upon the hearing, had introduced proof sustaining all the allegations of the bill, its case would have been no better than it was without any proof, because the proof could show no more equity than the bill itself showed upon its face. In Walker v. Ray, 111 Ill. 315, we said: 'A bill

wholly insufficient to authorize the relief sought is never aided by proof. If every allegation of a bill that shows a want of equity is proved, the proof shows no more equity than the bill; and, if the proof goes beyond such a bill as establishes ground for relief, the relief cannot be granted, because the allegations and proofs do not correspond. . . . It is therefore immaterial whether there was a certificate of evidence or not, or whether the court below was or not warranted in finding by the decree that the allegations of the bill were proved, because, if they were, they constituted no ground of relief.' Where a bill, on its face, shows no ground for equitable relief, it is proper, on the hearing, to dissolve the injunction and dismiss the bill. Harris v. Galbraith, 43 Ill. 309. Where, as here, the objection to the granting of equitable relief is the existence of an adequate remedy at law, as shown by the bill itself, such objection to the jurisdiction must be taken by the pleadings. Nelson v. Bank, 48 Ill. 36. But the objection may be made, not alone on demurrer to the bill, but it may be specially relied upon in the answer (Creely v. Brick Co., 103 Mass. 514); and in the case at bar it is specially relied upon in the answer. Upon turning to the answer, as it appears in the

of the objection that plaintiff has an adequate remedy at law, must raise it by answer; for after he has submitted to the jurisdiction of the court, the plaintiff will not be turned out to seek his remedy elsewhere, upon objection taken for the first time at the trial.⁵²

§ 1135. **Same subject; exceptions.**—When trespass to property consists of a single act, and it is temporary in its nature and effect, so that the legal remedy of damages is adequate, equity will not interfere. But where repeated acts are done or threatened, though each of the acts by itself may not be destructive to the estate or cause irreparable injury, and the legal remedy might be adequate for each single act, if it stood alone, yet in such a case the entire wrong may be prevented or stopped by injunction.⁵³ Thus, where plaintiff, after large expenditures on his wood land, is manufacturing charcoal and lumber, and has contracted for the sale of the manufactured products, the defendants, who are cutting and removing timber from the land and threaten to continue to do so, will be enjoined.⁵⁴ An injunction will also be granted to restrain labor unions and members thereof from entering upon complainant's mines, or interfering with the working thereof, or by force, threats, or intimidation preventing complainant's employees from

record, we find the following allegation: 'This respondent is advised by counsel that the injunction . . . to . . . restrain a threatened trespass is without authority of law, and that complainant has an adequate remedy at law for the acts complained of in the bill of complaint, and that a court of equity is wholly without jurisdiction in the premises, and therefore prays that it [he] may have the same benefit . . . of these objections as though it [he] had specially demurred to the bill.' We are of the opinion, for the reasons here stated, that the want of equity upon the face of the bill, was properly taken advantage of upon the hearing, and that there was

no error in dissolving the injunction and dismissing the bill."

52. *Baron v. Korn*, 127 N. Y. 224, 229, 27 N. E. 804; *Town of Mentz v. Cook*, 108 N. Y. 504, 15 N. E. 541; *Cox v. James*, 45 N. Y. 557; *Grandin v. LeRoy*, 2 Paige, 509; *Wiswall v. Hall*, 3 Paige, 313; *Le Roy v. Platt*, 4 Paige, 77.

53. *Murphy v. Lincoln*, 63 Vt. 278; *Smith v. Rock*, 59 Vt. 232; *Langdon v. Templeton*, 61 Vt. 119; *West Point Co. v. Reymert*, 45 N. Y. 703; *Falls Village Co. v. Tibbetts*, 31 Conn. 165. And see *Owens v. Lewis*, 46 Ind. 488; *Pence v. Garrison*, 93 Ind. 345.

54. *Griffith v. Hilliard*, 64 Vt. 643, 25 Atl. 427; *Stetson v. Stevens*, 64 Vt. 649, 25 Atl. 429.

working the mines, where the threatened acts are such that their frequent occurrence may be expected, and defendants are insolvent.⁵⁵ And one owning to the center of a bayou may maintain a bill for an injunction against one who, claiming under an agreement with the plaintiff's grantor, obstructs the bayou by using it as a booming ground for saw-logs, the facts being admitted by a general demurrer.⁵⁶

§ 1136. **Legal remedy continued.**—Where defendant confessedly intends to regain possession of certain premises by the use of unlawful force, in view of the fact that the State courts furnish abundant means for punishing forcible entries and detainers and breaches of the peace, a Federal court will not restrain such intention by injunction.⁵⁷ And where defendant repeatedly tore down a fence and drove over plaintiff's land, claiming that there was a highway by dedication and use, it was held that no injunction should issue, because there was a prompt and adequate remedy at law;⁵⁸ and that as there was a conflict of evidence as to the dedication of the *locus in quo*, the parties should be remitted to whatever remedy they might have at law.⁵⁹ But where defendants had repeatedly torn down plaintiff's fence in order to pass over his lands, and had threatened to continue to do so, it was held that the plaintiff was entitled to relief in equity by injunction, in order to prevent a multiplicity of suits.⁶⁰ Where numerous acts are being committed, and their continuance threatened, under a claim of right, by one person on the land of another, which acts

55. *Coeur d'Alene Mining Co. v. Miners' Union*, 51 Fed. 260.

56. *Turner v. Holland*, 54 Mich. 300.

57. *Latham v. Northern Pac. R. Co.*, 45 Fed. 721. But see *Sprague v. Locke*, 1 Col. App. 171, 28 Pac. 142.

58. *Smith v. Gardner*, 12 Or. 221, 6 Pac. 771; *Cyr v. Madore*, 73 Me. 53; *Wright v. Tukey*, 3 Cush. 290; *Burnham v. MacQuesten*, 48 N. H. 446; *Marcy v. Taylor*, 19 Ill. 634; *Morse v. Ranno*, 32

Vt. 600; *Sharp v. Mynatt*, 1 Lea (Tenn.), 375; *Barraclough v. Johnson*, 8 Ad. & El. 99; *Le Neve v. Mile End Town*, 8 El. & Bl. 1055.

59. *Smith v. Gardner*, 12 Or. 221, 6 Pac. 771; *Hacker v. Barton*, 84 Ill. 314; *Wing v. Sherrer*, 77 Ill. 200.

60. *Shafer v. Stull*, 32 Neb. 94, 48 N. W. 882. And see *Council Bluffs v. Stewart*, 51 Iowa, 385; *Bolton v. McShane*, 67 Iowa, 207; *Tantlinger v. Sullivan*, 80 Iowa, 218; *Ladd v. Osborne*, 79 Iowa, 93; *Owens*

constitute trespass, and the injury resulting from each act is or would be trifling in amount as compared with the expense of prosecuting actions at law to recover damages therefor, injunction will lie to restrain the trespass.⁶¹

§ 1137. **The Missouri rule.**—In Missouri it is not necessary in order to maintain an injunction against trespass upon real or personal property, that the defendant should be insolvent or the wrong irreparable, as the statute gives the right whenever an adequate remedy cannot be afforded by an action for damages. Thus, where the owners of a steamboat seriously and habitually interfered with plaintiff's business of sawing and delivering lumber by discharging freight at his private wharf against his protest, it was held that he was entitled to an injunction.⁶²

§ 1137a. **Effect of recovery of damages.**—It is a general rule that a verdict for damages for a trespass on real estate in favor

v. Crossett, 105 Ill. 354; Newaygo Mfg. Co. v. Chicago, etc., R. Co., 64 Mich. 114.

61. *Lembeck v. Nye*, 47 Ohio St. 336, 24 N. E. 686.

62. *Turner v. Stewart*, 78 Mo. 480, per Martin, C.: "It is not necessary that the defendant should be insolvent, or the wrong irreparable to sustain the right to equitable relief against trespassers. It is provided in our statute that the remedy by writ of injunction shall exist in all cases when an injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." Rev. Stat. 1879, § 2722. The business of the plaintiff was constantly interrupted at the pleasure of the defendants. He was subjected to a grievance recurring

at irregular intervals. His immediate damages would be difficult to estimate on account of the nature of his business. For consequential damages and loss of profits on his contracts it would be difficult, if not impossible, to obtain anything in an action at law. It is also clear that no single action for damages would afford him redress. He would have to sue for every time the defendants landed; and the burden of carrying on such a multiplicity of lawsuits would make his remedy about as grievous as the injury. Under this statute and the decisions construing it, I am satisfied the plaintiff was entitled to the remedy asked for, and that a suit at law would not be an adequate remedy. *State Savings Bank v. Kircheval*, 65 Mo. 682; *Damschroeder v. Thias*, 51 Mo. 100; *Echelkamp v. Schrader*, 45 Mo. 505; *Hayden v. Tucker*, 37 Mo. 214; *McPike v. West*,

of the plaintiff, though conclusive of the right of possession and use, is not conclusive of the right to equitable relief by injunction, for while the plaintiff may prove a single past trespass from which damages would flow, he might entirely fail to prove more than one trespass, or any threat or purpose of the defendant to commit a future trespass.⁶³

§ 1138. **Effect of insolvency.**—A court of equity will frequently grant relief by injunction in the case of a trespass where the defendant is insolvent. This is most frequently done in those cases where the only remedy which the plaintiff has is an action at law for damages, and owing to the insolvency of the defendant such relief is inadequate.⁶⁴ So the fact that neither damages nor penalties can be collected from a persistent trespasser upon plaintiff's fisheries in the Delaware river, because of pecuniary irresponsibility, is such a failure of those legal remedies as will give plaintiff a standing in a court of equity.⁶⁵ In Florida

71 Mo. 199; *Wright v. Moore*, 38 Ala. 593; *Watson v. Sutherland*, 5 Wall. 78.

63. *Wood v. Pacolet Mfg. Co.* (S. C. 1908), 61 S. E. 95.

64. *Alabama.*—*Lyon v. Hunt*, 11 Ala. 295, 46 Am. Dec. 216.

California.—*Grigsby v. Burtnett*, 31 Cal. 406.

Colorado.—*Derry v. Ross*, 5 Colo. 295.

Georgia.—*Waters v. Lewis*, 106 Ga. 758, 32 S. E. 854; *Ryan v. Fulghum*, 96 Ga. 234, 22 S. E. 940; *Cottle v. Harrold*, 72 Ga. 830.

Illinois.—*Highway Comm'rs of Town of Ashmore v. Green*, 156 Ill. 504, 41 N. E. 154.

Iowa.—*Martin v. Davis*, 96 Iowa. 718, 65 N. W. 1001.

Kentucky.—*Musselman v. Marquis*, 1 Bush. 463, 89 Am. Dec. 637.

Maryland.—*Caswell v. Swindell* (1906), 62 Atl. 956.

Missouri.—*Lockwood v. Lunsford*, 56 Mo. 68.

New Hampshire.—*Milan Steam Mills v. Hickey*, 59 N. H. 241.

New Jersey.—*Wilson v. Hill*, 46 N. J. Eq. 367, 19 Atl. 1097.

Ohio.—*Merchants & Traders' Bank v. Debolt*, 1 Ohio St. 591.

West Virginia.—*Hanly v. Watter-son*, 39 W. Va. 214, 19 S. E. 536.

65. *Wilson v. Hill*, 46 N. J. Eq. 367, 19 Atl. 1097, per McGill, Ch.: "It is then only the impossibility of the defendant which makes these remedies practically valueless and inadequate to the complainant, but that is sufficient to give him a standing in equity. *West v. Walker*, 3 N. J. Eq. 279, 290; *Kerlin v. West*, 4 N. J. Eq. 449; *Chenango Bank v. Cox*, 26 N. J. Eq. 452; *Hodgson v. Duce*, 2 Jur. (N. S.) 1014. And see *Rogers, etc., Works v. Erie R. Co.*, 20 N. J. Eq. 379; *Cottle v.*

insolvency alone is not regarded as a sufficient ground for enjoining a trespasser, yet taken with other equitable grounds it is an important aid to equity jurisdiction.⁶⁶ Where an injunction is sought to enjoin defendant from cutting turpentine trees and timber on land claimed by plaintiff, and plaintiff's affidavit alleging defendant's insolvency on information and belief are met by strong counter affidavits, the injunction will not be continued to the hearing.⁶⁷

§ 1139. **When plaintiff's title in dispute.**—The more general rule is that a trespass to real property will not ordinarily be enjoined where plaintiff's title is in dispute and has not been estab-

Harrold, 72 Ga. 830; and the very recent case of *Hanly v. Watterson* (W. Va.), 19 S. E. 536.

66. *Pensacola, etc., R. Co. v. Spratt*, 12 Fla. 26. And see *Burns v. Sanderson*, 13 Fla. 381; *Yonge v. McCormick*, 6 Fla. 368. That the insolvency need not be absolute, see *Hicks v. Compton*, 18 Cal. 206. A bill to enjoin a trespass alleged that complainant was engaged in operating boats on a river, as a carrier of freight and passengers, and was under a contract to carry the mails; that it had leased from a railroad company a certain dock, and had the exclusive right to use the same for its boats; that said dock was wholly inadequate for complainant's own business; that it had never held itself out as a wharfinger; that its carriage of perishable freight and its mail contract required it to act with great promptness in making connections, and a failure to do so would subject it to forfeitures and heavy penalties; that all the room at the dock was necessary to enable it to carry on the business, and comply with its mail contract; that the use of the dock by respondents, who also ran steam-

boats, would cause delays in loading and unloading, and loss of connection, and thereby cause irreparable injury; that respondents persisted in using said dock in their business of carrying freight and passengers, and threatened that if complainant hindered them they would have its agents arrested, and would sue for damages for every package of freight refused to be received by complainant on said dock; that complainant would be subjected to a multitude of suits if it should use force to hinder respondents, or should refuse to receive freight consigned to them. The bill further averred that respondents were insolvent, and that the judgments that might be recovered against them would be uncollectible. It was held that the bill justified the issuance of a preliminary injunction. *Indian River Steam-Boat Co. v. East Coast Transp. Co.*, 28 Fla. 387, 10 So. 480.

67. *McCormick v. Nixon*, 83 N. C. 113; *Thompson v. Williams*, 1 Jones Eq. 176; *Gause v. Perkins*, 3 Jones Eq. 177. See also *Harms v. Jacobs*, 158 Ill. 505, 41 N. E. 1071.

lished at law.⁶⁸ Thus, an injunction will not be granted in favor of a complainant out of possession, to restrain the removal of stone from land of which defendants had possession under a claim of ownership, when complainant obtained title to it from the government, where the disputed question of title has not been adjudicated.⁶⁹ And where both parties claim the title of the land in controversy, and the defendant shows that he is solvent and acting in good faith, a preliminary injunction against him should be dissolved.⁷⁰ Again, where a bill of complaint seeking injunctions

68. *United States*.—*Irwin v. Dixon*, 9 How 10, 13 L Ed 25; *Waterloc Min Co v Doc*, 82 Fed. 45, 27 C. C. A. 50, 48 U. S. App. 411.

Alabama.—*Kellar v. Bullington*, 101 Ala 267, 14 So 466.

Florida.—*Carney v. Hadley*, 32 Fla. 344, 14 So 4, 37 Am. St. Rep. 101, 22 L R A. 233.

Georgia.—*Lainer v. Hebard*, 123 Ga. 626, 51 S. E. 632; *Georgia Slate Co. v. Davitte*, 79 Ga. 627.

Illinois.—*Hacker v. Barton*, 84 Ill. 313.

Indiana.—*Whitlock v. Consumers' Gas Co.*, 127 Ind. 62, 26 N. E. 570.

Maine.—*Porter v. Witham*, 17 Me. 292.

Massachusetts.—*Cummings v. Barrett*, 10 Cush. 186.

Michigan.—*Andries v. Detroit G. H. & M. R. Co.*, 105 Mich. 667, 63 N. W. 526.

Mississippi.—*Nevitt v. Gillespie*, 1 How. 108, 26 Am. Dec. 696.

Missouri.—*Arnold v. Klepper*, 24 Mo. 273.

New Hampshire.—*Maloon v. White*, 57 N. H. 152.

New Jersey.—*New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 322.

New York.—*Olmsted v. Loomis*, 9 N. Y. 133; *Lansing v. North River Steamboat Co.*, 7 Johns Ch. 162.

But see *Baron v. Korn*, 127 N. Y. 224, 27 N. E. 804; *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Corning v. Troy Iron & N. Co.*, 40 N. Y. 191.

North Carolina.—*Bogey v. Shute*, 57 N. C. 174.

Pennsylvania.—*Booher v. Brown-ing*, 169 Pa. St. 18, 32 Atl. 85; *Rhea v. Forsythe*, 37 Pa. St. 503, 78 Am. Dec. 441.

Tennessee.—*Caldwell v. Knott*, 10 Yerg. 209.

West Virginia.—*Burns v. Mearns*, 44 W. Va. 744, 30 S. E. 112; *Laz-zell v. Garlow*, 44 W. Va. 466, 30 S. E. 171.

69. *Kellar v. Bullington*, 101 Ala. 261, 14 So. 466. And see *Maloon v. White*, 57 N. H. 152, where Smith, J., said: "A suit in equity will not lie for relief against a trespass to lands or for an injunction to restrain a continuance of it unless it be in aid of a suit at law when the plaintiff's title is disputed, and has not been established at law, and no irreparable injury appears. *Burnham v. Kempton*, 44 N. H. 78." And see *Cresap v. Kemble*, 26 W. Va. 603; *Hart v. Albany*, 9 Wend. 572.

70. *Bell v. Chadwick*, 71 N. C. 329. And see *Thompson v. Williams*, 1 Jones Eq. 176, where Nash, Ch. J., said: "If in such a case a defendant

against trespassers on lands, shows the title to the land to be in another person as manager, and there is no allegation that complainant furnished the purchase money, or of any other fact showing the right or interest of the complainant in the land, a temporary injunction is properly denied.⁷¹ In an action to restrain trespass, to entitle defendant to a trial of title at law, his title must be based on facts showing a substantial dispute of plaintiff's title; a mere denial is not sufficient.⁷² But when the deed under which plaintiff claims his right is recited in the chain of title and is admitted by the pleadings, and the only question is whether or not it confers the right to mine coal which he claims, no such question of title arises as deprives a court of equity of jurisdiction.⁷³

§ 1139a. **Same subject; qualification of rule.**—The rule refusing to plaintiff relief in equity until after his right to the *locus in quo* has been established at law, is not so important under the modern system of trying equity cases and may be deemed rather a rule of discretion than of jurisdiction.⁷⁴ The former rule of equity in cases of alleged trespass on land not to restrain the use and enjoyment of the premises by defendant when the title was in dispute but to leave the complainant to his remedy at law,⁷⁵ has been modified; in modern times and in cases where irreparable injury is being done or threatened going to the destruction of the substance of the estate the common practice now is to restrain the alleged wrongdoer by injunction, though the title to the premises be in litigation.⁷⁶ And in this connection it has been declared by

can be enjoined, we see no reason why in any case where he is a poor man possessed only of the land for which he is contending, he may be stopped by an injunction from opening and clearing the ground."

71. *Baker v. McKinney* (Fla. 1907), 44 So. 944.

72. *Miller v. Lynch*, 149 Pa. St. 460, 24 Atl. 80.

73. *Jennings v. Beale*, 158 Pa. St. 283, 27 Atl. 948. Otherwise where

plaintiff's title is denied. *Coal Co. v. Snowden*, 2 Pa. St. 488; *Ferguson's Appeal*, 117 Pa. St. 426, 11 Atl. 885; *Grubb's Appeal*, 90 Pa. St. 228.

74. *Baron v. Korn*, 127 N. Y. 224, 229, 27 N. E. 804; *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 75; *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.*, 86 N. Y. 107, 127.

75. *Pillsworth v. Hopton*, 6 Ves. 51.

76. *Erhardt v. Boaro*, 113 U. S.

the United States Supreme Court that, "It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. . . . This doctrine has been greatly modified in modern times, and it is now a common practice in cases where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extracting of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation."⁷⁷ And in a recent case in Nebraska it is decided that in an action to enjoin a trespass a defendant cannot defeat the plaintiff's action by showing an outstanding right in a third party to have one of the deeds in the plaintiff's claim of title declared a mortgage.⁷⁸ And where there has been a long and undisturbed possession under a deed which was recorded and which the grantor and occupants under him supposed to convey title, it was held that even if the deed conveyed no title, yet the title was not so doubtful as to make it improper to grant an injunction in favor of the party holding it as against a trespasser without a color of right.⁷⁹

§ 1139b. Where property sold after action commenced.—
Where, in an action brought to restrain a trespass upon real prop-

537, 5 Sup. Ct. 565, 28 L. Ed. 1116; *Jerome v. Ross*, 7 Johns. Ch. 315; *LeRoy v. Wright*, 4 Sawyer, 530, 535.

77. *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. 565, 28 L. Ed. 1116. Per Mr. Justice Field. See, also, *Spear v. Cutter*, 5 Barb. (N. Y.) 486, wherein it is said: "Courts of equity originally declined to interfere by restraining waste or trespass where the right was doubtful or the defendant was in possession claiming by an adverse title. . . . But such

courts have gradually enlarged their jurisdiction in such cases, and now they interfere to prevent injury to land even where the title is in dispute and the right is doubtful, if the waste or trespass will be attended by irreparable mischief, or if, from the irresponsibility of the defendant, or otherwise, the plaintiff cannot obtain relief at law." Per Paige, J.

78. *Munger v. Yeiser* (Neb. 1907), 114 N. W. 166.

79. *Falls Village Water Co. v. Tibbetts*, 31 Conn. 165.

erty, the same is sold during the action, and the vendee thereupon substituted as plaintiff, such substitution is held not to modify the issues, and evidence taken before such transfer should be considered in the same manner as if there had been no change of parties.⁸⁰

§ 1140. Determining title; temporary injunction; instances.—

The plaintiffs filed a bill in equity to restrain defendant from erecting a house partly upon ground claimed by plaintiffs and from using the wall of plaintiffs' house as a party wall. The defendant opposed the application and set up a title in himself. On appeal from a decree making the injunction perpetual, prohibiting the defendant from erecting his building, and requiring him to remove the building materials from the ground in dispute and the joists inserted in the wall of plaintiffs' house, it was held that it was error for the court below to determine the legal title and to make the injunction perpetual; that there should be a temporary injunction restraining defendant from proceeding with the building until the title should be decided, but not requiring him to remove the part already erected owing to plaintiff's neglect to apply for an injunction when he began the erection, unless it should be made to appear that the safety of plaintiffs' wall was endangered, and that the plaintiffs should be required at once to begin an action to have the title determined and the temporary injunction should be dissolved if they failed, but should be made perpetual if they established their title.⁸¹ Plaintiff, being in possession of a large tract of timber land under color of title, and engaged with numerous laborers in getting out logs for his lumber mill, in which a large capital is invested, and which is dependent

80. *Munger v. Yeiser* (Neb. 1907), 114 N. W. 166.

81. *Clayton v. Shoemaker*, 67 Md. 216; *Lanahan v. Gahan*, 37 Md. 105; *Amelung v. Seekamp*, 9 Gill & J. 468; *Perry v. Parker*, 1 Woodb. & M. 280; *Smith v. Jameson*, 91 Mo. 13. In the last case it was held that an injunction would not lie as an

original and independent proceeding to determine the title to land and the court cited in support of that proposition, *Pillsworth v. Hopton*, 6 Ves. 51; *Smith v. Collyer*, 8 Ves. 89; *Hart v. Mayor*, 9 Wend. 571; *Echelkamp v. Schrader*, 45 Mo. 505; *Preston v. Smith*, 26 Fed. 884.

upon this tract for a supply of logs, is entitled to a temporary injunction against one who, under claim of title, with force and firearms, enters upon the tract, destroys plaintiff's logging implements, and spreads terror among his workmen; but as a court of equity cannot determine the title to the land the parties will be required to frame an issue of law on that question, to be tried by a jury, pending the injunction.⁸² A temporary injunction issued upon a bill the whole purpose of which is to have the defendant restrained from destroying timber growing on land until the question of title to the land is determined in a pending ejectment suit should not be made perpetual by a decree rendered before a trial of the ejectment suit.⁸³

§ 1141. **Same subject; defendant's title.**—Where on the trial it is shown that defendant is a trespasser, he will be enjoined and mulcted in damages though he was acting under an honest mistake as to the boundary.⁸⁴ And if one who is injuring land refuses to produce his title papers when ordered by the chancellor to do so, he is properly deemed a trespasser, and may be enjoined.⁸⁵ But where a water company which was authorized to take land by the right of eminent domain on filing a description of it "sufficiently accurate for identification," filed an insufficient description, and after it had answered a bill for an injunction brought by the owner of the land filed a second description which was sufficient and rendered the taking by the company lawful, it was held that no injunction could issue, but that the bill might be retained for the assessment of damages in respect to the entry by defendant before the taking became lawful.⁸⁶ Where a bill has been brought

82. *Santee River Lumber Co. v. James*, 50 Fed. 360. In *Harman v. Jones*, 1 Craig. & Ph. 301, Lord Cottingham said he could sustain the injunction "only upon the terms of its being accompanied by some provision for putting the question immediately into a course of legal investigation." And see, on the same point *Mayor of Cardiff v. Cardiff Waterworks Co.*, 4 DeG. & J. 598.

83. *Wadsworth v. Goree*, 96 Ala. 227, 10 So. 848; *Ashurst v. McKenzie*, 92 Ala. 484; *Tainter v. Mayor*, 19 N. J. Eq. 46; *Cornelius v. Post*, 9 N. J. Eq. 196; *Erhardt v. Boaro*, 113 U. S. 337, 5 Sup. Ct. 565, 28 L. Ed. 1116.

84. *Bates v. Slade*, 76 Ga. 50.

85. *Mayo v. McPhaul*, 71 Ga. 758.

86. *Woodbury v. Marblehead Water Co.*, 145 Mass. 509, 15 N. E. 282, per Holmes, J.: "It fol-

to enjoin threatened trespasses the defendant cannot oust the court of jurisdiction by committing *pendente lite* the very acts sought to be prevented by the suit.⁸⁷ Again, where plaintiff in an action of trespass fails to recover he is not entitled to an injunction against defendant on account of the same injury.⁸⁸

§ 1142. **Plaintiff must have possession.**—One seeking an injunction against trespassers on land must be in actual possession as well as entitled to the possession.⁸⁹ A person in possession of land, claiming title, is entitled to an injunction against an intruder who threatens to enter and dispossess him for the purpose of laying out a public street.⁹⁰ Actual possession, or *pedis possessio*, of

lands that no injunction can be granted. But whether or not the plaintiff would have obtained an injunction on the merits of his case as it stood at the time the bill was filed he must be taken to have had a case within the equitable jurisdiction of the court, in the absence of a demurrer, and for damages as an incident of the cause until after the original pleadings were complete. *Creely v. Bay State Brick Co.*, 103 Mass. 514; *Winslow v. Nayson*, 113 Mass. 411. The bill therefore may be restrained for the assessment of damages, if any, in respect of the entry before the lawful taking, if it be desired. See, further, *Milkman v. Ordway*, 106 Mass. 232."

87. A bill in equity was brought for an injunction to restrain the town surveyor from removing a building and obliterating the boundaries of the complainant's lot. The answer admitted the removal, but claimed that the land where the building stood was part of the public highway. A supplemental answer said the complainants ought not to maintain their bill, because the respondents had fully carried out their

objects by removing the building and grading the lot. General replications were filed to both answers. Upon respondents' motion to dismiss the bill, on the ground that the bill does not state a case for equitable relief, and, if it does, the case stated has ceased to exist; it was *held*, the motion must be denied. The case falls within the class of cases in which threatened trespasses are enjoined. The statements of the supplemental answer are not reasons for granting the motion, those statements being denied by the replication. Even if admitted, they do not make a case for dismissal, for a defendant, in an injunction suit, cannot oust the court of its jurisdiction by committing, *pendente lite*, the very acts to prevent which the suit was begun. *Lewis v. Town of North Kingstown*, 16 R. I. 15, 11 Atl. 173.

88. *Bierer v. Hurst*, 162 Pa. 1, 29 Atl. 98.

89. *Hillman v. Hurley*, 82 Ky. 626.

90. *Diamond Match Co. v. Village of Ontonagon*, 72 Mich. 249; 40 N. W. 448.

the land is not essential to maintain the equitable jurisdiction given by the Florida statute of 1889, in favor of persons claiming to own timber lands, to enjoin trespasses by cutting trees or removing logs, or other specified trespasses.⁹¹ A party showing an equitable title to realty will be protected by injunction against trespassers though the location of the legal title has not been finally determined.⁹²

§ 1143. **What is sufficient possession.**—In an action to restrain defendant, a village incorporated under the general law, from interfering with land to which plaintiff claimed title, it appeared and was found that the land in question was formerly a public street in the village, but the street had been discontinued; that plaintiff's predecessor in interest, who owned lands on both sides of the street, after the discontinuance of it entered into possession and inclosed it with his own lands, and occupied and used it in common therewith, claiming title down to 1890, when he conveyed the lands, including the street, to plaintiff, who had since used and occupied the same. It was held, that as against defendant, plaintiff's possession was a sufficient title to sustain the action.⁹³

91. *Reddick v. Meffert*, 32 Fla. 409, 13 So. 894, per Raney, C. J.: "In our judgment, it was clearly the purpose of the statute that no actual physical possession, or *pedis possessio*, by the owner of timbered lands, should be necessary to maintain the equitable jurisdiction which it provides for his protection against the trespass mentioned in it. *Mathews v. Marks*, 44 Ark. 436; *Sloan v. Sloan*, 25 Fla. 53, 59; 5 So. 603, 606; *Patton v. Crumpler*, 29 Fla. 573, 577; 11 So. 225, 226. If we should require such possession, the protection intended to be given to the owners of our extensive and valuable forests would be sadly curtailed."

92. *Wilson v. Rockwell*, 29 Fed. 674.

93. *Excelsior Brick Co. v. Havestraw*, 142 N. Y. 146, 36 N. E. 819, per Earl, J.: "The plaintiff commenced this action to restrain the defendant from interfering with its land and causing an irreparable injury thereto, and also to recover damages caused by the defendant thereto. The defendant claimed that the land was in a public street and that it was, therefore, authorized to interfere therewith in the improvement of the street, and upon that ground the complaint was dismissed. It is not disputed that the land in question constituted a street at some time prior to the acts complained of by the plaintiff, but it claims that the street had been discontinued and had

§ 1144. **Acquiescence; where license abused.**—In an action to enjoin defendant from an alleged trespass on land, evidence that plaintiff had acquiesced in the occupancy of the land, that he offered to receive a certain sum in compensation for the alleged trespass, and that his grantor had conveyed an interest in the land to a third person, is admissible in defense as tending to show the nature and extent of the injury.⁹⁴ And where, to an action for

thus ceased to exist. In June, 1887, the trustees of the village of Haverstraw formally adopted a resolution discontinuing the portion of Division street now in question, and the plaintiff claims that that resolution was effectual to discontinue the street. But the court below held that it was ineffectual for that purpose for the reason that the certificate of twelve freeholders was not obtained before the passage of the resolution. We think that the special requirement of the petition of the ten freeholders in the case of opening and altering a street indicates very clearly that a street may be discontinued by the trustees without any petition or certificate of freeholders. It cannot be supposed that the legislature would authorize the laying out and altering of a street upon the unsworn petition of any ten freeholders and require the certificate of twelve disinterested freeholders, summoned and acting under oath, before a street could be discontinued; and this construction of the language used in this section is in harmony with the decisions in *People v. Hair*, 29 Hun, 125, and in *The Matter of the Village of Rhinebeck*, 82 N. Y. 621, where similar provisions in other village charters were construed. The difference in the language used in the charters there under consideration from the

the language used in the section now under consideration is not sufficient to warrant a different construction. We think, therefore, that the resolution of the defendant's trustees was effectual to discontinue the portion of Division street now under consideration. But it had ceased to be a street for another reason. It was found by the trial judge that that part of Division street now in question 'had not been used or traveled by the public for more than six years prior to the commission of the acts complained of;' and in the general highway laws of the State (2 Rev. Stat. 1249, 7th ed.), it is provided that all highways that 'have ceased to be traveled or used as highways for six years shall cease to be a highway for any purpose.' In *Horey v. Village of Haverstraw*, 124 N. Y. 273, 26 N. E. 532, that provision was held applicable to a street in that village, and under the authority of that case, upon the finding of the trial judge, this portion of Division street had ceased to be a street prior to the commission of the acts complained of in this action." The appeal was decided in favor of plaintiff.

94. *Whitlock v. Consumers' Gas Trust Co.*, 127 Ind. 62, 26 N. E. 570. And see *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536.

trespass, defendant applied for an injunction because the alleged trespass was committed on land which plaintiff's agent had pointed out to defendant as belonging to defendant, it was held that the allegations showed a legal defense.⁹⁵ A trespasser who would justify his acts under a license must bring them within its terms, and if it is a parol license founded upon no consideration, it is revocable at pleasure, though the licensee may have expended money on the faith of it.⁹⁶ And where, in a suit for an injunction to restrain defendants from interfering with the exercise of a hunting right upon defendant's premises, granted by defendants to plaintiffs, it appeared that plaintiffs had, in excess of the rights granted, issued permits to third persons to hunt upon the premises, who hunted in places not included in the grant, and committed various depredations, it was held that an injunction would not be granted, although defendants were guilty of acts which interfered with the legitimate exercise of the right.⁹⁷

§ 1145. **Effect of lapse of time.**—Lapse of time on the part of a plaintiff in many cases will operate as a bar to injunctive relief. So it has been decided that an injunction will not be granted restraining a defendant from flooding complainant's lands by his logging operations where such operations have been continued for years in practically the same manner without indication from complainant that he could not be compensated in damages, where a considerable investment by defendant would be rendered valueless and complainant's injury from the operations is pecuniary and small in amount.⁹⁸ So, if the owner of a dam and of a mill-pond raised thereby, and of the land under it, is disseised of a portion of such land, no declaration of the abandonment by him of the right to flow such portion is necessary to prevent the disseisor's acquisition of title by adverse possession, and after such

95. *Atlantic Consolidated Coal Co. v. Maryland Coal Co.*, 62 Md. 135.

96. *Wheelock v. Noonan*, 108 N. Y. 179, 15 N. E. 67; *Murdock v. Prospect Park R. Co.*, 73 N. Y. 579; *Harper v. McElroy*, 42 N. J. Eq. 280.

See, also, *Mitchell v. Lea Lumber Co.* (Wash. 1906), 86 Pac. 405.

97. *Bingham v. Salene*, 15 Or. 208, 14 Pac. 523.

98. *Howard v. Bellows*, 148 Mich. 410.

adverse possession has continued for twenty years, the owner of the dam can no longer restrain the disseisor from the use of the disseised portion.⁹⁹ In New York the doctrine of acquiescence as a defense to an action in equity has been generally limited to those of exclusively an equitable nature or to cases where the legal right has expired, or the party has lost his right of property by prescription or adverse possession. No period of mere inaction has been held sufficient to justify a trespass or nuisance, unless it has continued for such a length of time as will authorize the presumption of a grant.¹ And in this State it has been decided that the right to bring an action in equity to restrain continuous trespasses upon real estate is not barred in ten years from the time of the original trespass, but may be sustained if brought at any time while the plaintiff has title to the property injured, and a cause of action for such injuries is not barred at law.²

§ 1146. **Same subject; continuous trespass.**—As trespassers upon real property effected by an unlawful structure are continuous in their nature and give separate successive causes of action from time to time, barred only by the running of the statute of limitations against the successive trespasses, no lapse of time or inaction merely on the part of an owner of the real property after the erection and during the maintenance of the unlawful structure is sufficient to defeat his right to injunctive relief and his action for damages, unless it has continued for such a length of time as will effect a change of title in the property or authorize the presumption of a grant.³ And in such a case it is

99. *Middlesex Co. v. Lane*, 149 Mass. 101, 21 N. E. 228. And see *Smith v. Langewald*, 140 Mass. 205, 207, 4 N. E. 571; *Isele v. Arlington*, etc., Bank, 135 Mass. 142; *Storm v. Manchaug Co.*, 13 Allen (Mass.) 10.

1. *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 123, 23 N. E. 1134; *Chapman v. City of Rochester*, 110 N. Y. 273, 18 N. E. 88; *N. Y. Rubber Co. v. Rothery*, 107 N. Y. 310, 14 N. E. 269; *Viele v. Judson*, 82

N. Y. 32; *Arnold v. Hudson River R. Co.*, 55 N. Y. 661; *Broiestedt v. South Side R. Co.*, 55 N. Y. 220; *Campbell v. Seaman*, 63 N. Y. 582; *Ormsby v. Copper Mining Co.*, 56 N. Y. 623; *Haight v. Price*, 21 N. Y. 241.

2. *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132, 28 N. E. 479.

3. *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132, 28 N. E. 479; *Uline v. N. Y. Central, etc., R. Co.*,

immaterial either in equity or law whether the injuries done were originally intended by the wrongdoer to be perpetual and permanent or were of a temporary nature only and occasional in their operation.⁴ A court having authority to grant a perpetual injunction to restrain such continuous trespasses does not impair the exercise of its authority by permitting, and it may permit, the wrongdoer to escape its effect by voluntarily paying the owner a specified sum for the property injured.⁵

§ 1147. **Taking for public use, etc.**—Where a city, by means of a basin and culvert, discharges all the surface water carried to a particular point in such manner that the water by its own force, makes a channel for itself through the land of plaintiff, a taking of private property for a public use occurs; and, if no compensation to the owner is provided, the use of his property by the city will be enjoined.⁶ And where, as provided by statute, a street railway company was to pay all damages arising from the construction of the road as a condition precedent, a property owner may enjoin the construction on non-payment of damages due him, though the act provides that either party may have the damages assessed.⁷ And a corporation having the power of eminent domain will be enjoined from taking land without making compensation

101 N. Y. 98, 4 N. E. 536; *Arnold v. Hudson River, etc., R. Co.*, 55 N. Y. 661; *Colrick v. Swinburne*, 105 N. Y. 503, *Tallman v. Metropolitan El. R. Co.*, 121 N. Y. 123, 23 N. E. 1134.

4. *Henderson v. N. Y. Central R. Co.*, 78 N. Y. 423; *Williams v. N. Y. Central R. Co.*, 16 N. Y. 111; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 170; *Krehl v. Burrell*, L. R. 11 Ch. D. 146.

5. *Galway v. Metropolitan El. R. Co.*, 128 N. Y. 132, 28 N. E. 479.

6. *Miller v. Morristown*, 48 N. J. Eq. 645, 25 Atl. 20, *aff'd* 47 N. J. Eq. 62, 20 Atl. 61, where *Van Fleet, V. C.*, said: "This method of discharging the water col-

lected in the basin condemns the complainants' land to public use just as effectually as that purpose would have been accomplished if the defendants had made an actual entry on their land and opened a channel through it." Under legislation pursuant to the present N. J. constitution "easy vestige of the ancient *jus publicum* to seize the property of the citizen without rendering to him its value has been abolished." *Ward v. Peck*, 49 N. J. Law, 42, 44, 10 Atl. 109.

As to enjoining or taking for public use, see § 1013 *et seq.* herein.

7. *Georgia, etc., R. Co. v. Ray*, 84 Ga. 376, 11 S. E. 352.

to the owner.⁸ Again, on defendant's failure to appear after due notice, an injunction pending a suit will be granted on plaintiff's showing that defendant is about to forcibly dispossess them of their land under an alleged invalid condemnation proceeding; that great injury would result to plaintiffs if they are deprived of the possession pending the action to determine the validity of the condemnation; and that no injury would result to defendant if it is restrained from taking possession.⁹ And where there is grave doubt as to the validity of a statute to the extent that it permits a telegraph company to be deprived of its right to maintain its wires on the structures of an elevated railroad, which is a post-road, an injunction against any interference with the wires thereon should be granted until the question can be passed on by the court of last resort, the maintenance of wires thereon not being attended with any public inconvenience.¹⁰ An electric lighting company which uses, without permission from either the city, the probate court, or another company, poles erected by such other company for its own use, will also be enjoined.¹¹ But the owner may lose his right to injunctive relief by laches in seeking it.¹²

§ 1148. **Trespass on public domain; pre-emptors.**—When the government finds persons in possession of the public domain, under claim or color of title, it can proceed by injunction to restrain an improper use of the same, without first determining the rights of the parties in a court of law.¹³ And where the title of one, claiming under the land laws of the United States, is under consideration in the land offices, a railroad company will be enjoined from entering on the land until it has taken proceedings to condemn the same, and has given security for the payment of

8. *Western Union Tel. Co. v. Judkins*, 75 Ala. 428.

9. *Morris v. City of New York*, 7 N. Y. Supp 943, 17 Civ. Proc. R. 407.

10. *Western Union Tel. Co. v. City of New York*, 38 Fed. 552.

11. *Hauss Electric, etc., Co. v. Jones Electric Co. (Ohio)*, 23 Wkly. Law Bul. 137.

12. *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 439. And see, *Goodin v. Cincinnati, etc., R. Co.*, 18 Ohio St. 169; *Traphagen v. Mayor*, 29 N. J. Eq. 206; *Easton v. New York, etc., R. Co.*, 24 N. J. Eq. 49.

13. *United States v. Cleveland, etc., Cattle Co.*, 33 Fed. 323. And see, *United States v. Ranch Co.*, 25 Fed. 465.

the appraised damages as soon as complainant's title shall have been determined in the land offices.¹⁴ And where hydraulic mining was carried on in such a way as to injure government rights in navigable waters, it was decided that an injunction might be granted to prevent such injury.¹⁵ Courts of equity will not, however, interfere by injunction to prevent the pasturing of sheep on public lands, where the petitioner has no property rights to be invaded.¹⁶ As there is a recognized public right of pasturage on the public domain which is left open, defendants cannot be enjoined from exercising such right by persons who own parcels of land detached and scattered through a large body of the public domain, and lying open, though thereby defendants' cattle will trespass on complainants' lands.¹⁷

§ 1149. Burial-place trespasses.—The heirs of a decedent at whose grave a monument has been erected, or the person who rightfully erected it, is entitled to an injunction to restrain one who, without right, threatens to injure or remove it, although the title

14. *Jones v. Florida, etc., R. Co.*, 41 Fed. 70. Plaintiff alleged the filing of his declaratory statement, claiming to pre-empt two subdivisions of land under the laws of the United States; that he was a legally qualified pre-emptor under said laws; that he had been in the peaceable possession thereof, complying with the requirements of said laws, in doing all necessary acts of residence and cultivation; that the defendant unlawfully and wrongfully took possession of one of the subdivisions, and prevented and forcibly resisted the plaintiff from taking possession thereof; that the defendant forcibly resists plaintiff's taking possession of the land in order to do the necessary acts of residence and cultivation thereon; and that the defendant was wholly insolvent. It was held sufficient to constitute a

cause of suit for an injunction to compel the defendant to desist from doing such acts, and to admit the plaintiff into the possession of the land; that the filing of the declaratory statement by the plaintiff entitled him to the possession of the land for the purpose of performing those acts required to be done by the pre-emption law; and that no other person had a right to enter the land, or to interfere with the plaintiff's occupancy of it, so long as his entry remained uncanceled. *Jackson v. Jackson*, 17 Or. 110, 19 Pac. 847.

15. *North Bloomfield Gravel M. Co. v. United States*, 88 Fed. 664, 59 U. S. App. 377, 32 C. C. A. 84.

16. *McGinnis v. Friedman*, 2 Idaho, 361, 17 Pac. 635.

17. *Buford v. Houtz*, 133 U. S. 320, 10 Sup. Ct. 305, 33 L. Ed. 618.

to the ground is in another.¹⁸ And where the owner of land has dedicated it to the public for burial purposes, his grantee may be enjoined from defacing and meddling with graves on the land at the suit of persons who have deceased relatives buried there. And two such persons can maintain a bill for such an injunction as well as if all others directly interested had joined with them.¹⁹ As a dead body belongs to no one and is under public protection, when it has once been buried no one has the right to remove it without the consent of the owner of the grave, or leave of the proper ecclesiastical, municipal or judicial authority.²⁰ And where a husband, with the wife's approval, has been buried by his father in a cemetery lot belonging to the latter, she will be enjoined from afterwards removing the remains.²¹ But if a husband has not freely

18. *Mitchell v. Thorne*, 134 N. Y. 536, 32 N. E. 10, per Follett, C. J.: "It has been decided many times and frequently asserted by text writers, that the heirs of a decedent, at whose grave a monument has been erected, or the person who rightfully erected it, can recover damages from one who wrongfully injures or removes it, or by an injunction may restrain one who without right threatens to injure or remove it; and this, though the title to the ground wherein the grave is be not in the plaintiff, but in another. *Frances v. Ley*, Cro. Jac. 366; *Corven v. Pym*, 12 Coke, 105; *Spooner v. Brewster*, 10 Moore, 494, 3 Bing. 136, 2 Car. & P. 34; *In re Brick Presbyterian Church*, 3 Edw. Ch. 155-168; *Matthews v. Jeffrey*, 6 Q. B. Div. 290; *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227; *Beatty v. Kurtz*, 2 Pet. 566; *Snyder v. Snyder*, 60 How. Pr. 368, 1 Rolle, Abr. 625, 4 Bac. Abr., tit. 'Heir and Ancestor,' 163, 2 Com. Dig., tit. 'Cemetery,' 305, 1 Co. Litt. 18b, 3 Co. Just. 202, *et seq.*, 2 Bl. Comm. 428."

19. *Davidson v. Reed*, 111 Ill. 167. And see *Beatty v. Kurtz*, 2 Pet. 566; *Trustees v. Walsh*, 57 Ill. 363; *Smith v. Bangs*, 15 Ill. 399; *Mooney v. Cool-edge*, 30 Ark. 640.

20. *Weld v. Walker*, 130 Mass. 422; *Regina v. Sharpe*, 7 Cox C. C. 214, 216; *Wynkoop v. Wynkoop*, 42 Pa. St. 293; *Pierce v. Swan Point Cemetery*, 10 R. I. 227; *People v. Thompson*, 21 N. Y. W. Dig. 345; *Rhodes v. Brandt*, 21 Hun, 1; *State v. Doepke*, 68 Mo. 208; *State v. McClure*, 4 Blackf. (Ind.) 328; *Regina v. Stephenson*, L. R. 13 Q. B. Div. 331; *Foster v. Dodd*, 8 Best & S. 842.

21. *Peters v. Peters*, 43 N. J. Eq. 140, 10 Atl. 742.

Where a father interred his daughter in his lot, it was held that her husband could not afterwards maintain replevin for the coffin and contents in order to rebury them in his lot. *Guthrie v. Weaver*, 1 Mo. App. 136.

After a widow had decently buried her husband, their son averred that he had purchased a plot of ground according to the father's instructions for a family burial place,

consented to the burial of his wife in a lot of land owned by another person, with the intention that it should be her final resting-place, a court of equity may permit him, after such burial, to remove her body and grave-stone to his own land, and may restrain the other from interfering with the removal.²² A complaint praying that defendant be restrained from desecrating the burial ground of plaintiff's ancestors, which was reserved in a grant of the land to defendant's predecessor in title as a burial-place for the grantor and his heirs forever, need not aver the intestacy of the ancestor.²³

§ 1150. Trespass by railroad company.—Injunction will lie to prevent a railroad company from making excavations, laying tracks, and placing switches without first having acquired the right to do so, and without making compensation.²⁴ And where

but it was held that he had no right to remove the body to it. See cases cited, 10 Alb. L. J. 70; 31 Legal Intel. 268. And see *Meagher v. Driscoll*, 99 Mass. 281.

After a mother had been buried in a sister's lot, a bill brought by her son's executors to remove the body to his lot, as provided in the will, but against the opposition of her daughter, was dismissed. *Lowrie v. Plitt*, 11 Phila. 303.

22. *Weld v. Walker*, 130 Mass. 422, per Gray, C. J.: "The rules of law applicable to this case are too well settled to require elaborate discussion. Neither the husband or next of kin have, strictly speaking, any right of property in a dead body; but controversies between them as to the place of its burial are in this country where there are no ecclesiastical courts within the jurisdiction of a court of equity. 2 Bl. Com. 429; In re Beekman Street, 4 Bradf. 503, 532. It is the husband's right and duty to bury his deceased wife. *Durell v. Hayward*, 9 Gray. 248; *Lakin v.*

Ames, 10 Cush. 198, 221; *Cunningham v. Reardon*, 98 Mass. 538." A wife and child were buried by the wife's mother in her lot without consulting the husband, and without objection from him, who was ill at the time; a demurrer filed by the wife's mother to the husband's bill for permission to remove the bodies to his own burial lot, and to enjoin the mother and cemetery company from interfering with such removal, was overruled and defendants ordered to answer. *Fox v. Gordon*, 11 W. N. C. (Pa.) 302.

23. *Mitchell v. Thorne*, 10 N. Y. Supp. 682, *aff'd* 134 N. Y. 536, 32 N. E. 10. As to the right of next of kin to protect a burial place, see *Pierce v. Proprietors*, 10 R. I. 227; *Wynkoop v. Wynkoop*, 42 Pa. St. 293.

24. *Lake Erie & W. R. Co. v. Michener*, 117 Ind. 465, 20 N. E. 254; *Midland, etc., R. Co. v. Smith*, 113 Ind. 233; *Indiana, etc., R. Co. v. Allen*, 113 Ind. 581; *Pittsburgh R. Co. v. Swinney*, 97 Ind. 586, 594; *Lake Erie R. Co. v. Kinsey*, 87 Ind. 514;

a railroad company, by its charter, is authorized to acquire a right of way eighty feet wide, but accepts from the landowner a release expressly limiting the right of way across his land to twenty-five feet, it cannot subsequently, in the absence of a further grant, assert a claim to a greater width, and may be enjoined from doing so.²⁵ But if a railroad company enters upon land under a parol license from the owner and makes large expenditures with the understanding that it is to have permanent occupation, and proceeds so far with its works that the public interest becomes involved, the owner cannot then withdraw the license and enjoin it from further occupancy.²⁶ And the fact that a city has passed an invalid ordinance for the purpose of vacating a part of a street for the benefit of a railroad company, does not entitle an abutting owner to an injunction to restrain the company from laying tracks in the street, since the invalid ordinance does not cause the title to the street to revert to the lot owner.²⁷ And in such a case an abutting owner cannot enjoin the railroad company on the ground that the laying of the railroad tracks is an additional public use of the street, but he must seek compensation in damages for any injury to his property caused by such additional use thereof.²⁸

§ 1150a. **Timber trespasses.**—A court of equity will as a general rule grant an injunction restraining a person from entering without right upon the land of another and cutting and removing timber therefrom, as in the majority of cases the remedy at law for such a trespass is not an adequate one.²⁹ So where the vendor,

Chicago, etc., R. Co. v. Jones, 103 Ind. 386; Anderson R. Co. v. Kernodle, 54 Ind. 314; Parker v. East Tennessee V. & G. R. Co., 13 Lea (Tenn.) 669.

25. Lake Erie & W. R. Co. v. Mischener, 117 Ind. 465, 20 N. E. 254. And see Prather v. Western Union Tel. Co., 89 Ind. 501; Indianapolis, etc., R. Co. v. Rayl, 69 Ind. 424; Indianapolis, etc., R. C. v. Reynolds, 116 Ind. 356.

26. Louisville, etc., R. Co. v. Solt-

wedde, 116 Ind. 257, 19 N. E. 111; Indiana, etc., R. Co. v. Allen, 113 Ind. 581, 15 N. E. 446; Morgan v. Railroad Co., 96 U. S. 716, 24 L. Ed. 743.

27. Corcoran v. Chicago, M. & W. R. Co., 149 Ill. 291, 37 N. E. 68.

28. Stetson v. Railroad Co., 75 Ill. 74; Patterson v. Railroad Co., 75 Ill. 588; Penn, etc., Ins. Co. v. Heiss, 141 Ill. 35; Truesdale v. Sugar Co., 101 Ill. 564; Chicago, etc., R. Co. v. McGinnis, 79 Ill. 269.

29. *United States.*—King v. Camp-

and others acting for him are removing and threaten to remove, from day to day, timber from the land which is in possession of the vendee, the latter is entitled to an injunction against such trespass.³⁰ And in an action by a vendee of land to enjoin a tres-

bell, 85 Fed. 814; *King v. Stuart*, 84 Fed. 546.

Alabama.—*Coleman v. Elliott* (1906), 40 So. 666.

California.—*Natoma Water & M. Co. v. Clarkin*, 14 Cal. 544.

Georgia.—*Baxter v. Mattox*, 106 Ga. 344, 32 S. E. 94; *Goettee v. Lane*, 99 Ga. 282, 25 S. E. 736; *Powell v. Cheshire*, 70 Ga. 357, 48 Am. Rep. 572.

Illinois.—*Kaufman v. Wiener*, 169 Ill. 596, 48 N. E. 479; *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284.

Indiana.—*Owens v. Lewis*, 46 Ind. 488, 15 Am. Rep. 295.

Maryland.—*Shipley v. Ritter*, 7 Md. 408, 61 Am. Dec. 371.

Minnesota.—See *State v. District Court* (1906), 107 N. W. 963.

Missouri.—*Stroter v. American Cooperage Co.*, 116 Mo. App. 518, 92 S. W. 758.

Nebraska.—*Sapp v. Roberts*, 18 Neb. 299, 25 N. W. 96.

New Jersey.—*Piper v. Piper*, 38 N. J. Eq. 81; *Porch v. Fries*, 18 N. J. Eq. 204.

New York.—*Relyea v. Beaver*, 34 Barb. 547.

Pennsylvania.—*Appeal of Smith*, 69 Pa. St. 474.

Vermont.—*Griffith v. Hilliard*, 64 Vt. 643, 25 Atl. 427.

Virginia.—*Miller v. Wills*, 95 Va. 337, 28 S. E. 337.

Wisconsin.—*Starks v. Redfield*, 52 Wis. 349, 9 N. W. 168; *Wilson v. City of Mineral Point*, 39 Wis. 160.

Compare *Carney v. Hodley*, 32 Fla. 344, 14 So. 4, 22 L. R. A. 233, 37 Am.

St. Rep. 101; *Heaney v. Butte & M. C. Co.*, 10 Mont. 590, 27 Pac. 379; *Spear v. Cutter*, 5 Barb. (N. Y.) 486; *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169, 9 Am. Dec. 295.

Where timber has been cut and sold by a trespasser an injunction against a repetition of the trespass and a payment of the money by the purchaser to the trespasser may be granted, it appearing that the latter is insolvent. *Kaufman v. Wiener*, 169 Ill. 596, 48 N. E. 479.

The cutting and removal of crops may be enjoined. *State v. District Court* (Minn. 1906), 107 N. W. 963.

Cutting timber of a larger diameter than a contract of sale gives the right to may be enjoined. *Stroter v. American Cooperage Co.*, 116 Mo. App. 518, 92 S. W. 758.

A bill alleging ownership and possession of certain lands, and praying an injunction to restrain the cutting of timber thereon, and a decree determining the ownership of the timber and compensation for the timber already cut, does not merely incidentally involve the title to the land, but the answer claiming title in defendant, the title is directly involved, and there being no prayer that title be quieted, the averment of possession in complainant is immaterial in support of equitable jurisdiction. *Simmons v. Day*, 151 Mich. 1, 114 N. W. 853.

30. *Loudermilk v. Martin* (Ga. 1908), 61 S. E. 122.

pass by cutting and removing timber from land, the refusal of the vendor to make a deed will not preclude the vendee in possession who has complied with his part of the agreement and made valuable improvements thereon from securing an injunction against such trespass.³¹ In Florida, under the general statutes of 1906, while it is the duty of the courts of chancery of that State to entertain suits by any person claiming to own any timber lands in the State, to enjoin the trespasses stated in the statute, it is essential that necessary facts showing the basis of the claim to ownership of the land by the complainant be stated in the bill of complaint.³²

§ 1151. **Timber trespasses continued.**—An injunction will not be granted to restrain the cutting of timber unless the defendant's insolvency is made out with reasonable certainty.³³ And an injunction will not be granted to prevent the cutting of timber where the plaintiff's patent to the land is void for indefiniteness,³⁴ or he otherwise fails to show a good title,³⁵ or the timber was cut before he obtained his patent,³⁶ or where the defendant offers strong proof in support of his title and has in good faith expended large sums in establishing his business.³⁷

§ 1152. **Same subject; bond instead of injunction.**—A court of equity may interfere to prevent threatened irreparable injury to growing trees by a trespasser who is cutting the same.³⁸ And a complaint alleging that plaintiff is the owner of land described, on which is a large quantity of growing trees suitable for a sugar orchard; that defendant is now cutting and destroying said trees,

31. *Loudermilk v. Martin* (Ga. 1908), 61 S. E. 122.

32. *Baker v. McKinney* (Fla. 1907), 44 So. 944.

33. *McCormick v. Nixon*, 83 N. C. 113; *McMillan v. Ferrell*, 7 W. Va. 223.

Must show irreparable injury or insolvency.—*Haggart v. Chapman Dewey L. Co.* (Ark. 1906), 92 S. W. 792.

34. *Hillman v. Hurley*, 82 Ky. 626.

35. *Cox v. Douglass*, 20 W. Va. 175; *Schoonover v. Bright*, 24 W. Va. 698; *Tate v. Vance*, 27 Gratt. 571. See, also, *Hudson v. Williams*, 99 Ga. 183, 25 S. E. 182.

36. *Peck v. Brown*, 5 Nev. 81.

37. *Lewis v. Roper Lumber Co.*, 99 N. C. 11, 5 S. E. 19.

38. *Smith v. Rock*, 59 Vt. 232. And see *Sarles v. Sarles*, 3 Sandf. Ch. 601.

and threatens to continue so doing, to plaintiff's irreparable damage; that defendant is insolvent; and praying for a temporary restraining order, and on final hearing a perpetual injunction,—states a good cause of action.³⁹ And where parties financially irresponsible, without valid title, but claiming under a void attachment sale, cut timber constituting the principal value of land purchased, of which others claiming under a purchase in bankruptcy proceedings are in possession, equity will enjoin the continuance of such trespass at the instance of the latter, on the ground of the inadequacy of the remedy at law, and the irreparable nature of the injury.⁴⁰ And an injunction will lie to prevent a trespasser from cutting walnut trees as their timber is possessed of peculiar qualities, and they are also cultivated for the nuts they bear.⁴¹ But a person having an option to purchase the timber growing upon certain land may by acquiescence in the acts of another who is cutting and removing the timber and asserting an adverse claim to it, estop himself from making any claim under his option and may be enjoined from cutting and removing such timber.⁴² And where plaintiffs and defendants both claim title to certain timber lands, plaintiffs alleging that defendants are cutting and carrying away the timber, and that they have no property beyond the exemptions allowed by law, defendants admitting the former and denying the latter, the court should not issue an injunction, but should order a bond executed by defendants to meet such damages as might be adjudged against them, and on their failure to give such bond the court should otherwise protect the rights of the parties.⁴³

39. *Clendening v. Ohl*, 118 Ind. 46, 20 N. E. 639.

40. *Sullivan v. Rabb*, 86 Ala. 433, 5 So. 746. And see *Hammond v. Winchester*, 82 Ala. 470; *Boulo v. New Orleans*, etc., R. Co., 55 Ala. 480; *Lyon v. Hunt*, 11 Ala. 295; *Fulton v. Harman*, 44 Md. 251; *Davis v. Reed*, 14 Md. 152; *Kelly v. Robb*, 58 Tex. 377.

41. *Thatcher v. Humble*, 67 Ind. 444. See *Powell v. Rawlings*, 38 Md. 239. And see, as to the protection by

injunction of ornamental and fruit trees, *Shipley v. Ritter*, 7 Md. 408; *Daubenspeck v. Grear*, 18 Cal. 443.

42. *Hanly v. Watterson*, 39 W. Va. 214, 19 S. E. 536. And see *Stone v. Tyree*, 30 W. Va. 701, 5 S. E. 878. As to the time within which the option must be exercised where no time is specified, see *Stone v. Harmon*, 31 Minn. 512; *Larmon v. Jordan*, 56 Ill. 204.

43. *Ousby v. Neal*, 99 N. C. 146, 5 S. E. 901. From the opinion in this

Again, where plaintiff alleged his ownership of certain timber lands, and that defendant was insolvent and threatened to carry away the timber, to his irreparable damage, and defendant denied insolvency and plaintiff's ownership, and justified under a lease from another; also stating that it had expended much money in preparing to carry away the lumber, and that plaintiff's alleged damages would be capable of estimation, it was held that an injunction should not issue if defendant would file bond to pay plaintiff all damages which he might recover.⁴⁴

§ 1153. **Boring gas wells.**—Injunction is the proper remedy against one who attempts or threatens to bore gas wells on land, to the flowage of gas under which plaintiff has by contract with the owner acquired the exclusive right, as the damages could not be measured. And whether a contract for the exclusive right to bore and maintain gas wells on a tract of land is a license or a lease, is executory or executed, or whether it is a fair one between the parties, cannot be brought into question by a stranger to the contract and trespasser, in an action by the grantee to enjoin him from boring wells.⁴⁵

case it appears that chapter 401 of the Acts of 1885 provides "that in an application for an injunction to enjoin a trespass on land it shall not be necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature or is the cutting or destruction of timber trees."

44. *Lewis v. Roper Lumber Co.*, 99 N. C. 11, 5 S. E. 19; *Roper Lumber Co. v. Wallace*, 93 N. C. 22.

45. *Indianapolis Gas Co. v. Kibby*, 135 Ind. 357, 35 N. E. 392, per Howard, J.: "The complaint shows the appellant to be simply a stranger who has entered upon said land, and 'engaged in the erection of a derrick thereon, and threatens and intends, without the consent of the plaintiff,

and unlawfully, to bore a well on said land for gas, and threatens to convey from said premises the gas flowing from such well by pipes.' And, further, 'that if said defendant is permitted to do this, that it will greatly lessen the flow of natural gas from any well that said plaintiff may cause to be bored on said land, whereby irreparable damage will be caused.' etc. We think that an injunction was the proper remedy. An action for damages would have been inadequate, since the damages could not be measured. By the terms of the contract appellee had a right to all the gas under the 80 acre tract that could be obtained by boring within the 20-foot square, save that which might be obtained from one well for the domes-

§ 1154. **Artificial channels which submerge adjacent land.**—An injunction will be granted against a trespass in order to prevent a threatened continuous disturbance of the possession of the owner of land, as where the trespasser is about to turn the water of a large swamp, which has a natural outlet through a well defined stream, in another direction by making an artificial channel, and so causing the water of the swamp to pour into a drain of only sufficient capacity to drain the lands which had been assessed for its construction and thereby submerge the plaintiff's land.⁴⁶ But when all the averments of a complaint for an injunction charge a mere threatened trespass continuous only in a limited sense, as, for example, continuing only long enough to cut and remove the wheat on a specified tract, and there is no averment of defendant's insolvency, there is not a sufficient showing, to authorize the granting of an injunction.⁴⁷

§ 1155. **Trespass to mines.**—The digging and removing of ore from a mine without the permission of the owner is a trespass which will be readily enjoined, because it reaches to the very substance and value of the estate, and goes to the destruction of it as a mine.⁴⁸ And because a continued trespass of this character

tic use of the owner and his neighbors. From the nature of the product it is evident that one flowing well would withdraw the gas from a considerable territory, and that other wells could not be sunk within such territory without diminishing the flow of the first well. How much the flow of appellee's well would be diminished, however, could not be determined; the damages could not be measured in money. Neither would ejectment lie as to that part of the 80-acre tract outside the bounds of the 20-foot square, for as to that part of the land appellee has only the right to the gas under the surface which may be drawn to the wells sunk within the square. *Funk v. Halde-*

man, 53 Pa. St. 229; *Allison's Appeal*, 77 Pa. St. 221."

46. *Pence v. Garrison*, 93 Ind. 345. And see *Owens v. Lewis*, 46 Ind. 488.

47. *Miller v. Burket*, 132 Ind. 469, 32 N. E. 309, per McBride, C. J.: "An injunction will never be awarded to restrain the commission of a mere trespass where it is not shown that the threatened injury will be irreparable and that full and adequate compensation cannot be had in an action at law. *Whitlock v. Consumers', etc., Co.*, 127 Ind. 62, 26 N. E. 570; *Anthony v. Sturgis*, 86 Ind. 479; *Caskey v. Greensburgh City*, 78 Ind. 233; *Indianapolis Mill Co. v. Indianapolis*, 29 Ind. 245.

48. *Dimick v. Shaw*, 94 Fed. 266,

would almost inevitably lead to a multiplicity of actions for damages.⁴⁹ And where one owned simply the mineral interests in lands which, without authority, were being mined by another, an injunction was properly granted; the jurisdiction in equity being clear by reason of irreparable loss to the owner.⁵⁰ In such cases the injunctive jurisdiction of courts of equity is freely exercised, and this principle is applied in interfering to restrain the violation of contracts having ores and minerals for their subject matter, as the damages resulting from the repeated violation of such contracts could not be estimated.⁵¹ And plaintiff, one of two adjacent mine owners, may enjoin the other from removing the supports which prevent the surface of his mine from caving in, when it appears that such removal will result in the destruction of plaintiff's mine.⁵² The owner of the lower of two adjacent mines cannot, however, complain that the water of the upper mine flows into his, in the ordinary course of gravitation and of the working of mines.⁵³ But he may enjoin the owner of the upper mine from so working it as to cause a river to flow into it, and thence into plaintiff's, to his irreparable injury.⁵⁴

§ 1156. Same subject; trying title to mine.—While an injunction will not lie as an original and independent proceeding to

36 C. C. A. 347; *Scully v. Rose*, 61 Md. 408. And see *Halpin v. McCune*, 107 Iowa, 494, 78 N. W. 210; *Shipley v. Ritter*, 7 Md. 408.

Question of solvency not material.—*Mabel Min. Co. v. Pearson Coal & I. Co.*, 121 Ala. 567, 25 So. 754. Compare *Rice v. Looney*, 81 Ill. App. 537.

49. *West Point Iron Co. v. Reymert*, 45 N. Y. 703; *Livingston v. Livingston*, 6 Johns. Ch. 497; *Thomas v. Oakley*, 18 Ves. 184.

50. *Hammond v. Winchester*, 82 Ala. 470.

51. *Chambers v. Alabama Iron Co.*, 67 Ala. 353, 359.

52. *Lord v. Carbon Iron M'fg. Co.*,

33 N. J. Eq. 452; *Thomas Iron Co. v. Allentown Min. Co.*, 28 N. J. Eq. 77.

53. *Smith v. Kenrick*, 7 C. B. 515. And see *Baird v. Williamson*, 15 C. B. (N. S.) 376; *Kauffman v. Griese-mer*, 26 Pa. St. 407; *Martin v. Riddle*, 26 Pa. St. 415.

54. *Crompton v. Lea*, L. R. 19 Eq. 115, citing and approving *Smith v. Fletcher*, L. R. 9 Exch. 64; *Rylands v. Fletcher*, L. R. 3 H. L. 330. As to the duty of reasonable diligence on the part of the upper proprietor to prevent the flow of water to the lower mine, see *Locust Mountain Iron Co. v. Gorrell*, 9 Phila. 247.

determine the title to land and its mines, where the defendant holds them under color of title;⁵⁵ yet in such a case, where the appropriate action of ejectment is brought to test the right and try the title, an injunction *pendente lite* may in a proper case be granted as auxiliary to that action, for the protection of plaintiff's rights until the trial.⁵⁶ And where, after the filing of a bill by complainant in possession, to satisfy the description of land covering mines, the defendant takes possession of the portion in dispute and fences it off, the complainant may have an injunction during the pendency of the suit, to restrain the defendant from mining, and so preserve the *status quo* until the conflicting claims of the parties shall be adjudicated.⁵⁷ And equity will enjoin defendants from interfering with plaintiff's mining operations by assaulting his lessee's workmen, attempting to blow up the entry to his mine, etc., though he has not first established his right at law; there being no questions of material facts, but only questions of law at issue.⁵⁸ But a perpetual injunction to restrain a trespass to mines will not be granted at the suit of one whose only title is an alleged parol lease which is not sustained by satisfactory evidence.⁵⁹ And where plaintiffs commenced an action to recover a gold mine, and obtained

55. *Smith v. Jameson*, 91 Mo. 13. And see *Echelkamp v. Schrader*, 45 Mo. 505; *Preston v. Smith*, 26 Fed. 884; *Hart v. Mayor*, 9 Wend. 571; *Pillsworth v. Hopton*, 6 Ves. 51; *Smith v. Collyer*, 8 Ves. 89.

56. *Janney v. Spedden*, 38 Mo. 395; *Major v. Rice*, 57 Mo. 385; *More v. Perry*, 61 Mo. 174; *Tamm v. Kellogg*, 49 Mo. 119.

57. *N. J. Zinc, etc., Co. v. Trotter*, 38 N. J. Eq. 3.

58. *Appeal of Rankin* (Pa.), 16 Atl. 82. Civil Code, Colo. § 159, provides that the district courts may issue writs of injunction for affirmative relief, restoring any person to the possession of any mining property from which he may have been "ousted by fraud, force, or violence,"

or from which he is kept out of possession by threats; and that the granting of such writ "shall extend only to the right of possession, under the facts of the case, in respect to the manner in which the possession was obtained." It was *held*, that the issuance of such writ in favor of one complaining of such forcible entry, and withholding of possession by threats, was warranted when it was shown that while the working of the mine by plaintiff was suspended, and the shaft-house fastened up, defendant, by force or otherwise, entered the shaft-house, and maintained possession with fire-arms, regardless of plaintiff's title. *Sprague v. Locke*, 1 Colo. App. 171, 28 Pac. 142.

59. *Clegg v. Jones*, 43 Wis. 482.

an injunction on a showing that they were sole owners and that defendant had forcibly entered, the injunction was dissolved on its appearing that plaintiffs and defendant were tenants in common, but as the defendant was a person of doubtful ability to respond in damages, a receiver was appointed to take the rents and revenues and protect the interests of all concerned.⁶⁰ And where, under a claim of title defendant entered on an unimproved portion of land which the plaintiff claimed to own, and cut timber, sunk shafts, and began mining, it was held that, in the absence of evidence of an emergency requiring a speedier remedy than any available at law, an injunction would not be granted to restrain defendant.⁶¹

§ 1157. **Same subject.**—Plaintiff, under authority of Act of Congress,⁶² giving the owner of lode or vein, whose apex lies on the surface of its own location, the right to follow it within the land of others, was mining upon lands owned by defendants, and obtained an injunction, pending litigation, to prevent them from interfering with plaintiff's claim. On motion of defendants, the injunction was modified so as to allow them to enter and inspect, within the compass of their own lands, tunnels and galleries of plaintiff, and prosecute certain development work therein, in order to obtain a knowledge of the character and identity of the veins, for use at the trial. It was held that, notwithstanding the statute, the plaintiff was *prima facie* a trespasser, and there was no abuse of discretion in making the modification.⁶³ But one who is in possession of mining grounds, claiming title thereto, and who makes a *prima facie* case, covering his surface locations, may sue to restrain an alleged unlawful interference with underground veins of ore within the lines of his claim.⁶⁴ And there is no error in granting an injunction where plaintiff shows a chain of title end-

60. Parker v. Parker, 82 N. C. 165, where Baldwin v. York, 71 N. C. 463; Bell v. Chadwick, 71 N. C. 329; Falls v. McAfee, 2 Ired. 236; Deep River Mining Co. v. Fox, 4 Ired. Eq. 61, are cited and approved.

61. Leininger's Appeal, 106 Pa. St. 398.

62. U. S. Rev. Stat. § 2322.

63. Blue Bird Min. Co. v. Murray, 9 Mont. 468, 23 Pac. 1022, following Cheesman v. Shreve, 37 Fed 36.

64. Gilpin v. Sierra Nevada Min. Co., 2 Idaho, 662, 23 Pac. 547, 1014.

ing in himself, and defendant does not deny his insolvency and claims a right to operate the mine in question under a mere verbal permission from a former grantee of the land.⁶⁵ And where one is engaged in working a mine under a mere license from the owners which is revocable at their pleasure, he may be enjoined as a trespasser if he continues work after the revocation.⁶⁶

§ 1158. **Mining trespass on surface lands.**—An injunction will be granted to prevent the continuance of a trespass which impairs permanently the future use and enjoyment of land by the owner in the manner in which he has been accustomed to use it. Thus, an injunction will be granted at the suit of the owner of the surface of lands which are valuable for agricultural and grazing purposes, to restrain the owner of the minerals and mineral rights from depositing on the land foul water, slate, and other noxious substances brought up through the opening from subjacent lands which he is mining.⁶⁷ But where the grantor of land reserves all mines and minerals under it and the right to take them at pleasure, he cannot be restrained from mining though the buildings on the land be thereby necessarily injured.⁶⁸

§ 1159. **Trespass by road officers.**—In Iowa the road authori-

65. *Silva v. Rankin*, 80 Ga. 79, where *Nethery v. Payne*, 71 Ga. 378, is distinguished.

66. *Lockwood v. Lunsford*, 56 Mo. 68; *Lunsford v. La Motte Lead Co.*, 54 Mo. 426. In the former case *Vories, J.*: said: "It has for a long time been settled that if a mere trespasser digs into and works a mine to the injury of the owner, an injunction will be granted and, particularly so, where the trespasser is insolvent, so that an action at law could not avail. *More v. Massini*, 32 Cal. 590; *Merced Min. Co. v. Fremont*, 7 Cal. 317; *Thomas v. Oakley*, 18 Ves. 184.

67. *Hooper v. Dora Mining Co.*, 95 Ala. 235, 10 So. 652; *Hobbs v.*

Amador & Sacramento C., 66 Cal. 161, 4 Pac. 1147. In the first of these cases the court said: "The frequent and continuous deposit of vast quantities of slate on lands valuable and used for agricultural purposes, and the emptying of foul water thereon pumped from mines, deteriorates its usefulness for such purposes and permanently injures its future use, producing irreparable injury, to redress which pecuniary compensation is inadequate. *Sullivan v. Rabb*, 86 Ala. 433, 5 So. 746; *Ogletree v. McQuaggs*, 67 Ala. 580." And see *Hext v. Gill*, L. R. 7 Ch. App. 699.

68. *Aspden v. Seddon*, L. R. 10 Ch. App. 394, distinguishing *Caledonian R. Co. v. Sprott*, 2 Macq. 449.

ties have often been restrained from removing or interfering with fences, hedges, and water-courses, the relief in such cases not being based on grounds of irreparable injury and the defendants' insolvency, but on grounds of public policy and to prevent multiplicity of suits.⁶⁹ And where defendants claim that there is a public highway across plaintiff's land, and in order to pass over it have many times torn down plaintiff's fences, and threaten to continue to do so, an injunction will be granted against the trespass, in order to avoid a multiplicity of suits.⁷⁰ As an easement or right of way over land does not constitute a title to it the plaintiff need not prove title in an action to enjoin a road overseer from removing a fence, where he does not deny plaintiff's allegation of possession, but avers that the *locus in quo* is a public highway and that the plaintiff and his predecessors acquired it subject to the public easement.⁷¹ Therefore the fact that the owner of land has kept it inclosed with a fence during the past ten years is strong evidence to show that any use of it by the public was only permissive and entitles him to enjoin the road overseer from removing the fence.⁷² A dedication of land by the owner for a highway is not to be presumed without evidence of his unequivocal intention so to dedicate, and cannot be established by user unless the user was with his consent.⁷³

§ 1160. Trespass by railroad strikers; mandatory injunction.

—In accordance with the general rule that an injunction may be granted to restrain a threatened trespass which involves the immediate or ultimate destruction of property and thus causes an injury for which there could be no adequate remedy at law, it has been held that where a railroad strike is threatened involving not only a concerted cessation of work and service, but attended also with

69. Bolton v. McShane, 67 Iowa, 207, 25 N. W. 135; Bills v. Belknap, 36 Iowa, 583; Grant v. Crow, 47 Iowa, 632; McCord v. High, 24 Iowa, 336; Quinton v. Burton, 61 Iowa, 471.

70. Ladd v. Osborne, 79 Iowa, 93; 44 N. W. 235. And see, Council Bluffs v. Stewart, 51 Iowa, 385; Bol-

ton v. McShane, 67 Iowa, 207.

71. Cramer v. Kester (Cal.), 36 Pac. 415.

72. Quinn v. Anderson, 70 Cal. 456, 11 Pac. 746; Hope v. Barnett, 78 Cal. 14, 20 Pac. 245.

73. Muffman v. Hall, 102 Cal. 26, 36 Pac. 417.

intimidation of others from engaging in the service of the railroad company, and with the disabling and destruction of its property and with a resort to actual force and violence by thousands of the striking employees and lawless strangers who join them, a court of equity may afford injunctive relief to the company, and that in such a case a Federal court having charge through its receivers of an interstate railroad has jurisdiction to enjoin the executive heads of the various organizations of employees from ordering a strike; and may, in extreme cases where the peril is great and imminent, issue mandatory injunctions requiring a particular service to be performed or a particular order to be made or revoked to prevent the threatened trespass upon and destruction of the railroad property and the threatened interruption and injury to public rights.⁷⁴

74. *Farmers' Loan, etc., v. Northern Pac. R. Co.*, 60 Fed. 803, per Jenkins, J.: "If the combination and conspiracy alleged, and the acts threatened to be done in pursuance thereof, are unlawful, it cannot, I think, be successfully denied that restraint by the injunction is the appropriate remedy. It may be true that a right of action at law would arise upon consummation of the threatened injury, but manifestly such remedy would be inadequate. The threatened interference with the operations of the railway, if carried into effect, would result in paralysis of its business, stopping the commerce ebbing and flowing through seven States of the Union, working incalculable injury to the property, and causing great public privation. Pecuniary compensation will be wholly inadequate. The injury would be irreparable. Compensation would be obtained only through a multiplicity of suits against 12,000 men, scattered along the line of this railway for a distance of 4,400 miles. It is the peculiar function of equity in such

case, where the injury would result not alone in severe private, but in great public, wrong, to restrain the commission of the threatened acts, and not to send a party to seek uncertain and inadequate remedy at law. That jurisdiction rests upon settled and unassailable ground. It is not longer open to controversy that a court of equity may restrain threatened trespass involving the immediate or ultimate destruction of property, working irreparable injury, and for which there would be no adequate compensation at law. It will, in extreme cases, where the peril is imminent, and the danger great, issue mandatory injunctions requiring a particular service to be performed, or a particular direction to be given, or a particular order to be revoked, in prevention of a threatened trespass upon property or upon public rights. I need not enlarge upon this subject. The jurisdiction is beyond question, is plenary and comprehensive. Some of the authorities are assembled by Judge Taft in the case of *Toledo, etc., R. Co. v. Pennsylva-*

§ 1161. **Trespass on railroad land grants.**—A land-grant railroad company is not a tenant in common with the United States

nia Co., 54 Fed. 730,—a case in which the court restrained Mr. Arthur, chief of the Brotherhood of Locomotive Engineers, from giving the order for a strike which was intended to result in injury to the complainant's rights. See, also, *Blindell v. Hagan*, 54 Fed. 40, affirmed on appeal 6 C. C. A. 86, 56 Fed. 696; *Coeur d'Alene Consolidated & Min. Co. v. Miners' Union*, 51 Fed. 260. It would be anomalous, indeed, if the court, holding this property in possession in trust, could not protect it from injury, and could not restrain interference which would render abortive all efforts to perform the public duty charged upon this railway. . . . Here was a railway some 4,400 miles in length, traversing some seven States of the Union, engaged in interstate commerce, carrying the mails of the United States. This vast property was within the custody of the court, through its receivers, in trust to operate it, to discharge the public duties imposed upon it, to keep it a going concern until the time should come to hand it over to its rightful owners with all public duties discharged, and with its franchise rights and privileges unimpaired. The receivers employed in the operation of this property some 12,000 men. These men are, *pro hac vice*, officers of the court, and responsible to the court for their conduct. *In re Higgins*, 27 Fed. 443. The petition represented to the court—and the facts are confessed by this motion—that some of the men threatened to suddenly quit the service of the receivers, and to compel, by threats

and force and violence, other employees, who were willing to continue in the service, to quit their employment; that by organized effort, and by force and intimidation, they would prevent others from taking service under the receivers in place of those who might leave such service, and would thereby, as a means of forcing the receivers to submit to the terms demanded, disable the receivers from operating the road and discharging their duty to the public as a common carrier, and would so conduct themselves by disabling locomotives and cars, and taking possession of the property of the receivers, as to destroy and prevent its use, and hinder and embarrass the receivers in its management, thereby causing incalculable loss to the trust property, and inflicting great inconvenience and hardship upon the public. The restraining portion of the writ complained of, and now under consideration, prohibited these men from combining and conspiring to quit this service with the object and intent of crippling the property of the receivers and embarrassing the operation of the road, and from carrying that conspiracy into effect. . . . I freely concede the right of the individual to abandon service at a proper time, and in a decent manner. I concede the right of all the employees of this road, acting in concert, to abandon their service at a proper time, and in a decent manner; but I do not concede their right to abandon such service suddenly, and without reasonable notice. The railway is a great public highway. Its primary duty is to the public. In

in respect to lands which lie within its grant limits, opposite the completed line, but which have not yet been surveyed, so as to render the odd sections belonging to the company distinguishable

the interest of the public it must be kept a going concern, although it proved unremunerative to the shareholders. Bondholders and shareholders invest their money in view of the public nature of the enterprise. Their rights and interests are subordinated to the public duty charged upon the road. And so, also, employees, in entering the service, assume obligations coextensive in kind with that of the corporation. They may, indeed, sever their relation in a proper and decent manner, but they may not legally resort to obstructive methods to compass their demands. Their rights—as the rights of bondholder and shareholder—are subordinate to the rights of the public, and must yield to the public welfare. This public consideration permeates and controls the whole subject. The reason is forcibly stated by Judge Ricks in the case of Toledo, etc., *R. Co. v. Pennsylvania Co.*, 54 Fed. 746, 752, holding that the duties of an employee of a public corporation are such that he cannot always choose his own time for quitting the service. Was such a conspiracy unlawful? So long ago as 1821 Judge Gibson,—that judge ‘of great and enduring reputation,’—in the case of *Com. v. Carlisle*, Brightley, N. P. 36 (the case of a combination of employers to depress the wages of journeymen by artificial means), declared that ‘a combination is criminal when the act to be done has a necessary tendency to prejudice the public or to oppress individuals by unjustly subjecting them to the power of the confederates.’ He clear-

ly asserts the principle upon which combinations of men may become unlawful as follows: ‘It will therefore be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence.’ The doctrine thus declared is fully established. *State v. Buchanan*, 5 Har. & J. 317; *State v. De Witt*, 2 Hill (S. C.), 282; *State v. Norton*, 23 N. J. Law, 33; *State v. Donaldson*, 32 N. J. Law, 151; *State v. Burnham*, 15 N. H. 396; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *Smith v. People*, 25 Ill. 17; *State v. Stewart*, 59 Vt. 273, 9 Atl. 559; *In re Higgins*, 27 Fed. 443; *Coeur d’Alene Consolidated & Min. Co. v. Miners’ Union*, 51 Fed. 260; *U. S. v. Workmen’s Amalgamated Council*, 54 Fed. 994. The reason is that the confederacy of numbers to effect an injurious object creates new and additional power to injure, and congregated numbers supply in law the place of actual violence. *State v. Simpson*, 1 Dev. 504. And, therefore, in conspiracy, the unlawful thing proposed, whether as a means

from the even sections reserved to the government. The company has, however, such an interest in the lands as will entitle it to

or an end, need not be such as would be indictable if proposed to be done by an individual. 2 Bish. Cr. Law (7th Ed.) § 181. I think the conclusion well summed up by Mr. Wright in his work on 'The Law of Criminal Conspiracies,' that a combination of men by concerted action, to accomplish some object not criminal, by means which are not criminal, but where mischief to the public is involved; or where neither the object nor the means are criminal, but where injury and oppression are the result,—is a conspiracy condemned by law. That this is the general law of the land, is recognized in those States which, by statute in respect to labor organizations, have changed the general rule. I think no strike was ever heard of that was or could be successful unaccompanied by intimidation and violence. Counsel at the argument could recall but one which he was willing to indorse as peaceable. That was the strike upon the Lehigh Valley Railroad during the year 1893. The history of that occurrence does not carry out the declaration of counsel. There, as I understand, the running of trains was constantly interfered with, engines and cars disabled and wrecks caused by the violence of the strikers. The president of the company reported to his board of directors that the loss to freight and equipment by reason of the strike—which continued for less than three weeks—was \$77,000, of which amount \$46,000 was for damage done to locomotives alone. And that strike was not successful, the violence being insufficient. The history and

legality of strikes has been well told by Mr. Justice Brewer, of the supreme court of the United States, in an admirable address before the New York Bar Association, in January, 1893, in language that should be taken to heart by every one who has regard to the safety and peace of society, and the protection of our institutions. 'The common rule,' says Mr. Justice Brewer, 'as to strikes is this: Not merely do the employees quit the employment, and thus handicap the employer in the use of his property, and perhaps in the discharge of duties which he owes to the public, but they also forcibly prevent others from taking their places. It is useless to say that they only advise; no man is misled. When a thousand laborers gather around a railroad track, and say to those who seek employment that they had better not, and when that advice is supplemented every little while by a terrible assault on one who disregards it, every one knows that something more than advice is intended. It is coercion, force; it is the effort of the many, by the mere weight of numbers, to compel the one to do their bidding. It is a proceeding outside of the law, in defiance of the law, and in spirit and effect an attempt to strip from one that has that which of right belongs to him,—the full and undisturbed use and enjoyment of his own. It is not to be wondered at that deeds of violence and cruelty attend such demonstrations as these; nor will it do to pretend that the wrongdoers are not the striking laborers, but lawless strangers who gather to look on.

maintain alone (the government having refused to join with it) a suit to enjoin trespassers who are cutting timber from the lands

Were they strangers who made the history of the Homestead trike one of awful horror? Were they women from afar who so maltreated the surrendered guards, or were they the very ones who sought to compel the owners of the property to do their bidding? Even if it be true that at such places the lawless will gather, who is responsible for their gathering? Weihe, the head of a reputable labor organization, may open the door to lawlessness, but Beckman, the anarchist and assassin, will be the first to pass through; and thus it will be, always and everywhere. . . . This is the struggle of irresponsible persons and organizations to control labor. It is not in the interests of liberty; it is not in the interest of individual or personal rights. It is an attempt to give to the many a control over the few,—a step towards despotism. Let the movement succeed, let it once be known that the individual is not free to contract for his personal services, that labor is to be farmed out by organizations, as to-day by the Chinese companies, and the next step will be a direct effort on the part of the many to seize the property of the few.' The wrongs of labor are not to be righted by war upon society, by turbulence and disorder, by oppression and force. Such action alienates sympathy, and provokes resentment. In this land, only by peaceable means in the courts, and through the law-making power, can wrongs be redressed, and justice be established. Let combined labor deal with combined capital, but only in

ways sanctioned by the law. When this lesson is learned, and becomes the rule of conduct, labor will acquire in a decade greater privileges and surer protection from wrong than could be extorted by a century of violence. By the act of Congress of July 2, 1890 (26 Stat. chap. 647), every combination in restraint of trade or commerce among the several States is declared to be illegal. Under this act it was held by Judge Speer in *Waterhouse v. Comer*, 55 Fed. 149, that a strike, if it ever was effective, can be so no longer; and this view seems to have been held by Judge Billings in the case of *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 994. On the other hand, Judge Putnam in *U. S. v. Patterson*, 55 Fed. 605, is inclined to the view that the statute has no relation to labor organizations. Complainant, praying an injunction against trespass by a former employee intruding in his workshop, alleged that the law afforded no adequate protection; that the continuance of the trespass would result in irreparable injury to him; that defendant was unable to respond in damages; that pecuniary compensation for the actual damages would not be adequate relief; and that restraint was necessary to prevent continuance of the intrusions, and multiplicity of suits. It was held, that neither the naked allegation of irreparable injury, nor the insolvency of the trespasser, were sufficient to warrant an injunction against a trespass. *Mechanics' Foundry v. Ryall*, 75 Cal. 601, 17 Pac. 703.

in such manner that the denuded portions will fall within the old, as well as the even sections, when the survey is made.⁷⁵

75. *Northern Pac. R. Co. v. Hussey*, 61 Fed. 231, per Ross, J.: "While it is impossible to distinguish the lands granted to the railroad company from those retained by the government until the survey is made, it needs only a survey in accordance with established statute rules to distinguish those of the railroad company, in which the government has no interest, from those of the government, in which the railroad company has no interest. Tenants in common of a tract of land, although their estates be several, have each an undivided interest in the whole, and we are unable to understand how it can with propriety be said that a grantee of specific parts only has an undivided interest in the whole. The decisions of the Supreme Court relied on by the appellant to sustain its position in this respect are unlike the present case. The act of Congress involved in *Railroad Co. v. Litchfield*, 23 How. 66, granted to Iiwa an undivided half of the whole tract of land lying on each side of the Des Moines river from Racoon Fork to the Missouri line, at the same time conferring on the executive officers of the government the power to make partition of the land between the government and the grantee. In *Doe v. Wilson*, 23 How. 457, it appeared that by a treaty made by the government with the Pottawatomie tribe of Indians, by which that tribe ceded to the United States their title and interest in certain lands, certain reservations were made to Indian villagers and to individual Pottawatomes, among others to Pet-chi-co, two sections. The sections so reserved were

not otherwise described, but the treaty provided that they should be 'selected under the direction of the United States after the land shall have been surveyed, and the boundaries shall correspond with the public surveys,' and that patents should be issued by the government to their respective owners. In principle, that case was much like those Mexican grants, of which *Fraser v. O'Connor*, 115 U. S. 102, 5 Sup. Ct. Rep. 1141, was one, where a certain quantity of land was granted to be located by the government within defined boundaries containing a larger quantity. In each of those cases the grantee, being entitled only to the specific quantity named, which might be located on any part of the whole tract, manifestly had an undivided interest in the whole until the quantity to which he was entitled should be set apart to him in severalty. Not so, however, in the case at bar, where, by the grant, the title conferred upon the railroad company was confined to certain specific sections of land, all of which became vested by the grant in the company, and which needed only the government survey to distinguish them from the adjoining sections, of which the government remained the sole owner. But, because it cannot be properly held that the complainant and the United States are, prior to its survey, tenants in common of the entire body of lands within the limits of the grant to the railroad company, does it necessarily follow that a trespasser may, with impunity, go upon the lands, and cut down and destroy or carry away the timber growing upon them? The bill shows

§ 1162. **Meander line on supposed lake.**—An owner of lots on a meander line which was supposed to separate such lots from a lake which in fact did not exist, does not own the land covered by

that the lands in question are alone valuable for the timber that grows upon them. To cut down, destroy, or carry away the timber thereon is, therefore, essentially to destroy and take away the very substance of the estate. That an injunction will be awarded, in behalf of one showing the necessary interest in the property, to prevent such waste and destruction, is thoroughly settled. *Erhardt v. Boaro*, 113 U. S. 537, 5 Sup. Ct. Rep. 565. It is apparent that the complainant has no adequate remedy at law. It cannot maintain an action for damages for the cutting of any tree or trees upon the lands in question, or any other action at law, for the reason that it would be essential to the maintenance of such an action for the plaintiff to show that the particular tree or trees for the cutting of which damages were claimed, or other relief was asked, came from the land of the plaintiff; and this, as has been seen, is impossible to be shown in advance of the government survey. Yet the bill shows that the defendant, without any right or authority whatever—in other words, as a mere trespasser—has entered upon the body of unsurveyed lands within the limits of the grant to complainant, and, for purposes of speculation and sale, has commenced to cut down the timber thereon, and to manufacture the same into saw logs, lumber, etc., and has so cut 850,000 feet of saw logs, and will, unless restrained, continue those illegal acts, and thus remove the very thing which constitutes the chief, if not the only, value

of the lands. Every tree already felled by the defendant, and every tree intended to be cut by him, in the prosecution of his undertaking, necessarily impairs the value of the complainant's interest in its grant, for the condition of the lands within the grant limits necessarily renders it uncertain and impossible to ascertain how many of such trees have been or will be cut from the lands belonging to complainant. This very uncertainty would seem to vest in such grantee the right to protect the whole as against a mere trespasser and wrongdoer. In the case of *Ross v. McJunkin*, 14 Serg. & R. 364, land warrants had been issued to John and William Menough—to John for 300 acres, and to William for 200 acres—which had been surveyed together, and a general diagram of survey returned, which contained no division line, nor anything to distinguish the one tract from the other. The parties to that action, which was ejectment, derived their titles respectively from John and William Menough, and Gibson, J., speaking for the Supreme Court of Pennsylvania, said: 'The nature of the interest which the original owners of the warrants held under their joint survey will go far to settle the rights of the parties before us. They were grantees from the State, not of an undivided interest in the whole, but of separate and distinct parts of the whole; consequently, they were not tenants in common. The grant to the one would not have entitled him to possession in common

the supposed lake, but it is a part of the unsurveyed domain of the United States, and he is not entitled to an injunction to prevent another from taking possession of it.⁷⁶

of the whole; nor, if one had been dis-
seised, could he have recovered an
undivided portion from the other.
The truth is that the survey was im-
perfect, and, although a valid appro-
priation of the land as to strangers,
it left their rights, as between them-
selves, suspended till the subject of
the grant to each should be specific-
ally designated by the proper officer
or by themselves.' The bill, however,
in the present case, alleges that the
acts complained of are committed by
the defendant upon what, when sur-
veyed, will be odd numbered sections,
as well as what will be even num-
bered sections of the lands within the
grant limits. The case is a novel one,
it must be admitted, but where so
great a wrong is being perpetrated
as must be taken to be true for the
purposes of the present decision, and
the party seeking to prevent the
wrong has no adequate remedy at
law, equity will, we think, afford the
remedy. '*Ubi jus ibi remedium*,' is
the maxim which forms the root of
all equitable decisions. In Toledo,
etc., R. Co. v. Pennsylvania Co., 54
Fed. 751, the court said: 'Every just
order of rule known to equity courts
was born of some emergency to meet
some new conditions, and was there-
fore in its time without precedent.'"

76. *Grant v. Hemphill*, 92 Iowa,
218, 59 N. W. 263, 60 N. W.
618, per *Curiam*: "This is a
suit in equity, by which the plaintiffs
claim the title to and possession of
certain land, and they demand that
said title and possession be quieted
as against the defendants. A writ of

injunction was invoked and granted,
by which the defendants were re-
strained from taking the possession
of the land in dispute. Plaintiffs' pe-
tition was dismissed, and they ap-
peal. It is strenuously urged in be-
half of appellant that he is entitled
to a decree protecting his possession
of the land, even though his claim of
ownership is denied; and we are cited
to a large number of authorities
which hold that a mere possessory
right is sufficient to protect the pos-
session, as against a trespasser. This
rule invoked by counsel, when applied
to persons in possession of unsur-
veyed public lands, has no applica-
tion. When lands are surveyed, and
open to homestead entry, and posses-
sion is taken for the purpose of mak-
ing the entry, it is a lawful possession,
and may be interposed to protect the
right of the possessor against a tres-
passer, and the claim that one in pos-
session of land is presumed to be the
owner, if applicable to case—a ques-
tion which we do not determine—has
no application to this case, because
it is an action in equity to quiet title.
If it were a mere action to recover
for a trespass upon the land, it would
be an action at law; and when the de-
fendant moved to have it tried as an
action at law the court would, no
doubt, have sustained the motion.
And, again, the plaintiff did not rest
his case upon possession. His peti-
tion, and his own testimony, and that
of his witnesses, disclose the grounds
upon which his possession is based.
It is a claim of ownership because he
is the owner of the adjoining land.

§ 1163. **Tide land trespassers.**—An upland proprietor as such has no rights in the tide lands in front of him which

If his ownership on this ground is well founded, he is entitled to a decree quieting his title. If he has no title to the land, he has no more right to the possession than the defendants. In other words, if the land in dispute is not owned by the plaintiff, and is not surveyed, and cannot be sold or disposed of until it is surveyed, it is part of the public domain, to which no one can acquire either ownership or right of possession. It is to be understood that we do not hold that if a person should be found in peaceable possession of growing crops, under a good-faith claim of homestead right, on unsurveyed government land, another person would not be liable for the injury or destruction of the crops. That question is not in this case. On this subject, see *Murphy v. Railroad Co.*, 55 Iowa, 473, 8 N. W. 320. We come now to the material question in the case: A section of land is supposed to contain 640 acres. If section 19 had been all surveyed, it would have embraced a less number of acres, being what is known as 'fractional.' As we have said, the five lots owned by Eaton contain 221.36 acres, and the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ is marked on the plat of the government survey as containing 58.93 acres. If the section were not fractional, the plaintiff's claim would be a demand for a decree quieting title in him to more than 360 acres of land, based on the ground that he is the owner of 222 acres of land adjoining, to which he is a riparian proprietor, and he makes this demand in a court of equity. A riparian proprietor is one who owns land bounded

upon a water course or lake. The evidence in this case shows that there was not at the time of the government survey, and is not now, any body of water east of the meandered line, on which to found any valid claim of land outside of the line, by accretion or reliction, or in any other manner. In the large mass of authority collected and cited by counsel, we find no case which can be said to sustain a claim made upon any such a state of facts. It is well understood that a meandered line is not regarded as a line of boundary. It is supposed to be along the shore of a body of water, and to follow the windings of the stream or lake, and the sinuosities of the banks. In such case, and where it appears that the government intended to sell all the land, to the river or body of water, the riparian owner is entitled to all the land adjacent to his grant, to the water's edge. *Kraut v. Crawford*, 18 Iowa, 549. But no such condition is found under the evidence in the case at bar. There is not, and has not been, any body of water upon which to locate a meandered line. In *Railroad Co. v. Schurmeir*, 7 Wall. 286, it was said: 'Meander lines are run, in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as a means of ascertaining the quantity of the land in the fraction, subject to sale, which is to be paid for by the purchaser. In preparing the official plat from the field notes, the meander line is represented as the border line

the State is bound to respect.⁷⁷ But under the tide-land act of the State of Washington, passed in 1890, the owner of the upland has, as against all other individuals than the one in possession with improvements, a prior right to purchase from the State, and equity will by a temporary injunction protect his right of possession as against a mere trespasser till his rights can be passed on by the commissioners which the act provides shall be appointed by the Legislature.⁷⁸

of the stream, and shows, to a demonstration, that the water course, and not the meander line as actually run on the land, is the boundary.' We have cited this well-settled principle, not for the purpose of approving and following it—for it is known and understood everywhere to be the correct doctrine—but to show that the meander line and the banks of a stream or shore of a lake cannot be held to apply where there is no body of water to which it can be referred. In *Whitney v. Detroit Lumber Co.*, 78 Wis. 240, 47 N. W. 425, it was held that where the meander line of a lot supposed to be on a lake was some distance away from the lake, the owner of the lot was entitled to have the meander line extended, or rather set over, so as to include all of the land in the smallest government subdivisions, or enough to make out 40-acre tracts. It is claimed in behalf of appellant that he is entitled to at least this measure of relief. We are unable to discover any good reason for thus extending a government meander line. As we have said, there is no body of water anywhere within the boundary of the section to authorize any extension of the area of the lots which the government sold, and which the plaintiff now owns. The foregoing discussion disposes of the claim of

intervener. We hold that all of the land in dispute is part of the unsurveyed domain of the United States, to which no one can obtain title, except through the regular government methods adopted by the general government for the disposition of the public lands. The decree of the district court is affirmed."

77. *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539.

78. *West Coast Imp. Co. v. Winsor*, 8 Wash. 490, 36 Pac. 441, per Hoyt, J.: "That case (*Eisenbach v. Hatfield*), however, did not go to the extent of holding that an upland proprietor had no interest in the tide land in front of him, except as against the State, and the question as to what would be his rights as against one not claiming under the State has not been passed upon, so far as we are advised, by this court. Nor is it necessary that we should pass upon it in determining this appeal, as, in our opinion, the State, by the enactment of the tide-land above referred to, has conferred upon the upland proprietors a valuable right, which they hold to the exclusion of all others, excepting such improvers as, under the terms of said act, have superior rights; and as we have seen, from what we have said about the facts of this case, that, for the purposes of the decision of this appeal,

§ 1164. **Jurisdiction.**—A court of equity has jurisdiction to restrain the commission or the continuance of trespasses to lands. But when the title is purely legal and the property not of peculiar value the court will not afford injunctive relief unless the remedy at law is inadequate, or imminent and irreparable injury is threat-

the appellants are not in a situation to assert such rights under said act, there is nothing which prevents full force being given to the rights of the respondent as the upland owner. The respondent, then, under the provisions of the laws of the State in reference to tide lands, has the absolute right to purchase the location in question, with which right the State alone has authority to interfere. Such being the situation and rights of the respondent, we think that a fair interpretation of the statute will show that it was the intent of the law-making power that no mere trespasser upon the tide lands of the State should be allowed to occupy or in any manner interfere with the possession of the upland owner of the tide lands in his front, until such time as he could exercise his right to purchase the same from the State. The appellants, then, had no right whatever to do the acts complained of, and the respondent had a right to enjoy the possession of the location in question until such time as it would be allowed to purchase under the laws of the State. It follows that the action of the appellants was in contravention of the rights of the respondent. This being so, it would follow, under the general maxim that it must be entitled to some protection under the law. This court held, in the case of *Pierce v. Kennedy*, 2 Wash. 324, 26 Pac. 554, and 28 Pac. 35, that such upland proprietor had no remedy at law. Hence, if he has

any remedy at all, it must be in equity. We are not prepared to hold that in such a case as this the exception to the general rule must be held to obtain, and that by reason of such exception the respondent, though having an undoubted right, must submit to its violation by a stranger, for the reason that the courts are powerless to afford it protection. It is no doubt true, as contended by appellants, that the question of who shall have the right to purchase, and other matters of that kind, before they can be finally determined, should be acted upon by the board authorized by the legislature, and that, as to the final rights of the parties to controversies of this kind, the courts will have no jurisdiction until action has been had by said board. But it does not follow that during the time intervening between the granting of the right by the legislature and the doing of such acts under said law as will give such board jurisdiction to determine as to the rights of the parties, the courts have no jurisdiction to protect the enjoyment of the situation which the legislature fairly contemplated should be maintained until such time as such board should have taken action. There being no person who could acquire any right, as against the respondent, to occupy the location, until after the action of such board, it must follow that it is entitled to protection in its right of possession. It would not be questioned but that an improver is entitled to protection of his posses-

ened.⁷⁹ If this were not the rule the jurisdiction at law and in equity would be concurrent in every case of a continued trespass

sion until such time as he has opportunity to purchase under the law. Yet the rights given to him by the act are no more positive than are those conferred upon upland proprietors; and, if he is to be protected in his possession so that his right to purchase may in no manner be interfered with, the upland proprietor should be entitled to like protection. While the question might not have been directly involved in the case of *Eisenbach v. Hatfield*, *supra*, that was said by this court, in its opinion, which clearly tended to show that the improver would be entitled to protection as to his possession; and for that reason we think it must be held that the upland proprietor should have a like protection. It is contended on the part of the appellants that in the case of *Morse v. O'Connell*, 7 Wash. 117, 34 Pac. 426, this court decided that it could not interfere in favor of one claiming the right to purchase, as against one trespassing upon the location as to which said right was claimed. But an examination of the facts of that case will show that what was said by the court in regard to that question cannot fairly be so interpreted. In the first place, the question of law presented there was different from the one presented here. In that case the improver did not claim that his improvements actually covered the location, and for that reason the question as to whether or not he had any rights thereto would be dependent upon the finding by the properly constituted board as to whether or not it was necessary to the enjoyment of his improvements; and for this rea-

son the question of fact, the determination of which was primarily devolved upon such board, had to be determined, in order to ascertain whether or not he had any right to the location—while, in the case of an upland proprietor, the right is given regardless of the determination of any question of fact, subject only to an exception which must be made affirmatively to appear before it can have any influence upon the rights of the upland owner. If the courts should hold that the upland owner had no right to prevent one having no claim whatever from squatting upon tide lands in his front, we should have such a state of facts existing as would tend greatly to the prejudice of the public interests. The delays of the law are such that it may be years before it will be finally determined as to the right to acquire ownership under the State; and if, during all that time, the possession of such tide lands is to be the subject of an uncontrolled scramble between those claiming no right whatever thereto, a most objectionable state of affairs will be inaugurated. In our opinion the courts are not obliged to sit idly by and allow the unrestrained cupidity and passions of trespassers, in which might will be the all-powerful factor, to have full play. The courts, by retaining matters in *statu quo*, will in no manner interfere with the rightful jurisdiction on the part of the proper authorities as to the possession and ownership of the tide lands of the State. The order granting the temporary injunction must be affirmed."

79. *Western Union Tel. Co. v. Jud-*

and an injunction would be the mere auxiliary of or substitute for an action of ejectment.⁸⁰ Where a court of equity has jurisdiction of a person it may enjoin him from committing trespass upon lands in another county.⁸¹

§ 1165. **Parties.**—A person who has made a valid contract with a city to curb and pave a street and is liable for penalties for its non-performance is entitled to an injunction against trespassers who prevent him from doing the work as he has no adequate remedy at law and an injunction will avoid a multiplicity of suits.⁸² And where a right of way to and a right to maintain a cemetery lot for burial purposes are held in common by several persons any one or more of them may maintain an action to prevent by injunction the interruption or destruction of those rights without making the others parties.⁸³ Where plaintiff's store is taken by the sheriff under attachment against a third person, the sheriff, in seizing the property, becomes a trespasser, and he is the proper defendant in an injunction suit to restrain the closing of plaintiff's store and the sale of the goods, though he has no material interest in the subject matter of the suit.⁸⁴ An obstruction in a street may be both a public and a private nuisance and if the city authorizes it, as for an example by an ordinance for the leasing of spaces on a street in front of business houses to produce dealers, an abutting

kins, 75 Ala. 428; *Boulo v. New Orleans R. Co.*, 55 Ala. 480; *Moses v. Mayor*, 52 Ala. 198; *Brooks v. Diaz*, 35 Ala. 599; *Burnett v. Craig*, 30 Ala. 135; *Montgomery R. Co. v. Walton*, 14 Ala. 207; *Poughkeepsie Gas Co. v. Citizens' Gas Co.*, 89 N. Y. 493.

80. *Western Union Tel. Co. v. Judkins*, 75 Ala. 428, 430, per Brickell, C. J.

81. *Jennings v. Beale*, 158 Pa. St. 283, 27 Atl. 948.

82. *Palmer v. Israel*, 13 Mont. 209, 33 pac. 134. In this case Pemberton, C. J., adopted Pomeroy's theory that

in the case of trespass an "injunction is granted not merely because the injury is essentially destructive but because being continuous or repeated the full compensation for the entire wrong cannot be obtained in one action at law for damages."

83. *Mitchell v. Thorne*, 134 N. Y. 536, 32 N. E. 10; *Murray v. Hay*, 1 Barb. Ch. (N. Y.) 59; *Cadigan v. Brown*, 120 Mass. 493.

84. *North v. Peters*, 138 U. S. 271, 284, 11 Sup. Ct. 346, 34 L. Ed. 936; *Buck v. Colbath*, 3 Wall. 334, 343, 18 L. Ed. 257.

owner may enjoin the city from so leasing stands in front of his place for business.⁸⁵

§ 1166. **Requisites of bill; facts not conclusions.**—A complaint in a suit to enjoin a trespass which shows that the trespass has been committed and that the main object of the suit is to recover damages does not state facts sufficient to justify the granting of an injunction, and the plaintiff will be remitted to his action at law.⁸⁶ And where a bill for an injunction to stay waste and trespass upon lands alleges that the defendant does the acts complained of under a claim of ownership of an undivided one-third interest in fee of the land, and fails to negative, explain, or contest such claim, injunction should be denied, and in such a case it is error to perpetually restrain and enjoin the defendant from disputing or contesting the title of the complainant to the land in controversy.⁸⁷ Nor will equity enjoin the commission of a threatened trespass where the bill has no allegation of defendant's insolvency or that irreparable injury will result from it.⁸⁸ And where one has contracted to furnish logs to be cut into shingles, payment to be made in notes of the purchaser, but the title to remain in the seller until the notes are paid, and the shingles have been sold by the purchaser to others, who threaten to remove them from the jurisdiction of the court, a bill by the seller to enjoin their removal, for a receiver, and to foreclose complainant's lien, which fails to allege that the defendants, who threaten to remove the property, are pecuniarily irresponsible, does not show a right to equitable relief.⁸⁹ And an injunction will not be granted in a case of trespass where the bill seems to rest for its equity upon the

85. *Schopp v. St. Louis*, 117 Mo. 131.

86. *Ewing v. Rourke*, 14 Or. 514, 13 Pac. 483, per Thayer, J.: "The conduct of the defendant was according to the allegations of the complaint, lawless and high-handed, but from all that appears his acts were only a temporary affair and the law affords an ample remedy for redress in damages."

87. *Weeks v. Turner Lumber Co.* (Fla. 1907), 44 So. 173.

88. *Thornton v. Roll*, 118 Ill. 350. **Insolvency need not be alleged** where there is an allegation that the damage will be irreparable. *McConnell v. Jones Naval Stores Co.*, 125 Ga. 376, 54 S. E. 117.

89. *Brown v. Ring*, 77 Mich. 159, 43 N. W. 770, 1152. A deed conveyed to a railroad company

mere conclusions of the pleader that a resort to equity is necessary to prevent irreparable injury and a multiplicity of suits rather than upon any statement of facts to that effect.⁹⁰ Thus a general allegation of "irreparable injury" from trespass will not give equity jurisdiction.⁹¹ The fact, however, that the prayer for relief, in a bill seeking to restrain defendant company from taking the land of plaintiff company, is in the alternative; that if defendant cannot be restrained from constructing its road through plaintiff's yard the court may by its decree define the terms and conditions upon which defendant may be permitted to cross; and the fact that plaintiff offers evidence to show that another location through its yard would do less damage than the one proposed,—cannot be treated as a recognition of defendant's right to construct its road through any part of plaintiff's yard.⁹²

a right of way one hundred feet wide, and the right "to fell any timber beyond the right of way herein granted which is sufficiently near the track of said road to fall on or obstruct the same." A bill by the railroad company to enjoin an action of trespass to recover for felling timber averred that such action was "for trespass in going outside of the right of way and felling trees," etc. It was held that the bill showed no ground for injunction, as there was no averment that the trees were "sufficiently near the track . . . as to fall on and obstruct the same." *Day v. Louisville R. Co.*, 69 Miss. 589, 11 So. 25.

90. *Kellar v. Bullington*, 101 Ala. 267, 14 So. 466, per Head, J.: "The conclusion, therefore, from the facts, if they were averments to the contrary, would be that no destruction of the

estate or irreparable injury would follow the assertion of complainant's legal remedies without resort to injunction. A real action at law to try the disputed question of title, and for the recovery of damages and mesne profits, would serve to settle, in one action, the title to the land, and to award to plaintiff, if successful, all damages, not only for mesne profits, but for injuries committed in the nature of trespass or waste (Code, ch. 6, tit. 2, pt. 3); and those damages are recoverable to the time of the trial (Code, § 2716)." See, also, *Cooper v. Watson*, 73 Ala. 252; *Beatty v. Brown*, 76 Ala. 267; *Sedg. & W. Tr. Title Land*, § 668.

91. *Cresap v. Kemble*, 26 W. Va. 603.

92. *Appeal of Sharon Railway*, 122 Pa. St. 533.

CHAPTER XL.

AGAINST WASTE.

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Section 1167. **Waste defined.**—Waste is an improper destruction or material alteration or deterioration of the freehold, or of things forming an essential part of it, done or suffered by a person rightfully in possession as tenant, or having but a partial estate as a mortgagor.¹ An implied obligation exists, arising out of the relation of landlord and tenant, that the tenant will use reasonable care to prevent injury to the inheritance, and carelessly to permit stock to go into the orchard on the leased premises and destroy fruit trees, is waste.² So the cutting of trees by a tenant for years, except under special circumstances, is an act of waste.³ Waste

1. Hamilton v. Austin, 36 Hun (N. Y.) 138, 143.

2. Warder v. Henry, 117 Mo. 530.

3. McGregor v. Brown, 10 N. Y. 114. As to the exception in the case

of wild and uncleared land leased

by a tenant for life may consist in cutting and removing timber, in permitting the premises to go to ruin for want of necessary repairs, and in impoverishing the soil by defective tillage.⁴ And the same rule is applicable to a mortgagor who cuts timber for other purposes than husbandry or clearing.⁵ A tenant is not justified in making alterations in the demised premises without express permission from the landlord. Thus, the taking down of partitions is apparently an act of waste.⁶ It is not waste for a tenant of nursery grounds, entering subsequent to a mortgage, to remove and sell growing nursery stock, in good faith and in the usual course of business, if done before foreclosure is begun, and not for the purpose of injuring the freehold or the security.⁷ A defendant, properly served, may be enjoined from committing waste upon, or otherwise impairing the value of, property in which the complainant is interested, even though the property is situated abroad.⁸

§ 1168. **Statutory waste enjoined.**—Cutting down trees on public land is waste, within the meaning of the Washington Code, which provides that where there are opposing claimants to public land, and one is threatening to commit on such land waste which tends materially to lessen the value of the inheritance, and which cannot be compensated by damages, an injunction will lie to restrain him therefrom.⁹ Under the Michigan statute, providing that a township treasurer “shall be entitled to an injunction to restrain waste” on land chiefly valuable for its timber, when its owner neglects or refuses to pay any tax assessed thereon, it is no defense that the tax can be collected by other process; that the

for agricultural purposes, see *Jackson v. Brownson*, 7 Johns. 227; *Kidd v. Dennison*, 6 Barb. 9.

4. *Sarles v. Sarles*, 3 Sandf. Ch. (N. Y.) 607. See *Livingston v. Reynolds*, 26 Wend. (N. Y.) 115; *Jackson v. Brownson*, 7 Johns. Ch. (N. Y.) 227, 232.

5. *Webster v. Peet*, 97 Mich. 326, 56 N. W. 558.

6. *Agate v. Lowenbein*, 57 N. Y.

604; *Purton v. Watson*, 19 N. Y. St. Rep. 6.

7. *Hamilton v. Austin*, 36 Hun (N. Y.), 138. See *Adams v. Beadle*, 47 Iowa, 439; *Price v. Brayton*, 19 Iowa, 409; *Holmberg v. Johnson*, 45 Kan. 197.

8. *Marshall v. Turnbull*, 32 Fed. 124.

9. *Arment v. Hensel*, 5 Wash. 152, 31 Pac. 464.

owner does not intend to commit waste; and that, should waste be committed, the land would still be of sufficient value to pay the tax.¹⁰ In such case the refusal must be positive and unqualified as to a whole or some part of the tax, and the facts that the township treasurer called on the agent of the owner of the lands, and such agent refused to pay the taxes; that the agent took a list of the lands, saying he would send them to the owner, and see what he would do; and that the treasurer wrote to the owner, but received no answer,—do not show a sufficient refusal by the owner to warrant the treasurer's suing for the injunction.¹¹ Section 1925 of the New York Code of Procedure, which provides that an action to prevent waste of or injury to the property of a municipality may be maintained by a resident taxpayer, does not give such taxpayer the right to maintain a suit to enjoin a contemplated purchase by a municipality, on the mere ground that the purchase is to be made at an extravagant and unreasonable price, where there is no charge of fraud or collusion.¹² And it has been decided that the remedy given by the above provision is not the proper one for the purpose of testing the right of a village trustee to office,¹³ or to prevent the granting of a permit by city officials to a street railway company to use the streets.¹⁴

§ 1169. Alteration of demised premises.—Any material change

10. *Rossman v. Adams*, 91 Mich. 69, 51 N. W. 685, per *Curiam*: "It was not intended by the legislature that the imperative mandate of the statute should be defeated by a showing by affidavit that the tax could have been collected by other process, or that if the owners of the lands should cut what timber they intended to there would still be value enough in the land or timber to pay the taxes assessed against the lands. *Caldwell v. Ward*, 83 Mich. 16, 17, 46 N. W. 1024."

11. *Caldwell v. Ward*, 88 Mich. 378, 50 N. W. 303.

12. *Ziegler v. Chapin*, 126 N. Y. 342, 27 N. E. 471, per *Finch, J.*:

"We have quite recently declined to become arbitrators between taxpayers and their municipal officers in every instance of disagreeing opinions or conflicting judgments, and have decided that, jurisdiction in the officials existing, the courts can interfere in actions like that before us, only where some fraud or collusion or bad faith is alleged and proved. *Talcott v. Buffalo*, 125 N. Y. 280."

13. *Fahy v. Johnstone*, 21 App. Div. (N. Y.) 154, 47 N. Y. Supp. 402.

14. *Kittinger v. Buffalo Traction Co.*, 25 App. Div. (N. Y.) 329, 49 N. Y. Supp. 713.

of demised premises, made by a tenant without the landlord's consent, is waste, though the value of the property be increased by the alteration.¹⁵ And where the tenant of a room in a one-story wooden building, being deprived of the use of a chimney, began to build another, it was held that this was waste, constituting sufficient ground for an injunction.¹⁶ But this rule does not, it seems, apply to the erection by a tenant of a new building on the demised premises, if it is done without injury to the existing premises.¹⁷ But where a lease provided that the lessee might "make alterations in the building now on said lands so as to adapt it to other business than that of a livery stable," it was held that to tear down the building would be waste, against which an injunction should issue, even though the erection of a better and more expensive building on the land was contemplated.¹⁸ And where a building has been leased for the purpose of a post office, the lessee may be restrained by injunction from tearing down partitions and converting it into a beer establishment.¹⁹

§ 1170. *Insolvency and irreparable injury considered.*—It is

15. *Kidd v. Dennison*, 6 Barb. 13; *Douglass v. Wiggins*, 1 Johns. Ch. 435; *Jackson v. Andrew*, 18 Johns. 434.

16. *Brock v. Dole*, 66 Wis. 142, 28 N. W. 334.

17. In *Winship v. Pitts*, 3 Paige (N. Y.), 259, Paige, Ch., said: "Some of the ancient cases restrict the tenant within very narrow limits as to his right to alter or improve the premises held by him, without subjecting him to an action of waste or to a forfeiture of the estate. It was for a time questionable whether a tenant or a copyholder could erect a new building on the premises without subjecting himself to a loss of the property. *Ward's Case*, 4 Leon. 241; *Gray v. Ulisses*, 2 Dyer, 211, b, note; *Paston v. Utberts*, *Littleton's Rep.* 264; *Cecil v. Cave*, *Coke Litt.* 53a; *Darcy v. Askwith*, *Hobart's Rep.* 234. But

whatever doubts may have formerly been entertained on this subject, I have no hesitation in saying that by the law of this State, as now understood, it is not waste for the tenant to erect a new edifice upon the demised premises, provided it can be done without destroying or materially injuring the buildings or other improvements already existing thereon."

18. *Davenport v. Magoon*, 13 Or. 3; 57 Am. Rep. 1.

19. *Maddox v. White*, 4 Md. 72. The court cited and relied on *Douglass v. Wiggins*, 1 Johns. Ch. 435, where the lessor was enjoined from converting a dwelling into a warehouse, and *Steward v. Winters*, 4 Sandf. Ch. 587, was enjoined from converting a drygoods jobbing store into an auction mart. See, also, *Barret v. Blaggrave*, 5 Ves. 555.

not an essential prerequisite to an injunction to restrain waste to show that defendant is insolvent.²⁰ But to give equity jurisdiction the injury must be irreparable or the defendant insolvent or an injunction must be necessary to avoid multiplicity of suits. If the waste be destructive of the estate or of some vital necessity to its enjoyment, and so ruinous as not to be capable of actual measurement in money, an injunction may be granted.²¹ The Maryland doctrine is that to obtain an injunction to prevent waste of trees and timber it must be alleged that the trees have a peculiar value and are of great importance to the estate, as that they are fruit or ornamental trees, or, if timber and wood, that the enjoyment of the estate would be so affected by their destruction as to render the alleged injury irreparable. And facts, not mere apprehension, must be alleged.²² In enjoining acts of pure waste by a tenant, courts of equity interfere on the ground of irreparable injury to the inheritance, and ordinarily will not afford injunctive relief if the damage be slight.²³ But where the waste is in violation of covenant it will be prevented by injunction, irrespective of the question of damage and upon the ground that complainant is entitled to literal performance of the covenant.²⁴ It has been adjudged in England that in order to obtain an injunction against a tenant the landlord must show that what the tenant is doing is injurious to the inheritance; that if it improves the land it is not waste. Thus, where a lessee converted a farm into a market garden and at the trial it was proved that other farms in the vicinity had been changed into such gardens, that being found to be the most profitable mode of cultivation, it was held that the lessee had not violated his covenant to manage the farm "according to the best rules of husbandry practiced in the neighborhood," and that the conversion of the farm into a market garden was not actionable waste.²⁵

20. Trustees, etc., of the Episcopate v. Matteson, 12 N. Y. St. Rep. 370.

21. Powell v. Cheshire, 70 Ga. 357. This was, however, a case of trespass and not of waste.

22. Green v. Keen, 4 Md. 98.

23. Attorney-General v. Sheffield Gas Co., 3 DeG. M. & G. 321; Doran v. Carroll, 11 Ir. Ch. 379.

24. Kemp v. Sober, 1 Sim. (N. S.) 520; Tipping v. Eckersley, 2 Kay & J. 264.

25. Meux v. Cobley, 2 Ch. D. 253.

§ 1171. **Title in litigation; injunction pendente lite.**—The ancient equity doctrine which would refuse an injunction to restrain waste, where a bill is filed for an account, has been greatly modified; and in cases where irremediable mischief is being done or threatened, such as the extraction of ores from a mine, or the cutting down of timber, an injunction will issue, though the title to the premises be in litigation.²⁶ And a bill for an injunction against waste, which shows that the plaintiff is an applicant to purchase the premises from the United States as mineral land; that his right to do so is being contested in the United States land office; and that the defendants claim title adversely to him,—does not state a case within any known exception to the general rule, that equity will not interfere by injunction to prevent waste when the complainant's title is disputed.²⁷ And where, in 1844, a person took possession of land under a patent and held exclusive possession of it, and paid the taxes for more than the statutory period of limitation, the county record showing no other claim to the land, and in 1882, after the land had been purchased and paid for at a judicial sale from such person, defendant entered forcibly under a claim of title, to it, it was held that the purchaser was entitled to a perpetual injunction restraining waste.²⁸ Where there is a controversy pending in equity involving the title to land, an injunction restraining the commission of waste may be applied for by petition in the cause in order to preserve the property until the title can be ascertained. This procedure dispenses with a cross-bill and two suits.²⁹ So where it was conceded that defendant was the owner of a part of the land upon which a house stood

And see, *Jones v. Chappell*, L. R. 20 Eq. 539; *Doherty v. Allman*, L. R. 3 App. Cas. 709.

26. *Lanier v. Alison*, 31 Fed. 100, following *Erhardt v. Boaro*, 113 U. S. 537, 28 L. Ed. 1116, 5 Sup. Ct. 560, 565.

27. *McBride v. Board of Com'rs*, 44 Fed. 17.

28. *Basore v. Henkel*, 82 Va. 474.

29. *Green v. Keen*, 4 Md. 98; *Wagner v. Cohen*, 6 Gill (Md.), 98; *Hays v. Miles*, 9 Gill & J. 193; *Baltzell v. Foss*, 1 Harris & G. 504; *Cromwell v. Hughes* (Mich. 1906), 107 N. W. 326; *Codwise v. Gelston*, 10 Johns. 508; *Mayor, etc., v. Bolt*, 5 Ves. 129.

of which he was in possession and complainant who claimed the balance of the land on which it stood, brought an action to enjoin its threatened removal by the defendant, it was held proper to grant an injunction against waste until the title had been determined in ejectment.³⁰ An injunction, however, against waste will not issue where the title is in doubt, with the probabilities in favor of defendant having the better title, and where defendant, for all that appears, is solvent.³¹

§ 1172. **Writ of estrepement.**—An injunction to stay waste pending an action at law to try title to land, is in the nature of a writ of estrepement, and according to the nature of the judgment in such action, the injunction may be dissolved upon the plaintiff's defeat or be made perpetual, wholly or in part, according to his measure of success.³² An injunction by writ of estrepement against waste in ejectment for lands of which defendants are not in possession, and to which they lay no claim, and which are not mislocated in the writ, does not injure defendants, and they cannot sue on the estrepement bond, though the affidavit by mistake alleges that they are committing waste thereon, and though by reason of the injunction they refrain from cutting timber upon another tract to which plaintiffs make no claim.³³ Again, where, in a bill to quiet title and restrain waste, the latter relief is granted, the fact that the bill alleges title by an absolute deed, which the evidence shows to be a mortgage, is immaterial, the relief granted being justified in either case. And where land is conveyed to trustees for the benefit of creditors, to be conveyed on payment of the debts, grantees of the debtors will be restrained from cutting timber on the land for purposes other than good husbandry.³⁴

§ 1173. **Enjoining mortgagor in possession.**—Waste by a mortgagor in possession will not be enjoined unless the acts complained of may so impair the value of the property as to render it

30. *Cromwell v. Hughes* (Mich. 1906), 107 N. W. 323.

31. *Nethery v. Payne*, 71 Ga. 374.

32. *Hill v. Bowie*, 1 Bland (Md.), 593.

33. *Kulp v. Bowen*, 122 Pa. St. 78.

34. *Webster v. Peet*, 97 Mich. 326, 56 N. W. 558.

insufficient, or of doubtful sufficiency, as security for the debt. But the value of the property should remain largely in excess of the debt secured by it.³⁵ This is the prevailing rule both in this country and in England though there are some cases which hold that any act of waste by a mortgagor in possession may be prevented by injunction if they diminish the value of the mortgaged property.³⁶ When after a sale in foreclosure but before its confirmation the mortgagor who remains in possession attempts to remove machinery claimed by the purchaser to constitute a part of the realty the latter may have an injunction to prevent such removal.³⁷

§ 1174. **Removal of fixtures by mortgagor.**—Where, in an action by the mortgagee and purchaser at foreclosure sale, brought after such sale, against the mortgagor, to enjoin the removal of foundry machinery, which was not fastened to the soil because it was so heavy, defendant failed to demur, the bill will not be dismissed on a demurrer clause in the answer because the bill

35. *Moriarty v. Ashworth*, 43 Minn. 144 N. W. 531.

Ex parte affidavits.—Where an application is made for an injunction against waste during the pendency of mortgage foreclosure proceedings, *ex parte* affidavits may be heard. *Henry v. Watson*, 109 Ala. 335, 19 So. 413.

36. *Ensign v. Colburn*, 11 Paige (N. Y.), 503; *Fairbank v. Cudworth*, 33 Wis. 358; *Hastings v. Perry*, 20 Vt. 272; *Cooper v. Davis*, 15 Conn. 556; *Gray v. Baldwin*, 8 Blackf. (Ind.) 164; *Harris v. Bannon*, 78 Ky. 568; *Vanderslice v. Knapp*, 20 Kan. 647; *Buckout v. Swift*, 27 Cal. 433; *Coker v. Whitlock*, 54 Ala. 180; *Scott v. Wharton*, 2 Hen. & M. (Va.) 25; *Van Wyck v. Alliger*, 6 Barb. 507, 511; *Harper v. Aplin*, 54 L. T. (N. S.) 383; *Hippesley v. Spencer*, 5

Madd. 422; *King v. Smith*, 2 Hare, 239; *Humphreys v. Harrison*, 1 Jac. & W. 561. In *Moses v. Johnson*, 88 Ala. 517, the court said: "In *Coker v. Whitlock*, 54 Ala. 180, this court ruled that when the mortgagor is committing waste which impairs the security or renders it insufficient chancery at the suit of the mortgagee will restrain him by injunction. *Coleman v. Smith*, 55 Ala. 368; *Hammond v. Winchester*, 82 Ala. 470. See, also, *Brady v. Waldron*, 2 Johns. Ch. 148; *Robinson v. Preswick*, 3 Edw. Ch. 246; *Murdock's Case*, 2 Bland (Md.), 461; *Usborne v. Usborne*, 1 Dickens, 75.

37. *Mutual L. Ins. Co. v. Nat. Bank*, 18 Hun (N. Y.), 371. And see *McRea v. Central Nat. Bank*, 66 N. Y. 489; *Potter v. Cromwell*, 40 N. Y. 287.

does not allege that the articles named are fixtures, or show any claim thereto by defendant or threat to remove it, or because the injunction was issued on information and belief, though such objections would have been fatal on demurrer, since such defects could have been remedied by amendment.³⁸

§ 1175. **Enjoining vendee and vendor.**—A vendor who sells land, retaining the title as security for the purchase money, sustains the same relation to the vendee, so far as the question of security is concerned, as does a mortgagee to a mortgagor, and, if the security of the land is insufficient, may restrain the vendee from cutting timber on the land.³⁹ And where plaintiff, by written

38. *Smith v. Blake*, 96 Mich. 542; 55 N. W. 978, per Hooker, C. J.: "It is contended that the bill must be dismissed under the demurrer clause in the answer, for the following reasons, viz.: (1) The bill does not allege that the articles named are fixtures; (2) that it fails to show any claim of the property in controversy by the defendant, or threat of removal; (3) that no injunction can properly issue upon information and belief. Had a demurrer been filed, these objections would have been fatal. But the law does not favor the raising of technical questions after hearing upon the merits, and will not permit the dismissal of a bill upon a demurrer clause in the answer unless the bill is fatally defective, and past remedy by amendment. *Barton v. Gray*, 48 Mich. 164; 12 N. W. 30; *Bauman v. Bean*, 57 Mich. 1; 23 N. W. 451; *Lamb v. Jeffrey*, 41 Mich. 720; 3 N. W. 204. The bill impliedly states that these articles are part of the realty. When we read this sixth clause in the light of the whole bill, no other inference could be drawn. The failure to allege threats could

have been the subject of amendment in the court below, and probably would have been had any one considered it necessary. Threats were not even proved, but, as defendant's answer claimed this property to be personalty, not covered by the mortgage, and this question was all that was litigated, we may consider the intention to remove admitted. This brings us to the merits of the case. The proof shows that all of these articles were placed in a building erected many years ago for a foundry and machine shop by the owner of both, and, while some of the machines were not fastened to the soil or building, they were heavy, and it was unnecessary. All were adapted to the business for which the building was erected. Furthermore, the preponderance of the proof shows that the parties understood that this property was to be covered by the mortgage. We think the decision of the circuit court in holding that the mortgage covered these articles was in accord with the Michigan authorities."

39. *Moses v. Johnson*, 88 Ala. 517, 7 So. 146, per Stone, C.

contract, purchases a tract of land of defendant, and pays a portion of the purchase money down, and, by the terms of the contract, defendant is to remain in possession and have the use of the land during a period of five years for the taxes, care, and improvements put thereon by him in the meantime, plaintiff is entitled to an injunction to restrain defendant from committing waste on said land, by quarrying and removing therefrom rock, or removing trees except nursery stock.⁴⁰ But where plaintiff sold certain land, receiving part of the purchase price, and placing his vendee in possession, but retaining the legal title as security for the fulfillment of the contract of purchase, and the vendee, without any agreement with plaintiff relative thereto, constructed houses on the land, and then sold them to defendant to be removed, it was held that, in the absence of any showing on plaintiff's part that the security would be impaired by such removal, it would not be enjoined.⁴¹ The averment by the vendee that the value of the land would be enhanced by clearing it is affirmative matter, the burden of proving which is on him.⁴²

J.: "We have found but a single case precisely like the present one in facts. In *Scott v. Wharton*, 2 Hen. & M. (Va.) 25, a sale of land had been made on credit and title retained by the vendor. The vendee went into possession and a bill was filed by the vendor charging him with committing waste by cutting timber and praying for an injunction. The court treated the case precisely as if it had been a bill by mortgagee against mortgagor to restrain him from lessening the security by felling and removing the timber."

An injunction may be had to restrain from waste a purchaser under a decree who has not paid his purchase money. *Casamajor v. Strode*, 1 Sim. & Stu. 381.

When removal of personal property will not be enjoined. See

Nicholson v. Coleman, 90 Wis. 639, 64 N. W. 297.

40. *Holmberg v. Johnson*, 45 Kan. 197, 25 Pac. 575.

41. *Miller v. Waddingham*, 91 Cal. 377; 27 Pac. 750, per Harrison, J.: "It is a well recognized principle in equity that a mortgage cannot maintain an action to restrain waste without showing that thereby his security will be impaired. *Robinson v. Russell*, 24 Cal. 467; *Buckout v. Swift*, 27 Cal. 438; see, also, *Perrine v. Marsden*, 34 Cal. 14. And by purity of reasoning the vendor who holds the legal title as security for the fulfillment of the contract of purchase by the vendee in possession, should show that he will sustain some injury before he can maintain an action like the present."

42. *Moses v. Johnson*, 88 Ala. 517, 7 So. 146.

§ 1176. **As to building removed from mortgaged land.**—Where houses on mortgaged land have been removed from it they are personalty, however they may have been removed, and are no longer under the operation of the mortgage lien, and the mortgagee cannot therefore maintain a suit to enjoin their further removal. And the fact that they have been removed into a public street on which the land abuts, and not beyond the center line thereof, does not render their location still on the land, on the ground that the owner of land abutting on a street owns the land over which the street runs to the center line thereof, as he has no right to place his buildings in the street, and has no right as owner in anything in transit over the street.⁴³

43. *Stowell v. Waddingham*, 100 Cal. 7, 34 Pac. 436, per Belcher, C.: "The complaint avers, and it is found, that, deprived of the buildings, the land constitutes insufficient security for the money still due plaintiff upon his contract for the sale of the land. If it be admitted that, under the circumstances, plaintiff was the legal owner of the houses, he had an adequate remedy at law; but, whether owner or mortgagee, this action to stay waste cannot be maintained. It was commenced too late; the waste had already been committed. He had no right to stop the buildings in the public highway. *Buckout v. Swift*, 27 Cal. 433. In that case the plaintiff was mortgagee, and the house was a part of the land when the mortgage was executed. The premises were in Sacramento, and the house was moved by the great flood of 1862 into the street, a short distance from the lot. There it was purchased by Lowell with a full notice of plaintiff's mortgage. The court said: 'So far as legal effect is concerned, it matters not where the severance is by act of God or the act of man. The severance

proprio vigore changed the character of the property from real to personal, irrespective of the means by which it was accomplished.' It was also said that, by the removal of the house from the premises, 'the house was effectually removed from the operation of the mortgage lien.' Plaintiff's counsel claims that Stowell's position is that of a mortgagee. In such case his lien was effectually destroyed by the removal of the houses. But, whether he was owner or mortgagee, this suit cannot be maintained. Respondent's counsel does not appear to dispute this general proposition, but he contends that, inasmuch as plaintiff is the owner of the land over which the street runs to the center line of it,—as to that boundary the mortgaged premises extend,—the houses, though severed from the land, are still on the premises, and subject to his lien. Conceding, for the purposes of the case, that a suit could be maintained although the fixtures had been severed from the land, put upon rollers and wheels, and were being moved off from the premises, but were not yet entirely off, such a case is not made

§ 1177. **Removal of manure.**—In the absence of express stipulation to the contrary a tenant has the right to use manure made on the demised land during the tenancy, by putting it upon the land, but has no right to remove it and will be enjoined from removing it from the land as his own property.⁴⁴ The general rule is that an outgoing tenant has no right to remove manure made on a farm in the ordinary course of husbandry whether consisting only of collections from stables and yards or of admixtures of these with soil or other substances.⁴⁵ The North Carolina doctrine, however, is that a tenant about to remove has the right, where there is no covenant or custom to the contrary, to take with him as his personal property all the manure made on the farm during his tenancy, but it ceases to be his if he leaves it when he quits the farm.⁴⁶

§ 1178. **Parties plaintiff.**—While an action for waste at common law was maintainable only in favor of the first estate of inheritance, a bill in chancery lies in favor of any party in remainder whose estate is injured, and an intermediate tenant for life may enjoin the tenant for years from committing waste.⁴⁷ In New York it has been decided that one who has any equitable

by the facts. The owner of land, over which a public highway has been established, has no right to place his buildings there in such a way as to obstruct the highway, nor has he any right, as such owner, in anything in transit over the highway. He cannot interfere with persons using the street simply because he owns the land subject to the public easement. Property being carried over the street is no more on his premises there than it would be miles away."

44. *Bonnell v. Allen*, 53 Ind. 130, per Biddle, J.: "The first case we can conveniently find in support of this view is *Pulteney v. Shelton*, 5 Ves. 147, where an injunction was allowed against carrying away from the premises manure and soil. In

the case of *Onslow v. —*, 16 Ves. 173, a similar ruling was made enjoining the tenant from removing the crops and manure."

45. *Daniels v. Pond*, 21 Pick. (Mass.) 367; *Sawyer v. Twiss*, 26 N. H. 345; *Lewis v. Jones*, 17 Pa. St. 262; *Middlebrook v. Corwin*, 15 Wend. 169. This is partly by a matter of custom. *Roberts v. Barker*, 1 Cr. & Mees. 808; *Beatty v. Gibbons*, 16 East, 116.

46. *Smithwick v. Ellison*, 2 Ired 326.

47. *Dennett v. Dennett*, 43 N. H. 503. As to the right of ground rent term or to restrain waste by his underlessee, see *Farrant v. Lovel*, 3 Atk. 723.

contingent interest in lands may have an injunction to restrain waste.⁴⁸ An injunction to prevent waste by a tenant for life or for years may be granted not only at the suit of the owner of the inheritance but also at the suit of a remainderman for life.⁴⁹ And a contingent remainderman may sue for an injunction to restrain waste by the life tenant,⁵⁰ and an injunction may be granted at the suit of trustees to preserve contingent remainders.⁵¹ While it is the duty of trustees to enjoin waste by a tenant for life if persons unborn are interested,⁵² yet a remainderman need not wait for the trustees to protect his interests, but may sue in his own name for an injunction to restrain waste by the tenant for life.⁵³ And the remainderman of an undivided share may sue for an injunction.⁵⁴

§ 1179. **Enjoining cotenant and life tenant.**—One tenant in common may have his insolvent cotenant in possession enjoined from committing waste on the premises.⁵⁵ But a mortgagee of an undivided interest in land is not entitled to an injunction restraining the tenants in common in possession of the land from removing the clay deposits thereon, where works for the manufacture of

48. *Lee v. Whallon*, 20 N. Y. W. Dig. 366.

49. *Frank v. Brunnemann*, 8 W. Va. 462; *Freeman v. Reagan*, 26 Ark. 373; *United States v. Parrott*, 1 McAllister C. C. 271; *Tracy v. Tracy*, 1 Vern. 23; *Farrant v. Lovel*, 3 Atk. 723.

50. *University v. Tucker*, 31 W. Va. 621, 8 S. E. 410.

51. *Perrot v. Perrot*, 3 Atk. 94; *Garth v. Cotton*, 3 Atk. 751, 1 Ves. Sen. 524, 526. In the last case the injunction was against a tenant for life and a remote remainderman coluding to commit waste while the remainders were in expectancy. An injunction may be granted to prevent waste of contingent estates until the remainderman comes into being. *Stansfield v. Habersham*, 10 Ves. 281.

52. *Denton v. Denton*, 7 Beav. 388; *Pugh v. Vaughan*, 12 Beav. 517.

53. *Viner v. Vaughan*, 2 Beav. 469.

54. *Whitfield v. Bewit*, 2 P. Wms. 241.

55. *Stout v. Curry*, 110 Ind. 514.

"Although courts of equity will not interfere by injunction to prevent waste in cases of tenants in common, or joint tenants, because they have a right to enjoy the estate as they please, yet they will interfere in special cases, as where the party committing the waste is insolvent, or where the waste is destructive of the estate; and not within the legitimate exercise of the right of enjoyment of the estate." 2 Story's Com. § 916, quoted in *Burrtts v. Jackson* (Del. Ch. 1899), 68 Atl. 380.

brick had been constructed, and clay deposits worked and opened, before the execution of the mortgage.⁵⁶ Where a testator devises land to his daughter, provided she shall have lawful issue, and there is a remainder over in fee, the devisee takes a life estate subject to the fee on the birth of such issue, and the remainderman, until issue is born, has such an interest in the estate as will sustain an injunction to restrain the devisee for life from committing unauthorized waste.⁵⁷

§ 1180. **Tenant in dower.**—The Vermont statute, which provides that “no woman endowed of lands, tenements, or hereditaments shall commit or suffer waste on the same, but shall maintain the houses and tenements in good repair during her term, and

56. *Russell v. Merchants' Bank*, 47 Minn. 286, 50 N. W. 228, per Vanderburgh, J.: “It may be conceded that the unauthorized digging of clay by a tenant is waste when there is nothing in the situation of the premises or other special circumstances to take the case out of the general rule. *Livingston v. Reynolds*, 2 Hill, 157. And so in special cases an injunction will issue to restrain injuries to the freehold in the nature of waste between tenants in common. *Hawley v. Clowes*, 2 Johns. Ch. 122; *Coffin v. Loper*, 25 N. J. 443; *Atkinson v. Hewitt*, 51 Wis. 275. But where works of the character described for carrying on the business of making brick have been constructed, and the business lawfully undertaken by the owners of the land, we are of the opinion that, as between the subsequent grantee of an undivided interest in the land and co-tenants in possession, it is not waste for the latter to continue the business in the ordinary way, and that to so continue the manufacture is within the legitimate exercise of the enjoyment of their property by such

cotenants. And such grantee would not, therefore, be entitled to an injunction against them restraining such use of the premises, and breaking up or suspending the business. *Neel v. Neel*, 19 Pa. St. 323; *McCord v. Oakland Min. Co.*, 64 Cal. 134. A mortgagee of an undivided interest should not be held to occupy any better position than a tenant in common. He would not, in such a case be entitled to an injunction.

57. *Cowand v. Meyers*, 99 N. C. 198, 6 S. E. 82, per Smith, C. J.: “In *Gordon v. Lowther*, 75 N. C. 193, the facts were similar, except that the limitation over and after the life estate was to such children as the life tenant might have, who attained the age of twenty-one years, and to the plaintiff if there were none such left, and the life tenant as in our case had passed the period of child-bearing, and it was decided that no recovery could be had for damages from waste already committed, but the plaintiff was entitled to protection against future waste and destruction by the exercise of the restraining power of the court.”

shall be liable to the person owning the reversion for damages occasioned by waste committed or suffered by her," does not render the dowress liable for acts amounting to waste, committed by third persons without her permission. At common law, which is in force in Vermont, a tenant in dower is answerable to the reversioner for injuries to the estate; hence she may maintain an action against acts of waste affecting the inheritance. And as the tenant in dower and the reversioner are privies in estate, a judgment by the dowress against waste or trespass is a bar to another action by the reversioner for the same cause.⁵³ And in this State

58. *Wiley v. Laraway*, 64 Vt. 559, 25 Atl. 436, per Tyler, J.: "The first question to be determined is whether the plaintiff, holding a dower estate in the lands in question, can maintain this action for an injury to the reversion. The writ and declaration have not been furnished us, but counsel in argument have treated the action as brought upon section 4206, R. L., to recover treble damages. The action, therefore, is trespass *qu. cl. fr.* The statute giving treble damages in certain cases of trespass on real estate does not create the right of action, but only gives cumulative damages for what was, and still is, actionable at common law. *Montgomery v. Edwards*, 45 Vt. 75. The right of a life tennat to cut wood and timber upon the lands in which his tenancy exists is limited to reasonable estovers. Our statute in respect of the liabilities of a dowress is only declaratory of the common law: 'No woman endowed of lands, tenements, or hereditaments shall commit or suffer waste on the same, but shall maintain the houses and tenements, with the fences and appurtenances, of which she is endowed, in good repair during her term, and leave the same

in good repair at the expiration thereof, and shall be liable to the person owning the reversion for damages occasioned by waste committed or suffered by her.' R. L., § 2227. Voluntary waste implies acts of commission; permissive waste, acts of omission—as suffering buildings to fall for want of ordinary repairs, or lands to deteriorate from neglect. 2 Bl. Com. 281. It is not presumable that the legislature intended by the use of the word 'suffer' to render the dowress liable for acts amounting to waste committed without her permission by third persons. A stranger who does injury to the premises is liable either to the tenant or the reversioner; but one who acts by the authority or permission of the tenant in possession is not a stranger, and for his acts the tenant would be liable as for commissive waste. *Livingston v. Mott*, 2 Wend. 605. Resort must therefore be had to the common law for remedies for wrongs of this character when committed by strangers to the title. At common law, tenants by the curtesy and in dower were answerable for waste committed by strangers, and this liability was, by statute 52 Hen. III, ch. 23, and 6 Edw. I, ch. 5, extended to tenants for

where an action is brought to enjoin the commission of waste by a widower and the bill does not show that he is the wrongdoer, but that the wrong, if any, is that of the executors, who are subject to the order of the probate court, whose jurisdiction is ample, speedy,

life and for years. It is a general principle that the tenant, without some special agreement to the contrary, is responsible to the reversioner for all injuries, amounting to waste, done to the premises during his term, by whomsoever the injuries may have been committed, with the exception of the acts of God and public enemies, and of the reversioner himself. This principle is founded in public policy. The landlord cannot protect the property against strangers. The tenant is on the spot, and presumed to be able to protect it. 4 Kent, Comm. 77, 1 Washb. Real Prop. 146, 156. Blackstone says (2 Comm. 283), that the law ought to protect the reversion when the tenant takes the estate by operation of law, while in other tenancies the lessor might have guarded in his lease against waste by the lessee. It was held in Massachusetts that a tenant for life is bound to see that trespassers do not injure the estate, and that for this purpose the law gives him an action of trespass; so that whether waste is committed by himself or by a stranger, he is alike answerable to the reversioner. *Fay v. Brewer*, 3 Pick. 203; *Sackett v. Sackett*, 5 Pick. 191; *Clark v. Holden*, 7 Gray, 8. Beardsley, J., discussed this subject in *Cook v. Transportation Co.*, 1 Denio, 91, and quoted from the opinion of Heath, J., in *Attersoll v. Stevens*, 1 Taunt. 198, as follows: 'It is common learning that every lessee of land, whether for life or for years, is liable, in an action or waste,

to his lessor, for all waste done on the land in lease, by whomsoever it may be committed;' and from *Chambre, J.*, in the same case: 'The situation of the tenant is extremely analogous to that of a common carrier. To prevent collusion, . . . both are charged with the protection of the property intrusted to them against all but the acts of God and the king's enemies; and as the tenant in the one case is charged with the actual commission of the waste done by others, so in the other case the carrier is charged, . . . though he loses the goods by a force that was irresistible,' etc. He also quotes Lord Coke as saying: 'Tenants by the curtesy, tenants in dower, tenants for life, years, etc., shall answer for the waste done by a stranger, and shall take their remedy over;' and cites 1 Inst. 54, 57, 377; 1 Chit. Gen. Pr. 388; 2 Rolle, Abr. 821; 3 Bl. Comm. 228; Com. Landl. & Ten. 188. Although the reversioner doubtless may bring his action against the actual trespasser when the injuries affect the inheritance, it seems clear that the tenant in dower is answerable for such injuries to the estate; and, being thus liable, it follows as a legal consequence that she has her action over against the trespasser. 4 Kent, Comm. 77; 1 Washb. Real Prop. 156. The fact that the reversioner may omit to take action against the real trespasser, relying on the liability of the tenant to answer to him for such trespasses, is of itself a strong rea-

and less expensive than that of the court of chancery, it is decided that the remedy at law is sufficient and adequate and that an injunction will not be granted.⁵⁹

§ 1181. **Waste of timber.**—An injunction will be granted to stay waste, by cutting timber, threatened or being committed.⁶⁰ And entry on land for the purpose of opening a road without due preliminary notice to the owner and digging up and removing fruit trees thereon is waste which may be enjoined.⁶¹ And the remedy for waste of timber committed by the owner of a life estate in land charged with the payment of a legacy on the termination of the life estate is in equity where further waste can be enjoined, and damages awarded for the waste committed, which will be held if necessary for the benefit of the legatee who must be paid before the remainderman take.⁶² But where a lease required a tenant to reduce to cultivation uncleared portions of the premises, his cutting down trees on those portions will not be enjoined as waste.⁶³ And a vendor of mortgaged premises who, as an inducement of the

son for holding that it is the right of the tenant to maintain an action of the wrongdoer before judgment against herself in favor of the reversioner. The counsel for the defendant argues that this judgment would not be a bar to an action by the reversioner against the defendant. It is true that a judgment is not exclusive, except as to the participants and their privies. *Nason v. Blaisdell*, 12 Vt. 165; *Gerrish v. Bragg*, 55 Vt. 329. On the other hand, the judgment of a court of competent jurisdiction is conclusive between parties and privies. In this case there is a privity of estate between the reversioner and the tenant in dower, so that this judgment would be a bar to another action. 1 Greenl. Ev. 189, 523; *Foot v. Dickinson*, 2 Mete. (Mass.) 611."

59. *Clark v. Peck* (Vt. 1906), 65 Atl. 14.

60. *Sheridan v. McMullen*, 12 Ore. 150. And see also:

United States.—*Northern P. R. Co. v. Soderberg*, 86 Fed. 49.

Delaware.—*Fleming v. Collins*, 2 Del. Ch. 230.

Kansas.—*Holmberg v. Johnson*, 45 Kan. 197, 25 Pac. 575; *Snyder v. Hopkins*, 31 Kan. 557.

New York.—*Kane v. Vanderburgh*, 1 Johns. Ch. 11.

Pennsylvania.—*Allison's Appeal*, 77 Pa. St. 225.

61. *Silva v. Garcia*, 65 Cal. 591. And see *Hicks v. Michael*, 15 Cal. 115; *Merced Min. Co. v. Fremont*, 7 Cal. 319.

62. *Dawson v. Tremaine*, 93 Mich. 320, 322, 53 N. W. 1044.

63. *McDaniel v. Callan*, 75 Ala. 327.

purchase, consents that timber may be cut from the conveyed property, cannot restrain the cutting of the timber as a waste which impairs the security of the mortgage upon which he is liable.⁶⁴ In Pennsylvania it has been held that cutting down timber to the prejudice of the inheritance is waste and may be restrained under the equity powers conferred on the courts by the statutes of 1836 and 1857.⁶⁵

§ 1182. **Same subject.**—The provision of the New York Code of Procedure as to restraining “further waste,”⁶⁶ does not include the removal of wood or timber already cut,⁶⁷ except where there are some special grounds for equitable interference.⁶⁸ And the rule would seem to have been the same under the similar provision of the revised statutes.⁶⁹ But there is a line of cases in which it has been held that not only will future waste be restrained but also the removal of timber already cut.⁷⁰

§ 1183. **Equitable waste.**—Story defines equitable waste to consist in such acts as are not considered waste at law, being consistent with the legal right of the party committing them, but which are deemed waste in equity on account of their manifest injury to the inheritance.⁷¹ In an early and leading case Lord

64. *Hurst v. Elliott*, 52 Hun (N. Y.), 273, 23 N. Y. St. Rep. 476. And see *Brumley v. Fanning*, 1 Johns. Ch. (N. Y.) 501.

65. *Smith's Appeal*, 69 Pa. St. 474; *Denny v. Brunson*, 29 Pa. St. 382.

66. Section 1681.

67. *Trustees, etc., of the Episcopal v. Matteson*, 12 N. Y. St. Rep. 370.

68. *Winship v. Pitts*, 3 Paige (N. Y.), 259.

69. *People v. Alberty*, 11 Wend. (N. Y.) 161, 163; *Johnson v. White*, 11 Barb. (N. Y.) 194.

70. *Kidd v. Dennison*, 6 Barb. (N. Y.) 18; *Watson v. Hunter*, 5 Johns.

Ch. (N. Y.) 169; *Weatherby v. Wood*, 29 How. Pr. (N. Y.) 404; *Farrington v. Birdsall*, 5 N. Y. W. Dig. 421.

71. *Attaquin v. Fish*, 5 Met. (Mass.) 140, 148; *Story, Eq. Jur.*, § 915. In *Vincent v. Spicer*, 22 Beav. 380. In this case a person on his marriage settled his estate on himself for life “without impeachment of or for any manner of waste except spoil, or destruction, or voluntary or permissive waste, or suffering buildings to go to decay, and in not repairing the same.” It was held that he was entitled to cut all such timber (except ornamental) as the owner of an estate in fee simple, having due regard to his present interest, and to the permanent

Bernard, upon his marriage, settled a castle upon himself for life, without impeachment of waste, and remainder to his son for life. He was enjoined from pulling down the castle at his son's suit, the chancellor holding that the power he had reserved extended only to cutting down timber and opening new mines.⁷² In the Marlborough case though the court would not interfere on the mere ground that the tenant in tail was prohibited by statute from barring the entail, yet having regard to the enactment, "that Blenheim House should in all times descend and be enjoyed with the honors and dignities of the family," it was held that the destruction of the house should be prevented and also the destruction of the trees essential to its shelter and ornament.⁷³ Where an estate has been devised to defendant in fee subject to an executory devise over to plaintiff, the defendant is entitled to cut such timber as is mature except such as has been planted or left standing for ornament, but may be enjoined from cutting unripe or ornamental timber.⁷⁴ In England the protection of the court has been mostly confined to ornamental trees; and whether a tree is an ornament or not is a question of fact turning usually upon the existence of a mansion house and walks and avenues.⁷⁵ The principle that the cutting of saplings is, under certain circumstances, equitable waste, does not apply to cases between landlord and tenant where the cutting is seasonable. And the mere cutting of a hedge in such a manner that it will grow again is not waste; but grubbing up the thorns of which it is composed, or allowing the germines to be destroyed by cattle, or cutting them unseasonably so that they will not grow again is waste.⁷⁶

advantage of his estate, might properly cut in due course of management, and beyond that would be enjoined.

72. *Vane v. Bernard*, 1 Salk. 161, 2 Vern. 738.

73. *Attorney-General v. Marlborough*, 3 Madd. 498, 549.

74. *Turner v. Wright*, 2 DeG. F. & S. 234. And see *Wright v. Atkyns*, 17 Ves. 255; *Robinson v. Litton*, 3 Atk. 209.

75. *Halliwell v. Philipps*, 4 Jur. N. S. 608; *Micklethwait v. Micklethwait*, 1 DeG. & J. 527; *Newdegate v. Newdegate*, 8 Bligh (N. S.), 734; *Wellesley v. Wellesley*, 6 Sim. 497; *Morris v. Morris*, 15 Sim. 507; *Wombwell v. Belasyse*, 6 Ves. 110, n; *Downshire v. Sandos*, 6 Ves. 107, 114; *Ford v. Tynte*, 2 DeG. J. & S. 127.

76. *Dunn v. Bryan*, 7 Ir. Eq. 143.

§ 1184. **Same subject.**—While in general a tenant for life, without impeachment of waste, may cut down timber and convert it to his own use, yet in New Hampshire he may be enjoined from committing such acts of malicious or equitable waste as consist in the destruction of shade and ornamental trees and cause a peculiar and irreparable injury to the inheritance.⁷⁷ In a recent case in Illinois it is decided that a court of chancery will interfere to enjoin equitable waste by the owner of a base or determinable fee only when the contingency which is to determine the estate is

77. *Clement v. Wheeler*, 25 N. H. 361, per Gilchrist, C. J.: "Chancery will interpose where the tenant affects the inheritance in an unreasonable and unconscientious manner, even though the lease be granted without impeachment of waste. *Perrot v. Perrot*, 3 Atk. 94; *Aston v. Aston*, 1 Ves. Sen. 264. These cases are referred to as containing the law on this point by Kent, Ch., in the case of *Kane v. Vanderburgh*, 1 Johns. Ch. 11. At common law timber cut by the tenant for life belongs to the owner of the inheritance, and the words in the lease, 'without impeachment of waste,' had the effect of transferring to the lessee the property in the timber. *Moore v. Wait*, 3 Wend. 104; *Pyne v. Dor*, 1 T. R. 55. And in general the words *absque impetitione vasti*, that is, without challenge or impeachment of waste, enable the tenant for life to cut down timber and convert to his own use. By the statute of Marlbridge, ch. 23, it appears that lessees for life could not rightfully sell the trees or pull down the houses, unless the lessor had by deed granted them the power to do so. When that act was passed the clause 'without impeachment of waste,' was in use, which proves that it was to such purpose that the lessee might commit

waste and dispose it to his own use, which he could not do without such clause. *Bowles' Case*, 11 Coke, 81. But the extensive power given to the tenant for life by this clause may be exercised by him contrary to conscience and in an unreasonable manner. It will, therefore, be so far restrained that he will not be allowed to commit malicious waste, so as to destroy the estate, which is called equitable waste. A leading authority on this point is *Vane v. Lord Barnard*, 2 Vern. 738, commonly called 'Lord Barnard's Case.' . . . And the court will restrain the tenant for life without impeachment of waste from committing equitable waste by cutting timber planted or left standing for the shelter or ornament of a mansion-house or grounds. *Packington v. Packington*, 3 Atk. 215; *Strathmore v. Bowes*, 2 Bro. Ch. 88. This principle has been extended from the ornament of the house to out-houses and grounds, then to plantations, vistas, avenues, and to all the rides about the estate for ten miles around. *Mahon v. Stanhope*, 3 Madd. 523, n; *Downshire v. Sandys*, 6 Ves. 110, n. The remedy by injunction is applicable to every species of waste, it being to prevent a known and certain injury. *Hawley v. Clowes*, 2 Johns. Ch. 122."

reasonably certain to happen and the waste is of a character to charge the owner with a wanton and unconscientious abuse of his rights.⁷⁸

§ 1185. **Waste of water.**—An injunction should be granted to restrain a mill-owner from opening his gates and allowing water to run to waste, when the plaintiff, an owner on the other side of the stream, taking his water from the same dam, has a right to all the water not needed for use by the defendant.⁷⁹

§ 1186. **Injury and insolvency considered.**—The owner of land in fee may enjoin a tenant from cutting and removing valuable growing timber, to the irreparable injury of the fee simple estate; and in such a case a complaint which alleges the cutting and removal, and threats to cut and remove, to the irreparable injury of the fee simple, is sufficient on demurrer.⁸⁰ And where defendants, who are holding under an adverse claim of title and are pecuniarily irresponsible, are cutting off wood and timber which give the premises their chief value, they may be restrained by injunction.⁸¹ In North Carolina an allegation of insolvency is essential to the granting of an injunction against waste of timber.

78. *Fifer v. Allen*, 228 Ill. 507, 81 N. E. 1105.

79. *Fuller v. Daniels*, 63 N. H. 395, per Blodgett, J.: "The temporary injunction heretofore granted is made perpetual. If, however, in point of fact the storage capacity of the pond or the water supply of the river has been increased by the defendant or his grantor since the conveyance to Putnam and Chase, to the extent of that increase the injunction will be modified upon application. *Whittier v. Coheco Mfg. Co.*, 9 N. H. 454."

80. *Robertson v. Meadors*, 73 Ind. 43; *Miller v. Shields*, 55 Ind. 71; *Modlin v. Kennedy*, 53 Ind. 267; *Dawson v. Coffman*, 28 Ind. 220.

81. *Piper v. Piper*, 38 N. J. Eq. 81.

And see *Southmayd v. McLaughlin*, 24 N. J. Eq. 181. In *Butman v. James*, 34 Minn. 547, *Berry, J.*, said: "The court finds that the land is chiefly valuable for its maple timber, and will be greatly damaged by cutting down the same; that defendant has at different times, under a claim of right, entered upon the land and cut down valuable maples. This is a case of irreparable injury in the equity sense. The cutting will destroy that which is essential to the principal value of the land, and in such cases an injunction is a proper and usual remedy. *Fulton v. Harman*, 44 Md. 251; *Thatcher v. Humble*, 67 Ind. 444."

except in special cases in which the injury would be irreparable, even though the defendant be solvent. Thus, an injunction will not be granted to prevent the cutting and removal of walnut trees, unless by reason of defendant's insolvency he cannot be made to compensate.⁸² The Federal Circuit Court, on a bill for account and to restrain waste, may enjoin the cutting of timber and boxing it for turpentine, and, under the Georgia statute, the injunction may issue, although there is no averment therein of defendant's insolvency.⁸³

§ 1187. **Plaintiff's laches and misconduct.**—A person having the right to cut timber from certain land for a number of years became the assignee of a mortgage on such land. He made a written assignment of the mortgage, under a verbal agreement that the timber should be free from the mortgage lien. The assignment was not recorded. Later he conveyed his interest in the timber to plaintiff. The mortgage was foreclosed, and defendant purchased the property without notice of the verbal agreement. It was held that plaintiff could not restrain defendant from cutting the timber for want of reasonable diligence to see that the release of the timber right was endorsed on the mortgage by the holder of the mortgage.⁸⁴ But the mere fact that the owner of land has permitted another for several years to cut and remove timber, does not estop him from restraining a continuance of the waste.⁸⁵ And where plaintiff in an action of ejectment, having obtained an injunction to prevent waste by defendant on land, the principal value of which consisted in its pine timber, went upon the land with a force of men and cut a large quantity of timber with the purpose of removing it, it was held that for this abuse of the process of the court, the injunction might, on defendant's application, have been revoked.⁸⁶ But a landowner who has

82. *Dunkart v. Rinehart*, 87 N. C. 224. And see *McCormick v. Nixon*, 83 N. C. 113; *Troy v. Norment*, 2 Jones Eq. 318; *Purnell v. Daniel*, 8 Ired. Eq. 9.

83. *Lanier v. Alison*, 31 Fed. 100.

84. *Beaufort Lumber Co. v. Dail*, 111 N. C. 120, 15 S. E. 941.

85. *Davis v. Hull*, 67 Iowa, 479, 25 N. W. 740.

86. *Haight v. Lucia*, 36 Wis. 355.

demised for a term of years the right of shooting over his lands, is not thereby estopped from cutting timber as he thinks fit in the ordinary management of his land, though it be injurious to the shooting.⁸⁷

§ 1188. **Account for damages.**—Where a court of equity exercises jurisdiction to restrain waste, it may incidentally decree an account and satisfaction for the waste committed.⁸⁸ In such cases to prevent a multiplicity of suits, the court will decree an account of the damages already caused by the waste, and thus settle the entire controversy between the parties, instead of compelling the plaintiff to go into a court of law for damages.⁸⁹ Where a reversioner claims damages from the tenant for life because of equitable waste to ornamental trees, the amount is measured by the damage to the inheritance.⁹⁰ A tenant for life will not be charged with sums produced by acts of waste, as cutting and selling turf, which have improved the land.⁹¹

87. *Gearns v. Baker*, L. R. 10 Ch. App. 355.

88. *Fleming v. Collins*, 2 Del. Ch. 230; *Sarles v. Sarles*, 3 Sandf. Ch. 601.

89. *Allison's Appeal*, 77 Pa. St. 221, 227; *Thomas v. Oakley*, 18 Ves. 184. And see *Souder's Appeal*, 57 Pa. St. 498; *Coleman's Appeal*, 75 Pa. St.

441; *Masson's Appeal*, 70 Pa. St. 26; *McGowin v. Remington*, 12 Pa. St. 56; *Winship v. Pitts*, 3 Paige (N. Y.), 259.

90. *Bubb v. Yelverton*, L. R. 10 Eq. 465.

91. *Harris v. Ekins*, 20 W. R. 999. And see *Birch Wolfe v. Birch*, L. R. 9 Eq. 683.

AGAINST TAXES.

CHAPTER XLI.

AGAINST TAXES.

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 1247. Federal interference in States.

Section 1189. General rule.—A court of equity will not grant an injunction to restrain the action of the taxing power, except where it may be necessary to protect the rights of the citizens whose property is taxed, and he has no adequate remedy by the ordinary processes of the law.¹ Thus the fact that an assessment was not based upon the assessor's judgment as to the value of the property

1. Dows v. City of Chicago, 11 Wall. 108, 110, 20 L. Ed. 65, per Field, J.: "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public. No court of equity will, therefore, allow its injunction to issue to restrain their ac-

tion, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary process of the law." See *Insurance Co. v. Bouver*, 7 Colo. App. 97, 42 Pac. 681; *Craighill v. Van Riswick*, 8 App. D. C. 185, 24 Wash. Law Rep. 177.

The question of the validity cannot be reviewed in a proceeding for an injunction. *Kansas City S. & G. R. Co. v. Davis*, 50 La. Ann. 1054, 23 So. 946. See, also, *Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933. See § 1233 herein.

As to objection that action to enjoin assessment is premature, see *Craighill v. Van Riswick*, 8 App.

and that he did not make or return an oath with the assessment, and the fact also that the large number of lots affected will require a multiplicity of suits are not sufficient to justify interference by injunction in Nebraska since the revenue act of that State affords an adequate remedy at law by providing that invalid or irregular taxes may be paid under protest and then recovered by a method prescribed by statute.² And the sheriff will not be enjoined from collecting a tax issued by the State Comptroller on the ground that the act under which the tax is levied is unconstitutional, as the process in such a case being null and void the sheriff is a trespasser and the plaintiff has an adequate remedy at law against him.³ Neither in such a case can an injunction be restrained on the ground that the statute has been departed from and that the assessment is illegal, as in such a case there is an ample remedy by certiorari.⁴ But an injunction against the collection of taxes

D. 185, 24 Wash. Law. Rep. 177; *Lutman v. Lake Shore & M. S. R. Co.*, 56 Ohio St. 433, 47 N. E. 248.

Where a tax has been levied to defray election expenses, most of the tax has been collected and the election held, an injunction will not be granted to restrain the levy. *Kenneweg v. Allegany County Com'rs* (Md. 1905), 62 Atl. 249.

Pleading.—One who asks a court of equity to restrain the collection of taxes must state facts which bring his case under some acknowledged head of equity jurisprudence. *Gray v. Board of School Inspectors*, 231 Ill. 63, 83 N. E. 95. See *City of Ensley v. McWilliams* (Ala. 1906), 41 So. 296.

And in a recent case in Indiana it is decided that where an action is brought to enjoin the collection of taxes it must be alleged and proved either that the property upon which the tax is assessed is not subject to taxation or that the taxes have been paid. *Nyce v. Schmoll* (Ind. App. 1907), 82 N. E. 539.

2. *Bellevue Imp. Co. v. Bellevue*, 39 Neb. 876, 58 N. W. 446. And see *Thatcher v. Adams Co.*, 19 Neb. 485; *Caldwell v. Lincoln City*, 19 Neb. 569; *Price v. Lancaster Co.*, 18 Neb. 199.

3. *United, etc., Tel. Co. v. Grant*, 137 N. Y. 7, 32 N. E. 1005.

4. *Mayor, etc., v. Davenport*, 92 N. Y. 604; *Delaware Canal Co. v. Atkins*, 121 N. Y. 246, 24 N. E. 319; *Dusenbury v. Mayor, etc.*, 25 N. J. Eq. 295, 297; *State Railroad Tax Cases*, 92 U. S. 575, 614, 23 L. Ed. 663, per Miller, J.: "We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes; but we may say, that, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after payment of

levied on property as real estate may be granted where it appears

taxes will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere, as it would in any transaction between individuals, is, that it has no power to apportion the tax or to make a new assessment or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise, by the constitutions of all the States, and by the theory of our English origin, is exclusively legislative. A court of equity is, therefore, compared in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice, by making, or causing to be made a new assessment on any principle it may decide to be the right one. In this manner it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious that he ought to pay a tax if imposed in the proper manner." *Hannewinkle v. Georgetown*, 15 Wall. 547, 548, per Hunt, J.: "It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be allegation of fraud; that it creates a cloud upon the title; that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction." *McClung v. Livesay*, 7 W. Va. 329; *Doug-*

lass v. Harrisville, 9 W. Va. 162, where the court cited *Dows v. Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Heywood v. Buffalo*, 14 N. Y. 534; *Bull v. Read*, 13 Gratt. (Va.) 78; *Susquehanna Bank v. Supervisors*, 25 N. Y. 312; *Cook County v. Chicago, etc.*, R. Co., 35 Ill. 465, and held there was no case for injunction because plaintiff could have paid the tax and then have an action to recover it back or might have prosecuted both the officer and town for damages. *Bogert v. Elizabeth*, 25 N. J. Eq. 426; *Dusenbury v. Mayor*, 25 N. J. Eq. 295; *Wells, Fargo & Co. v. Dayton*, 11 Nev. 161; *Bank of Columbus v. Hines*, 3 Ohio St. 36; *Lucas County v. Hunt*, 5 Ohio St. 488; *Williams v. Mayor*, 2 Gibbs. (Mich.) 582; *Hope v. Sawyer*, 14 Ill. 254; *Clarke v. Ganz*, 21 Minn. 387; *Van Doren v. The Mayor*, 9 Paige, 388; *Burnes v. The Mayor*, 2 Kan. 454; *The City Council v. Sayre*, 65 Ala. 564; *Sayre v. Tompkins*, 23 Mo. 443; *Barrow v. Davis*, 46 Mo. 394; *McPike v. Pew*, 48 Mo. 525; *Harkness v. The District of Columbia*, 1 McArthur, 121; *Warden v. Board*, 14 Wis. 618; *Kellogg v. City*, 14 Wis. 623; *Mills v. Gleason*, 11 Wis. 497; *Stokes v. Knarr*, 11 Wis. 389; *Ableman v. Roth*, 12 Wis. 91; *Heywood v. The City of Buffalo*, 14 N. Y. 534; *Mooers v. Smedley*, 6 Johns. Ch. 27; *Dodd v. Hartford*, 25 Conn. 239; *Green v. Mumford*, 5 R. I. 478; *Messeck v. Supervisors*, 50 Barb. 190; *Heine v. The Levee Commissioners*, 19 Wall. 660; *Alabama Gold Life Ins. Co. v. Lott*, 54 Ala. 499; *The Susquehanna Bank v. The Board of Supervisors*, 25 N. Y. 312; *The Mutual Benefit Life Co. v. The Board*, 33 Barb.

that taxes have already been levied and paid upon the same property as personal property.⁵

§ 1190. Reason of the rule.—The general rule is that the collection of taxes will not be arrested by injunction. It has its reason in public policy, which cannot lend its sanction to any remedial proceeding which might clog the machinery of civil administration. If the tax complained of will not amount to more than a mere trespass the complainant will be remitted to his remedy at law.⁶ Where the corporate limits of a town are changed after the ending of the tax year, but before the taxes have been collected, the collection of the same will not be enjoined. And a bill to enjoin the collection of taxes on the ground of the illegality of the assessment should aver wherein the assessment and proceeding fell short of legal requirements; it is not sufficient to state that the same were illegal.⁷ The principal reason why a court of equity will not grant an injunction against the collection of a tax is, that it has no power to apportion the tax or to make a new assessment, or to direct another to be made by the proper officers of the State. These officers, and the manner in which they shall exercise their functions, are wholly beyond the power of the court when so acting. The levy of taxes is not a judicial function. Its exercise by the constitutions of all the States is exclusively legislative. A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of, in whole or in part, without any power of doing complete justice, by making, or causing to be made, a new assessment, on any principle it may decide to be the right one.

322; *Hixon v. Oneida County*, 82 Wis. 515, 52 N. W. 445; *Stewart v. Com'rs*, 45 Kan. 708, 26 Pac. 683; *Western R. R. Co. v. Nolan*, 48 N. Y. 513, holding that the rule denying the right to interfere by injunction to restrain the collection of a tax is one of public policy, and it is equally applicable to the case of an assessment.

5. *Hanberg v. Western Cold Stor-*

age Co., 231 Ill. 32, 82 N. E. 842.

6. *New Decatur v. Nelson*, 102 Ala. 556, 15 So. 275; *Alabama, etc., Ins. Co. v. Lott*, 54 Ala. 499; *City Council v. Sayre*, 65 Ala. 564; *Land Co. v. Ayres*, 62 Ala. 413; *Bank v. Mayor*, 62 Ala. 284; *Mayor v. Baldwin*, 57 Ala. 61; *Cooley, Tax'n*, p. 760.

7. *New Decatur v. Nelson*, 102 Ala. 556, 15 So. 275.

In this manner it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it is obvious that he ought to pay a tax if imposed in the proper manner.⁸

§ 1190a. **Where adequate remedy at law.**—The general rule that where the remedy at law is inadequate a court of equity will not interfere to grant relief by injunction applies to those cases where such relief is sought against an assessment or tax.⁹ Thus, it has been so held where a person had a remedy at law in an action to recover back an assessment paid by him.¹⁰ And likewise where a person has an adequate remedy by mandamus an injunction will not be granted.¹¹ But it has been decided that there is not an adequate legal remedy within the meaning of the rule from the fact that a person may defend an action to collect the tax where it appears that a penalty and fine is imposed by statute for a failure to pay the tax within a specified time.¹²

§ 1191. **Adequate statutory remedy.**—In many States the right is given by statute to a taxpayer to an injunction under certain conditions against the levy or collection of a tax or assessment.¹³ In others, however, a remedy other than by injunction is

8. *State Railroad Tax Cases*, 92 U. S. 575, 614-15, 23 L. Ed. 663. See preceding note.

9. *United States*.—*Linehan Ry. Transfer Co. v. Pendergrass*, 70 Fed. 1, 16 C. C. A. 585, 36 U. S. App. 48.

Minnesota.—*Schumacher v. Board of Commissioners* (Minn. 1906), 105 N. W. 1125.

Nebraska.—*Webster v. Lincoln*, 50 Neb. 1, 69 N. W. 394.

North Carolina.—*Hilliard v. Asheville*, 118 N. C. 845, 24 S. E. 738.

West Virginia.—*Riddle v. Charlestown*, 43 W. Va. 796, 28 S. E. 831.

See, also, cases cited in following section.

10. *Hilliard v. Asheville*, 118 N. C.

845, 24 S. E. 738. Compare *Bank of Kentucky v. Stone*, 88 Fed. 383.

11. *Beidler v. Kochersperger*, 171 Ill. 563, 49 N. E. 716; *Callister v. Kochersperger*, 168 Ill. 334, 48 N. E. 156.

12. *Bank of Kentucky v. Stone*, 88 Fed. 383.

13. *Mississippi*.—See *Yazoo & M. V. R. Co. v. Adams*, 73 Miss. 648, 19 So. 91.

New York.—See *Gerlach v. Brandreth*, 34 App. Div. 197, 54 N. Y. Supp. 479.

Ohio.—*Cleveland, C., C. & St. L. R. Co. v. Logan County*, 17 Ohio C. C. 436.

provided by the general statutes of the State or by the particular statute or act under which the tax is levied, and where such a remedy is given it is generally exclusive of any right to an injunction.¹⁴ So it has been held in Minnesota that the statute of 1885 creating liability for damages caused by the change of grade of a city street and providing for a special tax or assessment on property benefited to pay the same, is not unconstitutional because the subject thereof is not properly expressed in its title; and that the provisions of such act providing for such special assessment on the property benefited are not unconstitutional because they do not give the owners of such property a right to be heard as to who shall be appointed assessors, or a right to appeal from such appointment; and that such property owners cannot restrain by injunction the proceedings to assess such special tax for benefits on the ground of irregularities in the assessment proceedings, for the reason that the right given by statute to defend in the proceedings to obtain the tax judgment and the right to review such judgment by appeal afford such owners an adequate remedy at law.¹⁵

Oklahoma.—Wallace v. Bullen, 6 Okla. 17, 52 Pac. 954.

Utah.—Mercer Gold Min. & M. Co. v. Spry, 16 Utah, 222, 52 Pac. 382.

Washington.—Knapp v. King County, 17 Wash. 567, 50 Pac. 480.

14. *United States.*—Pittsburgh, C., C. & St. L. R. Co. v. West Virginia Public Works, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354.

Indiana.—Alley v. Lebanon, 146 Ind. 125, 44 N. E. 1003.

Minnesota.—Schumacher v. Board Commissioners (1906), 105 N. W. 1125.

Nebraska.—Western Union Teleg. Co. v. Douglass County (1906), 107 N. W. 985; Taylor v. Davey, 55 Neb. 153, 75 N. W. 553.

New York.—See In re City of New York, 114 App. Div. 519, 100 N. Y. Supp. 140.

North Carolina.—Hilliard v. Asheville, 118 N. C. 845, 24 S. E. 738.

Pennsylvania.—Thrall v. Williamsport, 18 Pa. Co. Ct. R. 330.

Virginia.—Johnson v. Trustees of Hampton N. & A. I. (1906), 54 S. E. 31.

United States Rev. Stat., sec. 3224, construed. See United States v. Nebraska Distilling Co., 80 Fed. 285, 25 C. C. A. 418, 46 U. S. App. 704; Craighill v. Van Riswick, 24 Wash. Law Rep. 177, 8 App. D. C. 185; Burgdorf v. District of Columbia, 24 Wash. Law Rep. 21, 7 App. D. C. 405.

15. *Kelly v. Minneapolis*, 57 Minn. 294, 59 N. W. 304, per Cady, J.: "The title to the act is 'An act amending section 2 of chapter 8 of the charter of the city of Minneapolis.' The title is sufficient.

§ 1192. **Certiorari.**—Under the provision of the New York consolidation act that no suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, a landowner cannot obtain the vacation of an assessment by means of a writ of certiorari to review the action of the assessors and board of revision, but must resist the levy upon his property if the assessment is void, or where the invalidity arises outside the record, may pay the assessment and then recover it back from the city.¹⁶

State v. Madson, 43 Minn. 438, 45 N. W. 856; *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110. Appellants claim that the statute authorizing these assessments is unconstitutional, because the parties whose property is assessed have no opportunity to be heard as to who shall be appointed on the assessing commission, and no appeal is allowed in which a new commission may be appointed by the court after hearing. It is well settled that, as against the State, property owners have no such constitutional rights, whether the assessment is of some regular tax for general purposes upon the regular tax districts, or of some special tax for a special purpose upon the district specially benefited. *Hennepin Co. v. Bartleson*, 37 Minn. 343, 34 N. W. 222; *Carpenter v. City of St. Paul*, 23 Minn. 232; *State v. District Court of Ramsey Co.*, 33 Minn. 295, 23 N. W. 222; *Rogers v. City of St. Paul*, 22 Minn. 494. Appellants further claim that the tax districts designated by the commissioners are too small; that a large area of the city was benefited by, and should be assessed for, these improvements; that the boundaries of the district are arbitrarily fixed; and that property within the district has been omitted which should be assessed. It may be well to remark that the size and shape

of the tax districts might properly have been influenced, to some extent, by the fact that similar improvements were at the same time being made on Third and Fourth streets, and were by the mandamus proceedings provided for on Seventh street, all of which, as well as the improvements on this street, will connect North Minneapolis with the southern part of the city. But injunction will not lie to restrain tax proceedings when there is an adequate remedy provided by the statute. It has been held that certiorari will not lie to the board making such an assessment to review such errors; that the only remedies for reviewing the acts of the assessing board are the right given to defend in the proceedings to obtain the tax judgment, and the remedies allowed for reviewing that tax judgment in this court. *State v. Board of Public Works*, 27 Minn. 442, 8 N. W. 161. If the assessment proceedings cannot, prior to the final determination and entry of the tax judgment, be reviewed for such errors by the direct proceeding of certiorari, how can such proceedings for such errors be attacked collaterally by injunction? The other assignments of error have no merit."

16. *Martin v. Meyers*, 133 N. Y. 627, 32 N. E. 241, per Finch, J.:

§ 1193. **Irregularities in the assessment.**—The courts will not interfere by injunction, to prevent the collection of taxes, because

“The purpose of the writ of certiorari issued in this proceeding is to review the action of the assessors and board of revision in levying an assessment for improving the roadway of what is described as the ‘Kingsbridge Road’ in the city of New York. The work was commenced in 1888, completed in 1889, and the assessments made and confirmed in 1890. The petitioner alleges jurisdictional defects, which make the assessment absolutely and wholly void, and seeks an affirmative judgment annulling and vacating the entire proceeding. Refusing to avail himself of the special remedy given by the Consolidation Act, he claims the right to vacate the assessment by an affirmative application for that sole purpose. It is quite certain, and we have so held, that the owner of land subjected to the apparent lien of a void assessment may resist a levy upon his property for its payment; or, where the invalidity arises outside of the record, and does not appear on its face, may pay the assessment, and then recover it back from the city. *Chase v. Chase*, 95 N. Y. 373; *In re Smith*, 99 N. Y. 424, 2 N. E. 52; *Jex v. Mayor, etc.*, 103 N. Y. 536, 9 N. E. 39, and 111 N. Y. 339, 19 N. E. 52. But beyond these remedies for a void assessment, which no statute has taken away, and outside of the special remedy for fraud or substantial error given by the Consolidation Act, it is now claimed that a void assessment may be vacated by an affirmative proceeding on the part of the landowner through the operation and effect of a writ of certiorari, and whether that is permissible or not becomes the pri-

mary question on this appeal. In framing the special remedy for fraud or substantial error the legislature took occasion to limit and restrain the application of other and existing remedies. It provided that no suit or action in the nature of a bill in equity or otherwise should be commenced for the vacation of any assessment in said city, or to remove a cloud upon title, but owners of property shall be confined to their remedies to have proceedings under that title. We have described this provision as broad and unqualified, and applicable to all assessments. *Eno v. Mayor*, 68 N. Y. 214; *Mayer v. Mayor*, 101 N. Y. 284, 4 N. E. 336. By its terms, an assessment can only be vacated or modified through the affirmative action of the landowner by resort to the special remedy provided. To forbid the vacating of an assessment by a bill in equity, and yet permit it upon a certiorari, would deprive the intended restraint of all its force, and is prevented by the express limitation which confines the affirmative action of the landowner to the special remedy provided. Although most of the provisions of title 3 of the Consolidation Act relate to assessments made before June 9, 1880, we have ruled that the special remedy by petition to correct assessments made after that date remains, and is regulated by section 903. Under its provisions the landowner can obtain no other relief than a reduction of his assessment to a just proportion of the fair value of the work done. *In re Feust*, 121 N. Y. 229, 24 N. E. 479. That case clearly intimates that no other affirmative

there have been irregularities in the assessment.¹⁷ So where it does not appear that persons whose lands were assessed for repair of a drain were not given notice in time to appeal, they cannot maintain an injunction on the ground of irregularities in the proceedings of the township trustee.¹⁸ But in Michigan a non-resident

remedy to vacate or set aside the assessment remains to the landowner, and that is true, under the explicit language of the section, even where the assessment is void. In *re Smith*, *supra*; and so the general term in New York have been constrained to hold that a certiorari cannot properly issue to vacate an assessment. *People v. Myers* (Sup.), 19 N. Y. Supp. 723. Where the error complained of consists in some matter of form amounting to an irregularity, or some injury resulting from fraud, the special remedy of a reduction will usually give adequate relief. But where it is sought to vacate the assessment entirely as void, and a nullity, the Consolidation Act interposes its prohibition, and the combined force of sections 897 and 903 leaves to the landowner aggrieved no affirmative right to vacate, and remits him wholly to his defense when his property is levied upon, or in some cases to his right to remove the apparent lien by paying the tax, and then suing to recover it back."

See, also, *McKee Land & I. Co. v. Swikehard*, 23 Misc. R. (N. Y.) 21, 51 N. Y. Supp. 399.

17. United States. — *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 31 C. C. A. 537, 60 U. S. App. 166.

California.—*Hellman v. Shoulters*, 114 Cal. 136, 45 Pac. 1057, *aff'g.* 114 Cal. 141, 44 Pac. 915.

District of Columbia.—*Burgdorf v. District of Columbia*, 24 Wash. Law Rep. 21, 7 App. D. C. 405.

Indiana.—*Studabaker v. Studabaker*, 152 Ind. 89, 51 N. E. 933; *Alley v. Lebanon*, 146 Ind. 125, 44 N. E. 1003.

Kansas.—*Dutton v. Citizens Nat. Bank*, 53 Kan. 440, 36 Pac. 719; *Seward v. Rheiner*, 2 Kan. App. 95, 43 Pac. 423.

Kentucky.—See *Pineville v. Burchfield*, 19 Ky. Law Rep. 984, 42 S. W. 340.

Oklahoma.—*Boyd v. Wiggins*, 7 Okla. 85, 54 Pac. 411; *Sweet v. Boyd*, 6 Okla. 699, 52 Pac. 939.

Oregon.—*Portland Hibernian Ben. Soc. v. Kelly*, 28 Ore. 173, 42 Pac. 3, 30 L. R. A. 167.

Wisconsin.—*Chicago & N. W. Ry. Co. v. State*, 128 Wis. 553, 108 N. W. 557; *Hayes v. Douglass County*, 92 Wis. 429, 65 N. W. 482, 31 L. R. A. 213.

"If we permit the injunction to be issued where the tax is authorized by law and the thing taxed is liable to that tax, there is no stopping point short of enjoining all taxes, whenever any irregularity has intervened. This power the court of chancery has never assumed, nor could it, without the most disastrous consequences to the State." *Chicago, etc., R. Co. v. Frary*, 22 Ill. 34, 37, per Caton, C. J.

18. Trimble v. McGee, 112 Ind. 307; 14 N. E. 83; *Wisman v. McGee*, 112 Ind. 600, 14 N. E. 375.

Tax assessments will not be enjoined for mere irregularities, particularly where the irregularities are the result of the taxpayer's negli-

landowner who has not been served with the notice required by law¹⁹ either personally or by publication, and has not waived it, is entitled to have the collection of a special tax levied for the construction of a drain restrained and the taxes and assessments set aside.²⁰ Again, an irregularity in an assessment for the construction of a ditch is not available to restrain an assessment for its repair.²¹ And irregularities and informalities in levies by school authorities cannot be questioned by a bill in equity. If officers authorized to make the assessment make it, then mere irregularities in the proceedings under which it was made cannot give a court of chancery jurisdiction to restrain its collection.²²

gence. *Covington v. Rockingham*, 93 N. C. 134.

Injunction will not lie to prevent a mere formal wrong in the collection of a tax, where nothing substantial is involved in the case. *Dickhaus v. Olderheide*, 22 Mo. App. 76.

An injunction will not lie, merely because of errors and irregularities in the proceedings of a tax assessor, to restrain the collection of taxes justly chargeable. *Kansas Mut. Life Ass'n v. Hill* (Kan.), 33 Pac. 300. Gen. Stat. Kan. 1889, authorizes cities of the first class to make special assessments for paving streets, and provides that "no suit to set aside the said special assessments or to enjoin the making of the same shall be brought, nor any defense to the validity thereof be allowed, after the expiration of 30 days from the time the amount due on each lot or piece of ground is ascertained." It was held that the amount due is ascertained when the ordinance making the assessment and designating the amount levied on each lot is published and takes effect, and, after 30 days from that time, the collection of the assessment cannot be enjoined on account of irregularities in the proceedings. *Hammerslough v. Kan-*

sas City, 46 Kan. 37; 26 Pac. 496.

A majority of the complainants having voted in favor of the approval of a local school law, and all of them having acquiesced in the result of the election until after a school was established and put into operation, an interlocutory injunction restraining the collection of a tax authorized by the local law, and levied for supporting the public school system provided for by said law, is properly denied. *Irvin v. Gregory*, 86 Ga. 605; 13 S. E. 120.

One who has made no objection to the construction of a drain, who has conveyed a right of way for it across his land, has had notice of the time for reviewing assessments, as for every other step in the proceedings, has aided in the work, and received all the benefits of it, is estopped, in equity, to contest his assessment for irregularities in the proceedings. *Hall v. Slaybaugh*, 69 Mich. 484; 37 N. W. 545.

19. Act No. 272, Pub. Acts 1899, Ch. 4, § 1.

20. *Hoffman v. Shell*, 151 Mich. 669, 115 N. W. 979.

21. *Davis v. Lake Shore R. Co.*, 114 Ind. 364; 16 N. E. 639.

22. *Gray v. Board of School In-*

And failure of a surveyor to give notice of an assessment for the repair of a public ditch, as required by law, is ground for an injunction; but his failure to make out a certified copy of the assessment is not, such failure not invalidating his proceedings.²³

§ 1194. Same subject; official discretion; plaintiff's default.—

Where, in an action by several property owners to enjoin the collection of certain assessments for benefits to their property by the opening of a street, the bill alleged that plaintiffs were not made parties, and had no notice of such proceedings; that the special tax bills were a cloud on the title of their property; and that plaintiffs were liable to be harrassed by a multiplicity of suits, it was held, that equity would not interfere, since plaintiffs had an adequate defense in any action at law for the collection of the tax if they were not notified of condemnation proceedings.²⁴ And where the president of a bank makes a return to the proper assessor, verified by his oath, showing that the bank is the owner of stock in a corporation of a certain value, and thereafter such return is properly filed in the office of the county clerk, and upon such return taxes are assessed and levied against the bank, the bank cannot enjoin the collection of such taxes on the ground that its capital stock is held by individual stockholders, as no showing for equitable relief on the part of the bank is presented, since the assessment and levy complained of were induced solely by the action of the bank.²⁵ And where the cashier of a banking corporation organized under the State law delivers to the assessor a personal property statement of the taxable property of the bank, and by mistake gives an amount exceeding that for which the bank is liable to be taxed, but does not give any list of the stockholders or the amount of the undivided profits or surplus, as required by law, and this is never done by any agent or officer of

spectors, 231 Ill. 63, 83 N. E. 95, citing *Schmohl v. Williams*, 215 Ill. 63, 74 N. E. 75; *Reynolds v. Drainage District*, 134 Ill. 268, 25 N. E. 516.

23. *Davis v. Lake Shore R. Co.*, 114 Ind. 364, 16 N. E. 639.

24. *Michael v. City of St. Louis*, 112 Mo. 610, 18 S. W. 967.

See preceding section.

25. *Winfield Bank v. Nipp*, 47 Kan. 744; 28 Pac. 1015. See *Bank v. Fisher*, 45 Kan. 726; 26 Pac. 482.

the bank, and no proper steps are ever taken to correct the mistake made by the cashier, the collection of taxes afterwards levied on the amount so given by the cashier will not be restrained, it not appearing that the stockholders have been assessed or taxed, or that the taxes against the bank are more than it and its stockholders could pay.²⁶ Again, an injunction will not be awarded to restrain the sale of personal property by a tax collector, where the bill avers that a portion of the land assessed was not the property of plaintiff's intestate; that plaintiff was willing to work out the road tax, but was not permitted to do so; that part of the tax has been paid; that the property levied upon is the personal property of plaintiff, and not the property of the estate of which plaintiff is administratrix; and that the land is of sufficient value to pay the taxes.²⁷ In the absence of any showing that parties whose lands had been assessed for repair of a drain were not given notice of such assessments in time to appeal, they cannot enjoin the collection thereof for informalities and irregularities in the proceedings of the township trustee, there being no grounds shown for such equitable relief.²⁸ And where to a certain court is given full jurisdiction of proceedings in relation to a special assessment, equity will not enjoin the collection of the assessment as authorized by said court.²⁹ If, in the exercise of an honest judgment, the taxing directors refuse a claim for exemption, equity will not revise their judgment by injunction; if they wantonly and maliciously refuse, the remedy is against them personally.³⁰ Tax assessments ought not to be vacated, and property released altogether, because the public officers have not strictly followed the provisions of law, which are merely directory; assessments are not invalid if such directions are not complied with.³¹ Where an affidavit is presented to the assessors by the owner of property subject to the taxation, for the purpose of reducing the amount of the tax,

26. *The Bank of Santa Fe v. Buster*, 50 Kan. 356, 31 Pac. 1094.

27. *Black v. Boyd*, 155 Pa. St. 163, 26 Atl. 5.

28. *Thimble v. McGee*, 112 Ind. 307, 14 N. E. 83.

29. *Kedzie v. West Chicago Park Commissioners*, 114 Ill. 280.

30. *Clinton School District's Appeal*, 56 Pa. St. 315.

31. *O'Neal v. The Virginia & Maryland Bridge Co.*, 18 Md. 1.

although it may be their duty to correct the assessment, in accordance with such affidavit, still the court has no power to restrain by injunction, the collection of taxes so irregularly assessed.³² The remedy of a party against whom taxes are erroneously assessed is, by application to the board of equalization for a correction of the error, and not by injunction.³³ And irregularities in the assessment and tax rolls, such as the description of land partly by reference to preceding descriptions and the use of ditto marks, the omission of owners' names, etc., are held not to be grounds for relief in equity, where the assessor acts in good faith, the assessment is intelligible and certain, no inconvenience or embarrassment is caused to the plaintiffs, and none of such irregularities result in charging them with more than their just and equitable portion of the taxes.³⁴ Mandamus, not injunction, affords the remedy of one whose land is to be conveyed by the county commissioners in pursuance of an irregular sale for taxes.³⁵ The fact that property subject to taxation has not been listed, although it improperly increases the burden of taxation upon the property that is listed, does not render the tax wholly void, or authorize the interference of a court of equity.³⁶ Nor will equity interfere to relieve a party on the ground that assessments are irregular and unauthorized by the strict provisions of law, where they are substantially authorized by and made in reliance upon his own express agreement.³⁷ Again, where the assessment roll does not distinguish who are residents and who non-residents, it is immaterial.³⁸ And a court of equity will not enjoin the collection of a general, or of a sidewalk tax, of a town or city, on the mere ground that it has been improperly assessed against the complainant, and that his real estate has been levied upon, and is

32. *Livingston v. Hollenbeck*, 4 Barb. 9.

33. *Macklot v. The City of Davenport*, 17 Iowa, 379.

34. *Hixon v. Oneida County*, 82 Wis. 515, 52 N. W. 445.

35. *Miller v. Madden*, 35 Kan. 455. If one would have an injunction against the issue of a tax deed,

the sale having been irregular, he must pay or tender the amount which is due. *Ibidem*.

36. *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 1.

37. *Jackson v. The City of Detroit*, 10 Mich. 248.

38. *Williams v. Mayor*, 2 Mich. 560.

about to be sold, for its satisfaction.³⁹ If persons having no pretense of legal authority were to levy a tax, or if persons not holding an office to which the power to levy a tax is incident, or holding an office to which it is not incident, were to levy a tax, the court might interpose. But if other officers *de facto* or *de jure*, exercising an office to which the power is incident, exercise it, the court will not interpose to prevent its collection.⁴⁰

§ 1195. Further illustrations.—Equity will not relieve the owner of property from the payment of road taxes, on account of irregularities in the manner of their return to the board of supervisors.⁴¹ And the collection of a road tax which was in fact legally levied but not certified to the board of supervisors within the proper time, by the township clerk, and was properly listed by the county auditor, will not be enjoined by a court of equity.⁴² Nor does the neglect to enter the levy of a tax upon the county commissioner's record, as required by law, authorize the issuing of an injunction against its collection.⁴³ And the listing or assessing of railroad property in a wrong name as owner, forms no ground for enjoining the collection of the tax thereon.⁴⁴ The rule that an injunction for an irregularity will not be granted, is also applicable to an assessment for a local improvement, as well as to a State and county tax,⁴⁵ and has been applied in numerous other cases.⁴⁶

39. *Greene v. Mumford*, 5 R. I. 472. Nor will equity give any remedy in such a case; the remedy at law being sufficient. *Ibidem*.

40. *Metz v. Anderson*, 23 Ill. 463.

41. *The Iowa Railroad Land Co. v. The County of Sac*, 39 Iowa, 124.

42. *The Iowa Railroad Land Co. v. Carroll County*, 39 Iowa, 151.

43. *The Kansas City, etc., R. Co. v. Tontz*, 29 Kan. 460.

44. *Union Trust Co. v. Weber*, 96 Ill. 346.

45. *Dean v. Davis*, 51 Cal. 406.

46. In further illustration of the rule, that mere irregularities in the

assessment do not warrant an injunction, see: *Gillette v. City of Denver*, 21 Fed. 822; *Center County v. Black*, 32 Ind. 468; *Brown v. Heron*, 59 Ind. 61; *City of Delphi v. Bowen*, 61 Ind. 29; *Warden v. Supervisors*, 14 Wis. 618; *Kellogg v. Oshkosh*, 14 Wis. 623; *Whittaker v. City*, 33 Wis. 76; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Schofield v. Watkins*, 22 Ill. 66; *Chicago, etc., R. Co. v. Frary*, 22 Ill. 34; *Merritt v. Farris*, 22 Ill. 303; *Munson v. Minor*, 22 Ill. 694; *Hallenbeck v. Hohn*, 2 Neb. 377; *Gay v. Hebert*, 25 La. Ann. 196; *Floyd v. Gilbreath*,

§ 1196. **Restraining the execution of a deed.**—Equity will not interpose to restrain the execution of a deed of land sold for taxes,

27 Ark. 675; *Murphy v. Harbison*, 29 Ark. 340; *Rockingham Savings Bank v. Portsmouth*, 52 N. H. 17; *Brown v. Concord*, 56 N. H. 375; *Challiss v. Commissioners*, 15 Kan. 49; *Stebbins v. Challis*, 15 Kan. 55; *Parker v. Challis*, 9 Kan. 155; *Smith v. Commissioners*, 9 Kan. 296; *City of Lawrence v. Killam*, 11 Kan. 499; *Albany Co. v. Auditor*, 37 Mich. 391; *Hall v. Houston*, 39 Tex. 286; *Rio Grande v. Scanlan*, 44 Tex. 649; *Newman v. City of Emporia*, 41 Kan. 589; 21 Pac. 593; *Henderson v. Rainbow (Iowa)*, 41 N. W. 29. Seven years after the county board had made an order establishing a ditch, under the act of March 9, 1875 (1 Rev. St. Ind. 1876, p. 428), plaintiff filed his complaint to enjoin the sale of his land on account of a ditch certificate issued by the auditor for work done thereon. The complaint did not show when plaintiff became the owner of the land, and averred that the viewer's report, on which the order was made, did not apportion any benefit to the plaintiff or his land, nor assess any benefit to it, nor in any manner mention plaintiff or his land. It was held that the averments were insufficient to show the invalidity of the certificate, it being presumed that the ditch was constructed over plaintiff's land, and that the viewers awarded to its then owner, perhaps by an erroneous description of the land, his proportionate share of the cost of the ditch. *Baker v. Clem*, 102 Ind. 109, 26 N. E. 215. The act providing in section 12 that, if any one shall fail to construct the portion of the ditch set off to him, the work shall be let, and,

on completion and acceptance thereof by the auditor, he shall issue a certificate to the one doing the work for the amount due, and shall enter the amount on the tax duplicate against the land, the invalidity of the certificate is not shown by an averment that the one to whom it was issued did not complete the work, it not appearing that he had not done work to the full amount of the certificate. —Id. An injunction restraining the collection of taxes will be granted, in Pennsylvania, where the assessors of a city of the third class have made an assessment for city purposes greatly in excess of the triennial assessment for State and county purposes made the previous year. *Kemble v. Titusville City*, 135 Pa. St. 141, 19 Atl. 946.

Where a village tax ordinance is void, the corporation, and all persons aiding to enforce it, are responsible for the consequences to the owner if he is injured thereby, for which reason, and because the amount involved in the present case is inconsiderable, and because it is sound policy to use *ad interim* injunctions sparingly on questions of taxation, the refusal to grant the injunction was not error. *Verdery v. Village of Summerville*, 82 Ga. 138, 8 S. E. 213.

A bill by a mortgagee to restrain a purchaser of the premises at tax-sale from taking out a deed thereon alleged that such deed would take away and destroy complainant's interest and destroy his security for the debt. It appeared that there were four other lots included in said mortgage, worth

on the ground that the tax proceedings are irregular or void, unless it also appears that the proceedings are inequitable, and

at their fair cash value about the amount of the debt, and also another mortgage held by complainant as additional security on 100 acres of farming land. It did not appear that the mortgagor was unable or unwilling to pay, or that complainant would be obliged to bring suit. The tax-sale was regular, and defendant's title as purchaser had, as against the mortgagor, been established by judgment of the supreme court. It was held that complainant was not entitled to relief. *Cook v. Miller*, 26 Ill. App. 421. In a suit by a corporation operating a canal and railroad to enjoin the collection of taxes on certain coal pockets on the ground that they are appurtenant and indispensable to the operation of the railroad and canal, where two affidavits are filed by plaintiff alleging that the pockets are an indispensable part of its canal and railroad in the transfer of coal from the railroad to the boats in the canal, and are absolutely necessary to the transportation of coal, and the two opposing affidavits merely deny in a general way that the pockets are appurtenant and indispensable to the canal, without denying that they are a necessary means of transmitting coal from the land to the boats, it is error to dissolve a preliminary injunction. *Lehigh Coal & Nav. Co. v. Miller* (Pa.), 26 Atl. 660.

Complainant failed to return his property for taxation, and assessor returned it, as required by act Pa. June 30, 1885, notifying complainant, who, after the time for appeal, applied to the commissioners for relief, alleging

that he was misled by the figures in the notices. The commissioners offered to substitute his return for that of the assessor even then, if he would file one, which he failed to do. It was held that the collection of the tax would not be enjoined. *Appeal of Van Nort*, 121 Pa. St. 118, 15 Atl. 473.

Where plaintiff furnished to the county treasurer an incomplete list of her property, asking delay in the payment of her taxes, and later taking a receipt, which included but half her tax, paid the amount of it, and, failing to examine the receipt, permitter her property to be sold for the residue of her tax, and a certificate to be transferred to a third person, she cannot have the sale certificate set aside because a part of tax paid was illegal. *Franz v. Krebs*, 41 Kan. 223, 21 Pa. 99.

Under the statute it was the county auditor's duty to search for property omitted from assessment. Under a void contract with the county commissioners he made the search in expectation of a compensation besides his salary. The property so discovered was added to the tax duplicate. It was held that these facts gave to the owner no right to demand an injunction against the collection of the tax. *Vandercook v. Williams*, 106 Ind. 345.

Comp. St. Neb. Ch. 77, § 144, provides that no injunction shall be granted to restrain the collection of any tax unless the tax sought to be enjoined be levied or assessed for an illegal or unauthorized purpose.

that it will be against conscience to let them go on.⁴⁷ But where the purchaser at a sale for an invalid street assessment tax will become entitled to a deed if plaintiff does not redeem from the assessment within a specified time, it is proper to grant an injunction against the execution of the deed as incidental to an action for the annulment of the invalid assessment and the cancellation of the certificate of sale.⁴⁸

Chapter 14, § 69, provides that cities may enact ordinances for the construction of sidewalks and may levy a special tax on property fronting on a highway to pay for such improvement. It was held that an injunction would not be granted at the instance of an abutting owner, to restrain the collection of a tax imposed for the construction of a sidewalk, although irregularities were committed in making the assessment. *Wilson v. City of Auburn*, 27 Neb. 435; 43 N. W. 257.

47. *Warden v. The Board of Supervisors*, 14 Wis. 618.

Equity will not interfere to aid a delinquent taxpayer or to stay proceedings at law, for mere irregularity, or when it appears that the moneys demanded are justly and equitably due on account of taxes, but will leave him to his legal remedies. *Kellogg v. City of Oshkosh*, 14 Wis. 623.

In *Myrick v. The City of La Crosse*, 17 Wis. 442, it was held that the practice of restraining the sale of lands for illegal taxes or assessments had been long established in Wisconsin. See *Sigel v. Supervisors*, 26 Wis. 70. But see *Hixon v. Oneida County*, 82 Wis. 515, where the doctrine that a court of equity will not interfere to declare a tax invalid and restrain its collection, is reaffirmed with emphasis.

See *Movell v. Irey*, 47 Neb. 213, 66 N. W. 289; *Yates v. Milwaukee*, 92 Wis. 352, 66 W. 248; *Mills v. Gleason*, 11 Wis. 497; *Warden v. Fond du Lac County*, 14 Wis. 618, 621; *Miltimore v. Rock County*, 15 Wis. 9; *Dean v. Gleason*, 16 Wis. 1; *Crane v. Janesville*, 20 Wis. 305; *Ballard v. Appleton*, 26 Wis. 67; *Whittaker v. Janesville*, 33 Wis. 76; *Mills v. Charleton*, 29 Wis. 400; *Fifield v. Marinette County*, 62 Wis. 532; *Wisconsin Central R. Co. v. Lincoln County*, 67 Wis. 478; *Canfield v. Bayfield County*, 74 Wis. 60; *Boorman v. Juneau County*, 76 Wis. 550; *Green Bay Canal Co. v. Outagamie County*, 76 Wis. 588; *Kaehler v. Dobberpuhl*, 56 Wis. 480; *Wisconsin Cent. R. Co. v. Ashland County*, 81 Wis. 1; and see the following cases which depart somewhat from the above: *Marsh v. Clark County*, 42 Wis. 502; *Philleo v. Hiles*, 42 Wis. 527; *Tierney v. Union L. Co.*, 47 Wis. 248; *Schettler v. Ft. Howard*, 43 Wis. 48; *Goff v. Outagamie County*, 43 Wis. 55; *Plumer v. Marathon County*, 46 Wis. 163.

48. *Kittle v. Bellegarde*, 86 Cal. 556, 25 Pac. 55; *Kittle v. McMullen* (Cal.), 25 Pac. 58. Under Pub. Acts 1889, Act 223, providing that a township treasurer "shall be entitled to an injunction to restrain waste" on land chiefly valuable for its timber, when its owner neglects or re-

§ 1197. **Cases where an injunction was denied.**—The essentials of a valid tax are: a levy by competent legislative authority; and a valid assessment of the property upon which such tax is levied by the officer or tribunal to whom this duty is committed by law. A mere misdescription of the property of a taxpayer by the assessor or a mere irregularity in his entry of it upon the assessment list or roll, furnishes no sufficient ground for enjoining the collection of a tax for which the plaintiff is justly liable, and with which his property has been legally assessed by the proper officer charged with this duty.⁴⁹ And an injunction will not be granted where the assessment roll was not ready for review on the day prescribed by statute.⁵⁰ And where a statute prescribes a mode of procedure to contest the validity of a tax, the impracticability of the proceeding provided by law is not a good ground for an injunction.⁵¹ As each individual tax is a separate and distinct burden, wholly disconnected from that of other persons, it follows that each individual has the legal right to contest the validity of the tax imposed upon him, but no taxpayer has the right to enjoin the collection of similar taxes imposed upon other persons.⁵² Where township assessors illegally assess property at a value less than they ought, such assessment does not render all the taxes founded thereon void, nor does it authorize an injunction to restrain the collection of the assessment.⁵³ A petition to enjoin the collection of a tax because of unlawful and excessive assessment should show that the petitioner has used every mode provided by the law for his relief.⁵⁴

§ 1198. **Prerequisites to injunction.**—Before an injunction can be granted to restrain the levying or collection of a tax, some step

fuses to pay any tax assessed thereon, it is no defense that the tax can be collected by other process; that the owner does not intend to commit waste; and that, should waste be committed, the land would still be of sufficient value to pay the tax. *Rossman v. Adams*, 91 Mich. 69, 51 N. W. 685.

49. *George v. Dean*, 47 Tex. 73.

50. *Albany & Boston Mining Co. v. Auditor-General*, 37 Mich. 391.

51. *Gay v. Hebert*, 25 La. Ann. 196.

52. *The Board of Supervisors v. Jenks*, 65 Ill. 275.

53. *Adams v. Beman*, 10 Kan. 37.

54. *The Rio Grande R. Co. v. Scanlan*, 44 Tex. 649.

must be taken by the taxing officers towards the levying or collection of the same.⁵⁵ An injunction will not issue to restrain the collection of taxes, unless irreparable damage is threatened,⁵⁶ or unless, as is sometimes stated, there are facts which bring the case under some acknowledged head of equity jurisprudence.⁵⁷ Injunction will not lie to prevent the sale of personal property for taxes, unless the property is of peculiar value to the owner, and damages at law would not be adequate compensation.⁵⁸ In an action to restrain the collection of a tax to pay railroad aid bonds, a preliminary order to restrain the owner from disposing of them is properly refused where the bill alleges that the railroad has not performed the conditions, that the bonds were issued fraudulently, and in violation of an injunction, that the owner is not a *bona fide* holder, and has fraudulently compromised his claim with the town officers, and defendant denies everything, and alleges that he purchased from a *bona fide* holder, that the railroad has complied with the conditions, and that the compromise was in good faith, affidavits being filed on both sides.⁵⁹ An order denying a temporary injunction in an action to restrain the collection of taxes, based on an order in a proceeding by certiorari adjudging the assessment void, must necessarily be affirmed where the order in the certiorari proceeding has been reversed, and the assessment in all respects affirmed.⁶⁰ A plaintiff who seeks to restrain a city of the first class from collecting a special tax on his property, on account of the cost of the improvement of a street upon which his property is situate, is not entitled to a judgment on the pleadings, when an answer by said city is on file, verified by the city attorney; that is in effect a general denial.⁶¹

55. *Andrews v. Love*, 50 Kan. 701, 26 Pac. 746; *Wyandotte Bridge Co. v. Board of County Commissioners*, 10 Kan. 326; *Challiss v. City of Atchison*, 39 Kan. 276, 18 Pac. 195.

56. *Rome, etc., R. Co. v. Smith*, 39 Hun (N. Y.), 332.

57. *City of Ensley v. McWilliams* (Ala. 1906), 41 So. 296.

58. *White v. Stender*, 24 W. Va. 615, 49 Am. Rep. 283.

59. *Verbeek v. Scott*, 71 Wis. 59, 36 N. W. 600.

60. *Delaware, etc., R. Co. v. Gordon* (Sup.), 19 N. Y. Supp. 533.

61. *McCrea v. City of Leavenworth*, 46 Kan. 767, 27 Pac. 129. Although the enlarged or additional remedy given by Civil Code, Kan., § 253, to a taxpayer to restrain the collection of an illegal tax is a statutory remedy, yet, if it is shown that the principles

§ 1199. **Insolvency of assessor, etc.**—The mere allegation of the insolvency of the assessor is not sufficient to authorize the court to grant an injunction to restrain the collection of a tax.⁶² And a complaint, averring that a county treasurer has demanded and endeavored to collect from the plaintiff a certain illegal tax, placed by the auditor unlawfully upon the tax duplicate of the county, but not averring that such duplicate had ever come to the hands of the treasurer, furnishes no ground for injunction against either the auditor or treasurer.⁶³ Again, it is no good ground for injunction that the tax collector is about collecting more money for taxes than has been assessed.⁶⁴ And a tax is not a cloud upon the title to real estate; and its unlawful collection, by distress or seizure of chattels, is no more than an ordinary trespass.⁶⁵

of estoppel apply against the taxpayer, the jurisdiction of the court under the statute is to be exercised upon equitable principles, and the taxpayer, to succeed, must exhibit a case in which upon the merits he is entitled to the equitable relief demanded. *Stewart v. The Board of Commissioners*, 45 Kan. 708, 26 Pac. 683. A creditor of a municipal corporation is not entitled to an injunction against the collection of his municipal taxes on the ground that the municipality is indebted to him, and has in its treasury a fund which could not be legally applied otherwise than by paying this debt, and which it refuses to pay until after the creditor discharges the claim against him for taxes. *Cartersville Waterworks Co. v. City of Cartersville*, 89 Ga. 689, 16 S. E. 70. Under Acts N. C. 1887, ch. 137, § 84, limiting the remedy of injunction to restrain tax levies to cases where the levy or assessment is "for an illegal or unauthorized purpose," in an action brought to restrain the collection of taxes, the facts necessary to consti-

tute the "illegal or unauthorized purpose" must be alleged in the pleading. *Mace v. The Commissioners*, 99 N. C. 65, 5 S. E. 740; *Mathews v. Commissioners*, 99 N. C. 69, 5 S. E. 742. And under Acts N. C. 1887, ch. 137, § 84, an injunction to restrain the collection of taxes cannot be granted except in the case of those "levied or assessed for an illegal or unauthorized purpose." *Mace v. Commissioners*, 99 N. C. 65, 5 S. E. 740.

62. *Wells, Fargo & Co. v. Dayton*, 11 Nev. 161.

63. *Anthony v. Sturgis*, 86 Ind. 479.

64. *Coulson v. Harris*, 43 Miss. 728. But the taxpayer may recover the taxes paid by action of assumpsit.

65. *Ritter v. Patch*, 12 Cal. 298. In New Hampshire, where a tax is illegally assessed, the remedy is by application for abatement; but a bill in equity may be considered and treated as a simple application for abatement, if the necessary preliminary steps have been taken. *Rockingham Bank v. Portsmouth*, 52 N. H. 17; *Brown*

§ 1200. **General and special taxes.**—Equity will not interfere to restrain by injunction the collection of taxes where the property is subject to taxation, the tax legal, and the valuation not excessive, simply because of irregularities in the tax proceedings. And this rule applies to general and special taxes, and whether the application be to restrain a sale or enjoin the execution of a deed.⁶⁶ A uniform tax of a given amount upon dealers, as such, is a tax upon employment or occupation, and not upon property. Whether certain individuals are of the class taxed, is a question of fact for decision by the revenue officers, and there can be no judicial interference of the officers in the collection of the taxes.⁶⁷ Equity will not enjoin the collection of municipal taxes, because the corporation owes the taxpayer.⁶⁸ Irregularities in the assessment made by the county clerks, acting as a board for assessing railroad property, or acting separately under other statutes, will not render the taxes founded upon such assessment void.⁶⁹

v. Concord, 56 N. H. 375. And see Barr v. Deniston, 19 N. H. 170, where it was held that a judgment recovered against the school district, in favor of the teacher, who has not produced a certificate of the superintending committee, will be restrained by injunction at the suit of any person interested as a taxpayer. See, also, Mills v. Johnson, 17 Wis. 598; Mills v. Gleason, 11 Wis. 490.

66. *Chaliss v. The Board of Commissioners*, 15 Kan. 49; *Lawrence v. Killam*, 11 Kan. 499. And the fact that the sale certificates have been disposed of by the county and belong to individuals, will not change this rule. *Stebbins v. Challis*, 15 Kan. 55.

In Indiana the Auditor of State is the proper person to direct the manner in which the assessments for plank, macadamized and gravel roads, under the act of March 11th, 1867, should be added to the tax duplicate, as directed by section three of that act; and this addition may, under his di-

rection, consist of a separate volume, or paper, with the precept of the county auditor attached thereto. *The Center and Warren Gravel Road Co. v. Black*, 32 Ind. 468.

67. *Decker v. McGowan*, 59 Ga. 805.

68. *Finnegan v. The City of Ferdinandina*, 15 Fla. 379.

69. *Mo. River R. Co. v. Blake*, 9 Kan. 489. On Arkansas the authority of a court of equity cannot be exerted to restrain, by injunction, the collection of the taxes assessed upon land as subject to overflow, on the allegation that the land was erroneously assessed, because it is not such as would be benefited by the levee work provided for by the act. *Clayton v. Lafargue*, 23 Ark. 137. In *Le Roy v. The Mayor*, 4 Johns. Ch. 352, it was held that the chancery court had no power to interfere with, or to set aside an assessment on the proprietors and occupants of lots, to defray the expense of a common sewer, made by commissioners, under the direction

§ 1201. **Same subject; personal tax, etc.**—Equity has no jurisdiction to enjoin the collection of a personal tax or fee by an officer where the bill shows no ground for apprehending that he will attempt to enforce a collection against the complainants will.⁷⁰ And one who, because of the refusal of a State to receive its coupons for taxes, as it has agreed to do, is unable to dispose of coupons owned by him to taxpayers, cannot ask for an injunction against the action of the State officials. His is a case of *damnum absque injuria*.⁷¹ Nor has equity any jurisdiction of a bill alleging that, after the fixing of a street grade, the city so constructed a sewer as to put him to expense in raising his lots, and praying that the collection of a special tax assessed against the lots for the expense of the sewer may be enjoined.⁷² Long acquiescence in the validity of annexation proceedings may also constitute a bar to a suit to enjoin the collection of taxes on the ground of the invalidity of the proceedings.⁷³

of the mayor, on the ground merely of a mistake in judgment of the commissioners of estimate and assessment, in not including all the owners intended to be benefited by the sewer. See *Haight v. Day*, 1 Johns. Ch. 18; *Missouri R. Co. v. Morris*, 7 Kan. 210; *Tainter v. Lucas*, 29 Wis. 375.

70. *Crawford v. Bradford*, 23 Fla. 404, 2 So. 782.

71. *Marye v. Parsons*, 114 U. S. 325, 5 Sup. Ct. 932, 962, 29 L. Ed. 205.

72. *Robinson v. Milwaukee*, 61 Wis. 585.

73. *Logansport v. LaRose*, 99 Ind. 117. The enforcement of taxes will not be enjoined as illegally assessed, where any part of the same is legal. *Shepardson v. Gillett*, 133 Ind. 125, 31 N. E. 788.

In a suit to restrain the collection of an alleged illegal tax, the complaint failed to show that plaintiff had applied to the supervi-

sors for a correction of the assessment under Comp. Laws Kan., § 2021. It was held that no ground for equitable relief appeared. *Campbell v. Bashford* (Ariz.), 16 Pac. 269. S. C., Gen. Stat., prohibits the courts from enjoining the collection of taxes. It was held that an assessment on townships to pay subscriptions in aid of a railroad is a tax within the terms of this statute. *Chamblee v. Tribble*, 23 S. C. 70.

Where land was illegally sold for taxes of 1871, which had been paid by the owner, and the purchaser paid taxes for the three subsequent years, and received a deed, which was afterwards set aside, and the money refunded, and the taxes for said three years were again assessed against the land, but were not paid by the owner, an injunction should not be granted to restrain the issuance of a deed to the purchaser of the land for said taxes. *Dudley v. Gilmore*, 35 Kan.

§ 1202. **Inequalities in valuations.**—As a general rule, the decisions of officers and tribunals specially created and charged, in tax laws, with the duty of valuing property for taxation and equalizing such valuations, are final and conclusive. Inequalities in the valuations, made under a valid law, of property for taxation, do not constitute grounds for enjoining the tax, in the absence of fraudulent discriminations by the agents and officers charged by the law with the duty of making such valuations.⁷⁴ And in a recent case it is decided that in the absence of fraud, or conduct which is equivalent to fraud, an overvaluation of property will not of itself justify an injunction against the collection of taxes and especially where it would operate to invalidate the whole tax levy.⁷⁵ If the complainant has an adequate remedy at law in the case of an excessive tax or an unfair valuation, relief by injunction will not be granted.⁷⁶ So where, in an action to restrain

555, 11 Pac. 398. See, also, *Clee v. Sanders*, 74 Mich. 692; *Duck v. Pee-ler*, 74 Tex. 268.

In an action by several property owners to enjoin the collection of certain assessments for benefits to their property by the opening of a street, the bill alleged that plaintiffs were not made parties, and had no notice of such proceedings; that the special tax bills were a cloud on the title of their property; and that plaintiffs were liable to be harassed by a multiplicity of suits. It was held that equity would not interfere, since plaintiffs had an adequate defense in any action at law for the collection of the tax if they were not notified of condemnation proceedings. *Michael v. City of St. Louis*, 112 Mo. 610, 20 S. W. 666.

74. *Wagoner v. Loomis*, 37 Ohio St. 571; *Woodman v. Ely*, 2 Fed. 839; *Washington Market Co. v. District*, 4 Mackey (D. C.), 416.

Fraudulent conduct on the part of the assessors is a ground

for an injunction. *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 31 C. A. 537, 60 U. S. App. 166; *Pacific Postal Teleg. Co. v. Dalton*, 119 Cal. 604, 51 Pac. 1072; *Renfrew v. Webb*, 7 Okla. 198, 54 Pac. 448. See § 1211 herein as to fraud.

Fraud must be shown where alleged as ground for an injunction. *West Portland Park Ass'n v. Kelly*, 29 Ore. 412, 45 Pac. 901.

75. *Board of Commissioners v. Bul-lard* (Kan. 1908), 94 Pac. 129.

76. *Regenstein v. Atlanta*, 98 Ga. 167, 25 S. E. 428; *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383, 51 N. E. 629; *Kinley Mfg. Co. v. Koch-ersperger*, 174 Ill. 379, 51 N. E. 648; *Kochersperger v. Larned*, 172 Ill. 86, 49 N. E. 988; *Lincoln County v. Bry-ant*, 7 Kan. App. 252, 53 Pac. 775; *Cleveland, C., C. & St. L. R. Co. v. Logan County*, 17 Ohio C. C. 436.

Where there is no adequate remedy an injunction will be granted. *Renfrew v. Webb*, 7 Okla. 198, 54 Pac. 448.

the collection of a tax on personal property, the complaint alleged that the assessment was out of due proportion and too large in its valuation, and that it was null and void, because the parties who assumed to make it were not assessors, either *de jure* or *de facto*, it was held that an injunction would not lie, there being no ground for equitable interference, as certiorari afforded an adequate remedy for the first wrong, and the remedy for the other wrong was an action against the collector for seizing property upon a warrant void on its face.⁷⁷ And the fact that a writ of certiorari

77. Delaware & H. Canal Co. v. Atkins, 121 N. Y. 246, 24 N. E. 319. Where a national bank, through its proper officers, voluntarily lists its stockholders' shares as the property of the bank for taxation, and the taxing officers tax the same in the name of the bank, equity will not relieve the bank from the payment of such tax by enjoining its collection, in the absence of application to all the statutory tribunals authorized to hear such matter and determine and grant the proper relief. Albuquerque Nat. Bank v. Perea (N. M.), 25 Pac. 776. Acts La. 1890, No. 106, § 26, which requires that "all taxpayers in the parish of Orleans" shall appear before the board of assessors and commence suit for redress, only in the manner therein prescribed, applies only to taxpayers who desire to claim that there has been error either in the description or valuation of the property assessed, and does not apply to those taxpayers who complain of error in the proportion of the property assessed, the description and valuation being conceded to be correct, and this last class of taxpayers, without complying with section 26, may, by bill in equity, enjoin the collection of taxes illegally assessed against it. Pullman's Palace-Car Co. v. Board of Assessors, 55

Fed. 206. Where the levy of a tax for school purposes is properly made, and is within the statutory limit, it is no ground for enjoining its collection that the levy was unnecessarily large, or that the directors proposed to divert part of the money raised to another purpose. Lawrence v. Traner, 136 Ill. 474, 27 N. E. 197. Inasmuch as the constitutional limit of \$1.50 taxation per \$100 valuation does not apply where the tax is authorized by a vote of the county. It was held that a petition to restrain the collection of a tax because in excess of the limit, which simply alleged that the levy was without authority of law and void, and that the commissioners had no authority to make the levy without alleging any reason, did not state a cause of action sufficient to support a judgment thereon. Burlington & Missouri River R. R. Co. v. Kearney County, 17 Neb. 511. When a statute requires property to be assessed for taxation at its cash value, a bill to enjoin the collection of a tax, solely on the ground that the property of other persons is assessed below its cash value, cannot be maintained by a person whose property is also assessed below that value. Albuquerque Bank v. Perea, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. Ed. 91.

has been sued out in a State court to renew the proceedings of a board of equalization, and that that proceeding is still pending, does not entitle the complainant to apply to the Federal court to stay the collection of the tax until that proceeding is determined, as it is clearly within the power of any one injured by the action of such board, to apply to the State court for relief.⁷⁸ But a bill to enjoin a levy on personalty under a tax bill, pending certiorari proceedings against the board of equalization to correct the assessment, which alleges that the assessor illegally, wilfully, and erroneously assessed complainant's land at a fictitious and speculative value, more than double the valuation of other like lands in the county, assessing wild lands and lands having no mineral, the same as improved and mineral lands, shows a fraudulent assessment, and, the writ under which it is sought to collect the tax not being void, and therefore protecting the officer against a suit for trespass, the injunction should be granted as to such an amount as is claimed to be excessive.⁷⁹ In Texas a statute providing that the board of equalization shall equalize as nearly as possible all the improved and unimproved lands by their class, each kind to contain three classes, is held not to require the board to set forth the classification on each assessment list, and the absence of such classification on the court minutes is not ground for enjoining the col-

78. *Hazard v. O'Bannon*, 38 Fed. 220. Nor does the general allegation that the people and officers of the county are prejudiced against complainant confer any jurisdiction on the Federal court. *Ibidem*. Rev. Stat. Mo., § 2722, provides that the remedy by injunction shall exist in all cases where an injury to property is threatened, and to prevent the doing of any "legal wrong," when, in the opinion of the court, an adequate remedy cannot be afforded by an action for damages. Although this section may confer on the Federal court the right to award an injunction whenever the State court may do so, it does not authorize an injunction when the board

of equalization has acted in good faith, and in conformity with law, as no "legal wrong" has been or will be done, though complainant's property is overvalued. *Hazard v. O'Bannon*, 38 Fed. 220.

79. *Hazard v. O'Bannon*, 36 Fed. 854. An injunction to restrain the collection of a tax alleged to have been fraudulently assessed, will not be refused on the ground that a proceeding by certiorari to correct the assessment is pending in the State court, since the motives which may have actuated the assessor in making the assessment are not open to review in the certiorari proceeding.

lection of the tax. It is not necessary to sustain the acts of the board of equalization in raising a valuation upon the assessment roll that an order of the board making such change be entered in the minutes. It is sufficient to show that the complainant has been cited by the board, that the valuation was in fact made; and that entry was made of the change by the assessor in presence of the board upon the original assessment, and that such alteration was carried into the completed rolls approved by the county commissioners.⁸¹

§ 1203. **No collateral attack by injunction; stock.**—The action of the board of equalization is *quasi* judicial, and since it has authority, under the Indiana statute of 1881, to assess the capital stock of a corporation, where the value thereof exceeds the value of its tangible property, such an assessment, if erroneous, must be corrected by appeal, or some other authorized direct proceeding, and cannot be collaterally attacked in a suit by the corporation to enjoin collection of the tax on the ground that its capital stock did not in fact exceed its tangible property in value.⁸²

80. *Graham v. Lasater* (Tex.), 26 S. W. 472, per Head, J.: "We are of opinion that it was not intended that the board should set forth with this particularity their action on each assessment list, and, unless this is required by the law, there is nothing in the record to show us affirmatively that the proper classification was not in fact made in this case. It is held in *Duck v. Peeler*, 74 Tex. 273, 11 S. W. 1111, that it is not necessary that the minutes of the court should show all the action had on each individual's rendition. We, therefore, conclude that the court below did not err in holding the classification of appellant's property sufficient, even if it be conceded that a failure to comply with this section of the law would render the action of the board a nullity, and subject to collateral attack."

81. *Duck v. Peeler*, 74 Tex. 268, 11 S. W. 1111, holding that failure to allege that plaintiff was denied the statutory relief, or allegations of its inadequacy, is fatal to an application for an injunction as a remedy.

82. *Jones v. Rushville Gas Co.*, 135 Ind. 595, 35 N. E. 390, per *Curiam*: "This case is, we think, easily distinguished from the case of *Hyland v. Coal Co.*, 128 Ind. 335, 26 N. E. 672. In that case it was a conceded fact that the capital stock was all invested in tangible property, which had been returned for taxation, and that the capital stock did not exceed in value the tangible property. The question, however, as to whether the action of the board of equalization could be attacked collaterally, was not argued or decided, while that question in this case is squarely made."

§ 1204. **Assessors and boards of review.**—A court of equity will not by injunction pass upon the action of assessors and boards of review. Courts cannot convert themselves into assessors of property for purposes of taxation, and re-assess in every case where the assessor has erred in his judgment as to the value of property.⁸³ In nearly all the States, probably in all of them, provision is made by law for the correction of errors and irregularities of assessors in the assessment of property for the purposes of taxation. This is generally through boards of revision or equalization, as they are often termed, with sometimes a right of appeal from their decision to the courts of law. They are established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions. Their action is not revers-

The board of equalization not only has the power to assess the capital stock of a corporation, where the value of such stock exceeds the value of the tangible property, but it is its duty to do so. Section 6358 Rev. Stat. 1881; *Hyland v. Steel Co.*, 129 Ind. 68, 28 N. E. 308. The board, in such cases, has exclusive original jurisdiction, and, while its action is not strictly judicial, it is at least *quasi* judicial, and binds every one within its jurisdiction. *Wilkins v. State*, 113 Ind. 514, 16 N. E. 192; *Kuntz v. Sumption*, 117 Ind. 1, 19 N. E. 474. It is true that such board cannot legally assess capital stock, where the capital is invested in tangible property listed for taxation, unless such stock exceeds in value the property in which it is invested; but who shall determine the question as to whether the stock is of greater value than the tangible property? The board of equalization, we think, must decide that question. If it makes a mistake, and reaches a wrong conclusion, can it be said that its assessment is void? We think not. We think it is binding on the corporation assessed

until set aside or vacated by appeal, or some other authorized, direct proceeding. It has always been the policy of the State to make the assessment and collection of taxes summary, and to hold now that a mere mistake or error of judgment in the officers charged with the duty of assessing and collecting taxes renders the tax void, and subjects the officers to injunction proceedings, is to reverse this long-settled policy."

83. *The Traders Ins. Co. v. Farwell*, 102 Ill. 413; *Moore v. Taylor*, 147 Pa. St. 481, 23 Atl. 768, per *Sterrett, J.*: "The duty of taxing officers is *quasi* judicial; and it is well settled that, when the general power to assess exists, the remedy for illegal taxation is by appeal; if none be given, neither the common pleas nor this court can reverse the judgment of the taxing officers. On the other hand, if a specific remedy is provided it must be pursued." See *Hughes v. Kline*, 30 Pa. St. 227; *Clinton School v. District's Appeal*, 56 Pa. St. 315; *Stewart v. Maple*, 70 Pa. St. 222; *Van Nort's Appeal*, 121 Pa. St. 118.

ible in a court of equity.⁸⁴ Under the law of New Mexico, which required property to be assessed at its cash value, property of a national bank was so assessed, but on appeal to the board of equalization the assessment was reduced to 85 per cent. of the full value, and it was held, that the mere fact that other property was assessed at 70 per cent. of its value, not through any design or systematic effort on the part of the assessors, would not justify an injunction to restrain the collection of the tax.⁸⁵ In an action to enjoin the collection of a tax, upon the ground of its illegal levy, an answer alleging that an appeal was taken from the order of the board of commissioners levying the tax, but failing to show that the Cir-

84. *Stanley v. Supervisors of Albany*, 121 U. S. 535, 550, 7 Sup. Ct. 1234, 30 L. Ed. 1000, per Field, J.: "Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value even of the most common objects before them—of animals, houses and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the constitutions of some States is complied with, when designed and manifest departures from the rule are avoided. To these boards of revision, by whatever name they may be called, the citizen must apply for relief against excessive and irregular taxation, where the assessing officers had jurisdiction to assess the property. Their action is judicial in its character. They pass judgment on the value of the property upon personal examination and evidence respecting it. Their action being judicial, their judgments in cases within their jurisdiction are not open to col-

lateral attack. If not corrected by some of the modes pointed out by statute, they are conclusive, whatever errors may have been committed in the assessment. As said in one of the cases cited, the money collected on such assessment cannot be recovered back in an action at law, any more than money collected on an erroneous judgment of a court of competent jurisdiction before it is reversed." *Albuquerque Bank v. Perea*, 147 U. S. 89-90, 13 Sup. Ct. 194, 37 L. Ed. 91, per Brewer, J.: "Surely upon the mere fact that other property happened to be assessed at thirty per cent. below the value, when this did not come from any design or systematic effort on the part of the county officials and when the plaintiff has had a hearing as to the correct valuation, on appeal before the board of equalization, the proper tribunal for review, it cannot be that it can come into a court of equity for an injunction or have that decision of the board of equalization renewed in this collateral way."

85. *Albuquerque Nat. Bank v. Perea*, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. Ed. 91.

cuit Court finally determined the case by levying the tax, or by remanding it with instructions to the board, is defective.⁸⁶ The State board of equalization increased the assessment of mortgages a certain per cent. In an action to enjoin the collection of taxes on a mortgage at such increased valuation, it appeared that the State board of equalization adopted a resolution to equalize real property at its fair value in money, and that the members of the board visited several counties, and endeavored to so equalize it. It was held, that, in the absence of evidence showing any wilful intent or arbitrary act on the part of the board in making such increase to discriminate against the holders of mortgages, an injunction should not be granted.⁸⁷ Equity will not enjoin a drainage assessment where the matter to be reviewed is the legality of the organization of the drainage district, and irregularities for which the right of appeal affords an adequate remedy.⁸⁸

§ 1205. **Same subject; findings by boards, etc.**—Where a board of equalization has found as a fact that the property of a non-resident has not been overvalued by the assessor, and has declined to reduce the assessment, the Circuit Court, on a writ of review to such board, is bound by its finding as to the assessable value of the property; and hence such writ does not afford an adequate remedy to the taxpayer, who alleges that his property was assessed beyond its cash value, and at a much heavier rate than the property of resident taxpayers, and he may resort to a court of equity to restrain the collection of such tax.⁸⁹ But where

86. *Lake Shore R. Co. v. Smith*, 131 Ind. 512, 29 N. E. 1075.

87. *Smith v. Kelly*, 24 Or. 464, 33 Pac. 642.

88. *Keigwin v. Hamilton Drainage Commissioners*, 115 Ill. 347. After the property of a taxpayer had been assessed and the taxes paid, the county commissioners, without notice to him, directed the clerk to enter an additional valuation on the property, and to charge additional taxes thereon. The taxpayer afterwards ap-

plied to the board to set aside these taxes. It was held that the taxes so charged were void, and that the owner of the property could enjoin their collection, though he did not appeal from the refusal to set them aside. *The Topeka City R. Co. v. Roberts*, 45 Kan. 360, 25 Pac. 854; *The Topeka Water Supply Co. v. Roberts*, 45 Kan. 363.

89. *California & O. Land Co. v. Gowen*, 48 Fed. 771.

plaintiff, in an action to restrain collection of taxes, alleged that his land was assessed at an agreed valuation between him and the assessor, who afterwards unlawfully listed it at a higher valuation; that he was cited to show cause before the board of equalization why his assessment be not raised, but he did not; that the board made no order changing or affecting the valuation of his land as theretofore listed; that the assessor had no power to change the assessment made by him without an order of the board in open court, and entered in the minutes; but did not state that he applied to the board to correct the assessment, nor give a reason for not doing so, nor that he could not obtain relief in that way, if entitled to it, it was held that under the Texas statute which provides that the board shall have power to increase or diminish the valuation of any property, and affix a proper one, and that such action shall be final, and not subject to revision thereafter by said board or any other tribunal, plaintiff's failure to show cause, when cited, precludes him from afterwards questioning the increased valuation.⁹⁰ And the sale of land for taxes will not be

90. *Duck v. Peeler*, 74 Tex. 268, 11 S. W. 1111. Laws Del., ch. 8, § 21, provides that at a meeting in March in every year the levy court shall examine and adjust the accounts of tax collectors, making all just allowances for delinquents, and the adjustment and allowances shall be final. It was held that where such adjustment and allowances have been made, and subsequently a judgment has been obtained against such collector and his sureties, on his official bond, an injunction will be issued at the prayer of one of the sureties to restrain the clerk of the levy court from altering the entries made by him upon the assessment list or list of delinquent taxables allowed by said court. *Mealy v. Buckingham* (Del. Ch.), 22 Atl. 357. Since, under Gen. Laws Tex. 1879, p. 44, before taxes assessed became a lien on land, the tax list must be pre-

sented to the board of equalization for approval and for correction of any errors in the listing of property, an injunction will not be granted before such approval to restrain an assessor of a county from assessing lands alleged to be in another county. *Chisholm v. Adams*, 71 Tex. 678, 10 S. W. 336. Gen. Laws Tex. 1879, pp. 24, 28, provide that assessors shall be furnished with a correct abstract of the surveys in their several counties; and that any lands which have been assessed in any county according to the abstract of land titles, and the taxes paid thereon, shall not be afterwards subject to the payment of taxes for the same period in a different county, although a subsequent survey shall show the said land to be in the latter county. It was held, where one alleging his lands to be in a certain county sought to restrain the assessor of an-

enjoined because, by a failure to file the assessment rolls within the time prescribed, the owner was prevented from appealing to the board of equalization, it not appearing that the land was not subject to taxation, nor that it was assessed too high, nor that the tax was levied for an illegal purpose.⁹¹

§ 1206. **Action of boards reviewed.**—While the general rule is that courts abstain from reviewing the action of boards of equalization and assessors by means of an injunction, yet there are occasions when the action of the board in fixing a tax will be reviewed. Thus the board of supervisors can equalize assessments, but they have no power to raise the assessment of personal property beyond the amount returned by the assessor; and if they do so, the collection of the tax upon such raised assessment will be enjoined by a court of chancery.⁹² And whenever the board undertakes to go beyond its jurisdiction, or to fix valuations through prejudice or a reckless disregard of duty, in opposition to what must necessarily be the judgment of all persons of reflection, it is the duty of the courts to interfere and protect the taxpayers against the consequences of the act.⁹³ So, a person owning real estate which is

other county from listing them, on the ground that they would thereby be subject to double taxation, that the petition was insufficient, which did not aver that the abstract showed the land to be in the former county. *Chisholm v. Adams*, 71 Tex. 678, 10 S. W. 336. An action does not lie to enjoin the collection of an assessment made under the two mile assessment pike law (Rev. Stat. Ohio, tit. 7, ch. 8), on account of defects or irregularities apparent on the proceedings had before the county commissioners to cause the improvement to be made. The appropriate remedy for such defects and irregularities is by petition in error. *Haff v. Fuller*, 45 Ohio St. 495, 15 N. E. 479; *Lewis v. Laylin*, 46 Ohio St. 663, 23 N. E. 288. Where taxes have been unlawfully assessed

on personalty assigned for the benefit of creditors, without allowing any opportunity to have the assessment corrected by the board of equalization, and the sheriff has seized and threatens to sell the property for such taxes, the assignee may have an injunction against such sale, it appearing that he has been charged with the inventoried price of the personalty, and that such sale would necessarily embarrass the settlement of the business pertaining to the trust. *Dawson v. Croisan*, 18 Or. 431, 23 Pac. 257.

91. *Frost v. Flick*, 1 Dak. 131, 46 N. W. 508.

92. *McConkey v. Smith*, 73 Ill. 313.

93. *The Chicago, Burlington & Quincy R. Co. v. Cole*, 75 Ill. 591. But when its jurisdiction is conceded

exempt from taxation is not required to take notice of its illegal assessment, nor to appear before the local tribunals to protect his property from taxation; and when it is illegally assessed he may resort to a court of equity for an injunction.⁹⁴ And where the valuation is so grossly excessive as to furnish evidence of fraud on the part of the officer or body making the same, the court will interpose.⁹⁵ A board of equalization cannot raise the assessment on property without giving notice to the owner; and if they do so increase the assessment of property without notice, they act without jurisdiction of the person or subject matter, and their proceedings are void.⁹⁶ Injunction also lies to restrain the collection of taxes where the opportunity to ascertain the amount of the assessment, and to be heard as to its fairness, has been withheld.⁹⁷

no mere difference of opinion as to the reasonableness of its valuations will justify equitable interference.

94. *The Illinois Central R. Co. v. Hodges*, 113 Ill. 323. The above case holds that § 97 of the revenue law, which empowers the board of supervisors to hear and determine the application of any person who is assessed on property exempt from taxation, is merely cumulative to that in equity to enjoin. See *Preston v. Johnson*, 104 Ill. 625.

95. *The Pacific Hotel Co. v. Lieb*, 83 Ill. 602.

96. *The South Platte Land Co. v. The Board*, 7 Neb. 253. But see *McIntyre v. The Town of White Creek*, 43 Wis. 620, which holds that while it is the duty of the town board of review to notify a resident taxpayer before increasing the assessor's valuation of his property, its failure to do so is merely an irregularity, not available in equity to avoid the tax without proof of substantial injustice.

97. *Woodman v. The Auditor-General*, 52 Mich. 28, 17 N. W. 227. See,

also, *Union Trust Co. v. Weber*, 96 Ill. 346; *Livingston v. Hollenbeck*, 4 Barb. (N. Y.) 9; *Mayor v. Meserole*, 26 Wend. (N. Y.) 132; *O'Neal v. Virginia B. Co.*, 18 Md. 1; *Heywood v. Buffalo*, 14 N. Y. 534; *Porter v. Rockford R. I. R. Co.*, 76 Ill. 561; *Texas & P. R. Co. v. Harrison County*, 54 Tex. 119; *H. & T. C. C. R. Co. v. Presidio*, 53 Tex. 518; *Hughes v. Kline*, 30 Pa. St. 227; *Merrill v. Gorham*, 6 Cal. 41; *Meyer v. Rosenblatt*, 78 Mo. 495.

Where a statute of Missouri provided that the State board of equalization "shall proceed to adjust and equalize the aggregate valuation of the property of each one of the railroad companies liable to taxation under the provisions of this act," it was held that this only authorized the board to equalize the aggregate valuation of the county boards, and did not give them power to act as an original assessing body, and make an assessment *de novo*. *Paul v. Pacific R. Co.*, 4 Dillon, 35.

In *The County Commissioners v.*

§ 1207. **Unconstitutional statutes.**—Some jurisdictions are authority for the doctrine that the collection of an assessment will not be restrained by injunction on the bare ground that the statute under which it is imposed is unconstitutional.⁹⁸ The reason that a court of equity will not enjoin the collection of an unconstitutional tax is, that if the act is unconstitutional, the officers enforcing it are trespassers, and liable in damages, to be ascertained in a court of law.⁹⁹ In illustration of the principle that equity will not enjoin the collection of an unconstitutional tax, the insolvency of an officer to whom an alleged illegal fee or tax has been paid is held not to, of itself, or in connection with the fact that the statute creating the office may be unconstitutional, give a court of equity jurisdiction for the recovery of such payment.¹ There are, however, numerous jurisdictions in which the rule prevails that the unconstitutionality of the statute under which a tax or assessment is levied is a sufficient ground for the granting of an injunction against the same.² And where there has been a sale of land under

The Union Mining Co., 61 Md. 545, it was held that it was only when no appellate tribunal has been created with power to remedy the wrong that an injunction will be granted against the action of a board of equalization. In Illinois it is held that when an owner makes affidavit that his personal property does not exceed a certain sum, then the sum he swears his personal property is worth, the board is required to adopt as its assessable value. *Darling v. Gunn*, 50 Ill. 424.

In Arkansas it is held that the clerk and county judge have no authority, under the revenue act of 1871, to change the valuation of land, as returned by the assessor, after the adjournment of the board of equalization; and where the assessment is so altered, the clerk will be enjoined from entering it on the tax books. *Wiley v. Flournoy*, 30 Ark. 609.

98. *Postal Tel. Cable Co. v. Grant*, 11 N. Y. Supp. 323; *United Lines Tel. Co. v. Grant*, 18 N. Y. Supp. 534; affirmed 137 N. Y. 7. See *Milwaukee v. Koeffler*, 116 U. S. 219, 29 L. Ed. 612, 6 Sup. Ct. 372; *Wason v. Major*, 10 Colo. Ct. App. 181, 50 Pac. 741; *Corsell v. Smith*, 221 Ill. 149, 77 N. E. 740.

99. *The Mechanics Bank v. Debolt*, 1 Ohio St. 591. See, also, *North Carolina R. Co. v. Commissioners*, 82 N. C. 259; *Knowlton v. The Board*, 9 Wis. 410. And see § 1189, *ante*.

1. *Crawford v. Bradford*, 23 Fla. 404.

2. *Wilson v. Lambert*, 168 U. S. 611, 42 L. Ed. 599, 18 Sup. Ct. 217, 26 Wash. Law Rep. 106; *Craighill v. Van Riswick*, 24 Wash. Law Rep. 177, 8 App. D. C. 185; *Ade v. County Comm'rs*, 7 Pa. Dist. R. 199; *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299.

And see the following cases where

an unconstitutional assessment, a court of equity will grant relief by enjoining the collector from making a deed on such sale.³

§ 1208. **Tendering sum due.**—In order to procure an injunction restraining the collection of a tax, it is necessary to pay, or offer to pay, such part of the sum assessed as is not disputed.⁴ And

the injunction was allowed: *Bristol v. Johnson*, 34 Mich. 123, the case of a township treasurer, who having been robbed, sought to have a tax levied to reimburse himself. The tax was enjoined as unconstitutional. *Riggsbee v. The Town of Durham*, 94 N. C. 800, holding that the collection of a tax will be restrained, when the purpose for which it is to be expended is unconstitutional. Where national bank shares are taxed beyond the limit established by congress, an injunction will be granted only as to such excess. *Whitney Nat. Bank v. Parker*, 41 Fed. 402. Act 1890, "to define the county line of Estill county," instead of defining an uncertain boundary line, abandoned it altogether, and so changed the line as to take 160 voters and \$175,000 of taxable property from Estill county, and transfer them to an adjoining county. It was held in an action by a citizen of the detached territory to enjoin the sheriff of Estill county from collecting taxes assessed by Estill county, the court cannot rightfully declare unconstitutional the act detaching such territory, since it is perfectly valid on its face, and affects, not only the parties litigant, but also all the other taxpayers of both counties, none of whom have an opportunity to be heard. *Walters v. Richardson*, 93 Ky. 374, 20 S. W. 279. The Mississippi act imposing a tax on express companies doing business in the State

is void as to all interstate transportation, but valid as to all business to be exclusively performed within the State. It was held that a levy of a tax on a company doing both a local and interstate business will be enjoined until a separation between the two kinds of business can be made. *United States Express Co. v. Hemmingway*, 39 Fed. 60. Mich. tax law of 1885, forbidding the injunction of assessment proceedings, is not retroactive. *Auditor-General v. Iosco Circuit Judge*, 58 Mich. 345.

Where it is sought to enjoin a tax levy on the ground that it is for the purpose of paying an unconstitutional indebtedness, the fact that it is unconstitutional will not be presumed and must be shown. *Armstrong v. Taylor County Ct.*, 41 W. Va. 602, 24 S. E. 993.

3. *Gage v. Graham*, 57 Ill. 144. See *Exchange Bank v. Hines*, 3 Ohio St. 1, which holds that even if a tax were repugnant to the constitution of the United States, a court of equity has no jurisdiction to restrain the collection of the tax by injunction, even though the court treasurer may individually be insolvent. See *Bradley v. Fallbrook Irrig. Dist.*, 68 Fed. 948.

4. *United States*. — *Albuquerque Bank v. Perea*, 147 U. S. 87, 13 Sup. Ct. 194, 37 L. Ed. 91.

Arkansas.—*Wells Fargo & Co. v. Crawford County*, 63 Ark. 576, 40 S. W. 710, 37 L. R. A. 371.

a complaint to enjoin the issue of an auditor's deed upon an illegal sale of land for taxes which fails to aver a tender and to make an offer to pay the lawful taxes, is bad on demurrer.⁵ And the holder of a judgment lien cannot maintain an action to quiet title as against one who purchased at a sale under a tax lien superior to the judgment lien without paying or offering to pay such superior lien.⁶ And an injunction will not lie to restrain the collection of

Indiana.—Buck v. Miller, 147 Ind. 586, 45 N. E. 647, 37 L. R. A. 384.

Pennsylvania.—Laver v. McGovern, 6 Northampton Co. Rep. 158.

South Dakota.—Dakota Loan & T. Co. v. Codington County, 9 S. D. 159, 69 S. W. 314.

Wisconsin.—Wells v. Milwaukee, 96 Wis. 116, 70 N. W. 1071.

Compare Norwood v. Baker, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. 187.

“It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found that but a small part of the tax should be permanently enjoined, submit to pay the balance. This is not equity. It is in direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the fact of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The State is not to be thus tied up as to that of which there is no contest by lumping it with that which is really contested. If the proper officer refuses to receive a part of

the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed.” State Railroad Tax Cases, 92 U. S. 575, 616, 23 L. Ed. 663. Per Miller, J.

A tender is sufficient.—Bar-drick v. Dillon, 7 Okla. 535, 54 Pac. 785; Dakota Loan & T. Co. v. Codington County, 9 S. D. 159, 69 N. W. 314.

If the entire tax is void no tender is necessary. Kerr v. Corsicana (Tex. Civ. App.), 35 S. W. 694.

Time of payment.—Payment of the portion of a tax which is acknowledged to be valid may be made after the action is commenced. Leavenworth v. Douglass, 3 Kan. App. 67, 44 Pac. 1099.

When rule not applicable.—When owing to the fault of the proper officials in failing to keep their record properly it cannot be determined what, if any portion, of an assessment is valid the rule as to a tender is not applicable. Hughson v. Crowe, 115 Cal. 404, 47 Pac. 120.

5. Rowe v. Peabody, 102 Ind. 198; Harrison v. Haas, 25 Ind. 281; McWhinney v. Brinker, 64 Ind. 360; Lancaster v. DuHadway, 97 Ind. 565. And see Shannon v. Hay, 106 Ind. 589.

6. Browning v. Smith, 139 Ind. 280, 37 N. E. 540.

part of an assessment on the ground that the money is not yet actually needed for the payment of bonds or interest.⁷

§ 1209. **Same subject; estoppel, etc.**—Where property is subject to taxation, the collection of the tax, part only of which is illegal, cannot be enjoined without payment or tender of the part which is legal.⁸ The collection of a tax will not be enjoined where that part which is legal is not pointed out and an offer to pay made.⁹ And one who seeks an injunction against the enforcement of a tax sale must make a sufficient tender, keep it good by bringing the money into court, and aver in his complaint that he does bring it into court.¹⁰ So the collection of taxes assessed on the

7. *Florer v. McAfee*, 135 Ind. 540, 35 N. E. 277, per Howard, J.: "It has often been decided that mere irregularities in levying taxes or making assessments will not avoid their collection, and also that, where any part of a tax or an assessment is due, that part must be paid, or at least offered to be paid, before suit will lie to enjoin the collection of the part alleged to be illegal. *City of Delphi v. Bowen*, 61 Ind. 29; *Foresman v. Chase*, 68 Ind. 500; *Mullikin v. Reeves*, 71 Ind. 281; *Stilz v. City of Indianapolis*, 81 Ind. 582; *Volger v. Sidener*, 86 Ind. 545; *Miles v. Ray*, 100 Ind. 166; *Bothwell v. Millikan*, 104 Ind. 162; 2 N. E. 959, and 3 N. E. 816. The suit by appellees for injunction against the county treasurer was not, therefore, well brought, unless it should appear that the county auditor had no authority whatever to place the assessment in question upon the special tax duplicate. The duplicate, being put into the hands of the treasurer, and being legal on its face, was sufficient to justify the treasurer in collecting the assessments, unless it be shown that some essential requirement of the law was not observed in its preparation,

or in the proceedings upon which its preparation was based. *Prima facie*, the duplicate is sufficient authority for the collection of the assessments. *Noland v. Busby*, 28 Ind. 154; *Rutherford v. Davis*, 95 Ind. 245; *Adams v. Davis*, 109 Ind. 10; 9 N. E. 162. Neither would the injunction lie on account of the fact, if it should be one, that provision was made for collecting a part of the assessment before it was actually needed for the payment of bonds or interest to become due. Those having charge of the collection of funds to meet the obligations of the county are required to use due diligence; and they must also be allowed the exercise of good judgment in providing in time for the payment of such obligations, so that the credit of the county may not be impaired. *Ricketts v. Spraker*, 77 Ind. 371."

8. *Hyland v. Central Iron & Steel Co.*, 129 Ind. 68; 28 N. E. 308; *Hyland v. Brazil Co.*, 128 Ind. 335; 26 N. E. 672. See preceding section.

9. *Covington v. Rockingham*, 93 N. C. 134.

10. *Morrison v. Jacoby*, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806.

capital stock of a corporation, which are alleged to be excessive, will not be enjoined where the corporation does not offer to pay the taxes' on the amount of capital stock it admits to be subject to taxation.¹¹ And where an officer assesses an illegal tax against a person, such person is not freed from taxation on other property; and, if he is entitled to a reduction upon other taxes by reason of such unlawful assessment, it is his duty to demand the reduction, and pay the tax legally due, before coming into a court of equity to enjoin the collection of an entire tax, part of which it is his duty to pay.¹² Again, a person who sees a system of drainage being constructed, calculated to benefit his property, cannot wait until it is completed, and the expenditure has been made, and his property received the benefit, before proceeding to avoid the tax, but must, as a condition of relief by injunction, do equity by paying the amount thereof justly chargeable against such property.¹³ So, also, the spreading on the assessment rolls of a certain increase, made by the board of equalization in the assessment on mortgages, will not be restrained, but relief must be sought after attempted collection of the tax, and on payment of the amount conceded to be due.¹⁴ Where a bill to enjoin the collection of taxes avers a tender by complainant to the collector of all taxes legally assessed, and seeks to enjoin the excess only, which was illegally levied, it is not a good objection to the bill that the taxes admitted to be due were not paid or tendered though the offer is not repeated by the bill.¹⁵ And an injunction will not lie to prevent the collection of taxes, a portion of which are legally assessed, without an allegation in the complaint that complainant has paid the amount legally due or that, in addition to having tendered the amount to the collector, he keeps the tender good by bringing the

11. *Smith v. Rude Bros. Mfg. Co.*, 131 Ind. 150; 30 N. E. 947.

12. *Rosenburg v. Weekes*, 67 Tex. 578, 4 S. W. 899.

13. *Darst v. Griffin*, 31 Neb. 668, 48 N. W. 819; *Barker v. Omaha*, 16 Neb. 269, 20 N. W. 382.

14. *Goodnough v. Powell*, 32 Ore. 525, 32 Pac. 396.

15. *City of Meridian v. Ragsdale*, 67 Miss. 86, 6 So. 619. See, also, *Board of Commissioners v. Dailey*, 115 Ind. 360, 7 N. E. 619; *State v. Hancock*, 79 Ga. 799.

amount into court.¹⁶ In a suit to enjoin the collection of a tax, the reading in evidence of the tax duplicate, showing that the plaintiff has not paid all his taxes, is not reversible in error.¹⁷ A decree in equity to set aside a tax sale is erroneous in not requiring repayment of taxes and costs to defendant and interest thereon.¹⁸

§ 1210. **Same subject; additional illustrations.**—When the valid portion of a tax can be easily distinguished from that alleged to be invalid, and it has been neither paid nor tendered, the collection of the tax will not be enjoined pending a litigation to determine the validity of the disputed portion.¹⁹ Without tender of payment of taxes admitted to be due on property returned for taxation, the owner thereof cannot maintain an action to prevent the collection of taxes assessed on such property by virtue of an unlawful increase of valuation made by the board of equalization after such return.²⁰ And where only part of a special assessment for road improvements is invalid, a bill to enjoin collection of the assessment cannot be maintained without payment of the valid part.²¹ But where the entire capital stock of a corporation is invested in tangible property duly assessed, the corporation need not, in order to restrain the collection of a tax on the capital stock, make a tender of the taxes due on its tangible property, as no tax whatever is due on the capital stock.²² And an abutting property owner may, without tendering the amount of the benefits, invoke

16. *Hewett v. Fenstamaker*, 128 Ind. 315, 27 N. E. 621.

17. *Hill v. Probst*, 120 Ind., 528, 22 N. E. 664.

18. *Gage v. Nichols*, 112 Ill. 269. See, also, *Brown v. School District*, 12 Or. 345; *Rowe v. Peabody*, 102 Ind. 198; *Fifield v. Marinette County*, 62 Wis. 532; *Wilson v. Longendyke*, 32 Kan. 267; *Augusta Factory v. City Council of Augusta*, 83 Ga. 734, 10 S. E. 359.

In Mississippi it is held that when it is sought to enjoin the collection of taxes illegally as-

sessed, it is not incumbent on complainant, before filing his bill, to tender what is equitably due for taxes, as a condition of relief. *Ball v. City of Meridian*, 67 Miss. 91; 6 So. 645.

19. *Breeze v. Haley*, 11 Colo. 351, 18 Pac. 551.

20. *Smith v. Union County Nat. Bank*, 131 Ind. 201, 30 N. E. 948.

21. *Loesnitz v. Seelinger*, 127 Ind. 422, 25 N. E. 1037, 26 N. E. 887.

22. *Hyland v. Brazil Co.*, 128 Ind. 335, 26 N. E. 672; *City of Logansport v. Case*, 124 Ind. 254.

the aid of equity against the consequences of an assessment for street improvements which were made under void proceedings, where he protested against the improvements in their inception.²²

§ 1211. **Fraud.**—It is well settled that it is within the power of a court of equity to restrain the collection of taxes where fraud has occurred.²⁴ Thus, if the supervisor of a township, in making the assessment of property for taxation, shall fraudulently, and with a view to impose upon an individual more than his just proportion of the public burden of taxation, assess the property of

23. *Ladd v. Spencer*, 23 Or. 193, 31 Pac. 474. Defendant, although not the owner of a certain lot, returned it for taxes as his own, with other property. Upon default tax executions issued against the land and other property belonging to defendant. It was held, that the claimants of the property erroneously returned by defendant must offer to pay the amount of taxes against the property before they can have it declared not subject to execution. *State v. Hancock*, 79 Ga. 799, 5 S. E. 248. An injunction will not be granted to restrain the sale of stock for delinquent assessments because notice has not been published 15 days before the day appointed for the sale, as required by Civil Code Cal. § 339, unless the complaint contains an offer to pay the assessments. *Burham v. San Francisco Fuse Mfg. Co.*, 76 Cal. 24, 26, 17 Pac. 939; *Board v. Elston*, 32 Ind. 27; *Brown v. Herron*, 59 Ind. 61; *City v. Bowen*, 61 Ind. 29; *Mullikin v. Reeves*, 71 Ind. 281; *Mesker v. Koch*, 76 Ind. 68; *Stilz v. City*, 81 Ind. 582; *Board v. Dailey*, 115 Ind. 360; *Rio Grande R. Co. v. Scanlan*, 44 Tex. 649; *Blanc v. Meyer*, 59 Tex. 89; *Rosenberg v. Weekes*, 67 Tex. 578. See, also, *Worthen v. Badgett*, 32 Ark. 496; *Taylor v. Thompson*, 42 Ill. 10; *Swinney v. Beard*, 71 Ill. 27;

Palmer v. Napoleon, 16 Mich. 176; *Merrill v. Humphrey*, 24 Mich. 170; *Pillsbury v. Humphrey*, 26 Mich. 245; *Hersey v. Supervisors*, 16 Wis. 185; *Bond v. Kenosha*, 17 Wis. 284; *Mills v. Johnson*, 17 Wis. 598; *Howes v. Racine*, 21 Wis. 514; *Mills v. Charleton*, 29 Wis. 400; *Kaehler v. Dobberpuhl*, 56 Wis. 480; *County Commissioners v. Union Mining Co.*, 61 Md. 545; *Burlington & M. R. Co. v. York Co.*, 7 Neb. 487; *Iler v. Colson*, 8 Neb. 331; *Overall v. Ruenzi*, 67 Mo. 203; *City v. Barney*, 10 Kan. 270; *City v. Killam*, 11 Kan. 499; *Hagaman v. Commissioners*, 19 Kan. 394; *Wilson v. Lonkedyke*, 32 Kan. 267; *Brown v. School District*, 12 Or. 345; *London v. City*, 78 N. C. 109; *Covington v. Town*, 93 N. C. 134; *Tallasee County v. Spigener*, 49 Ala. 262; *Alabama Gold Ins. Co. v. Lott*, 54 Ala. 499; *City v. Sayre*, 65 Ala. 564; *Parmley v. R. Co.*, 3 Dill. 25; *Huntington v. Palmer*, 7 Sawy. 355.

24. *The First National Bank v. Cook*, 77 Ill. 622. This case holds that, where the assessor, arbitrarily and without notice to the owner, alters the assessment and materially increases the valuation of the property, this is fraud, justifying an injunction. See § 1202 herein as to fraud.

such individual above its value, and relatively above the other assessments on his roll, the party aggrieved may have an injunction to restrain the collection of the excessive tax.²⁵ And where a collector of taxes, in violation of an agreement between the county court and a tax debtor, is about to enforce collection of certain taxes assessed against the real estate of the latter, an injunction lies to prevent the sale.²⁶ Again, where a combination is entered into by the collector and the principal bidders at a tax sale, to prevent competition at the sale, and that the lands should be struck off to one of the parties, for the sums charged to the respective tracts, and bidding was thus prevented, the court will enjoin the collector from making a deed to the party to the fraud.²⁷ The allegation of fraud in the bill is what gives the court jurisdiction to restrain.²⁸ But a mere statement in a bill to enjoin the collection of a tax, that the assessment is outrageously exorbitant, and was fraudulently made against the complainant, is a conclusion of the pleader, and without showing in what the over-valuation consists, and giving the facts and particulars, is not sufficient. A mere allegation of fraud is not sufficient, and an over-valuation will not of itself establish fraud.²⁹

§ 1212. **Clouding the title.**—Where an illegal tax casts a cloud on the title to real estate, it will be enjoined.³⁰ An illegal tax

25. *Merrill v. Humphrey*, 24 Mich. 170.

26. *The St. Louis R. Co. v. Anthony*, 73 Mo. 431.

27. *Gage v. Graham*, 57 Ill. 144.

28. *Leitch v. Wentworth*, 71 Ill. 146.

29. *Union Trust Co. v. Weber*, 96 Ill. 346. The petition in an action alleged an assessment and attempt to levy taxes on property of plaintiffs residing within the limits of a "pretended" corporation, and that no ordinance of said pretended corporation was ever passed authorizing the levy and collection of such taxes. It was *held*, there being no authority to levy a tax for municipal purposes

otherwise than by ordinance, that the petition showed ground for relief by injunction. *Winkler v. Halstead*, 36 Mo. App. 25. See, also, *Newcomb v. Horton*, 18 Wis. 566; *Cleghorn v. Postlewaite*, 43 Ill. 428; *City v. Mississippi R. Co.*, 1 Dillon, 536.

30. *Union Pacific R. Co. v. Cheyenne*, 113 U. S. 516, 525-6, 5 Sup. Ct. 601, 28 L. Ed. 1098, per Bradley, J.: "It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax;

which constitutes such a cloud on the title as warrants its being enjoined, is one which constitutes an apparent lien on the lands, and might result in a sale of them and a conveyance by a deed which would be *prima facie* evidence of title.³¹ So the assessing a tract of land to the wrong owner is a cloud on the title.³² And where a statute provided that work should be let to the lowest bidder, and in case it was not done within the contract time, should be relet, on giving proper notice, the reletting of the work without the proper notice makes a tax levied on the abutting property for the payment void, and it may be enjoined as casting a cloud on the title.³³ Again, where a statute made it necessary,

for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the taxpayer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be

supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in courts of equity.' This statement is in general accordance with the decisions of this court as well as of many State courts." See, also, *Hannewinkle v. Georgetown*, 15 Wall. 547; *Dows v. Chicago*, 11 Wall. 108; *State Railroad Tax Cases*, 92 U. S. 575; *Cummings v. National Bank*, 101 U. S. 153; *Litchfield v. Webster County*, 101 U. S. 773; *Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 31 C. C. A. 537, 60 U. S. App. 166; *Southern R. Co. v. Asheville*, 69 Fed. 359; *Skinner v. Herman*, 64 Mo. App. 441; *McKechnie Brew. Co., v. Canandagua*, 15 App. Div. (N. Y.) 139, 44 N. Y. Supp. 313; *Dietz v. Neenah*, 91 Wis. 422, 64 N. W. 299. See §§ 1234, 1236 post herein.

31. *The Marquette R. Co. v. The City*, 35 Mich. 504.

32. *Crane v. The City*, 20 Wis. 305.

33. *Mitchell v. City*, 18 Wis. 92.

before proceedings to condemn land could be brought, that an attempt must be made with the owner to effect an agreement as to the terms of purchase, then if no attempt is made, the property owner may restrain the city, by injunction, from selling his land to satisfy an assessment.³⁴ And where an assessor assessed a large body of lands belonging to a non-resident, of various values, at a uniform rate, beyond its cash value, and relatively at a much greater value than the lands of resident taxpayers, for the purpose of favoring the latter at the expense of the former, equity will restrain the collection of a tax levied upon such an assessment, when it further appears that the collection of the tax will cast a cloud upon the title of the non-resident, and involve him in a multiplicity of suits.³⁵ Every illegal or void tax, where the proceedings are not void upon their face, constitutes a cloud upon the title, before as well as after the tax sale, and it will be enjoined.³⁶

34. *Leslie v. The City*, 47 Mo. 474.

35. *California & O. Land Co. v. Gowen*, 48 Fed. 771.

36. *The Milwaukee Iron Co. v. The Town*, 29 Wis. 51; *Bramwell v. Guheen*, 3 Idaho 347, 29 Pac. 110.

Under Laws N. Y. 1880, ch. 68, § 8, making a deed executed by the tax receiver "presumptive evidence that the sale, and all proceedings prior thereto," were regular, and authorizing any one interested in assessed property to sue to restrain a sale, an action may be brought to set aside an assessment, and restrain a sale thereunder, though the assessment is void, as such sale would create a cloud on plaintiff's title. *Coxe v. Town*, 10 N. Y. Supp. 73.

Equity will enjoin a sale for a void tax, where by loss of records, the sale, though void, will cloud the title. *McCormick v. Dis-*

trict of Columbia, 4 Mackey (D. C.), 396. Though an assessment for a public improvement in the city of Buffalo is no lien on land until the roll is delivered to the city treasurer, as provided by the charter (title 7, § 1), equity will enjoin its enforcement if illegal, as a cloud on title may be prevented as well as removed. *Tifft v. City of Buffalo*, 7 N. Y. Supp. 633. Act, Neb., approved March 1, 1881, authorizes the mayor and council of cities of the first class "to levy and collect special taxes and assessments upon lots and pieces of ground adjacent to and abutting on the street, avenue, . . . thus in whole or part graded, etc. It was held that a petition for an injunction denying that there was "any street laid out by said city, or any grading done by or in pursuance of any ordinance or direction of said city, or any grading done whatever, and that the lots of

§ 1213. **Same subject; void assessment, etc.**—Where the land has been sold for a tax extended upon a void assessment, the issue of a tax deed will be restrained at the suit of one whose title, though acquired since the assessment, will be clouded by the deed.³⁷ The deed for land illegally sold for taxes will be enjoined, to avert a cloud upon the title, where it would be such *prima facie* evidence of title as would require evidence to remove.³⁸ Under a statute which allows abutting property to be assessed for highway improvements only to the extent to which it is actually benefited, which is to be estimated upon actual view by public officers; and where an apparent estimate of benefits in such a case rests absolutely on the estimated cost of the improvement, and not upon an actual consideration or estimate of actual benefits, the assessment is invalid and will be restrained as a cloud on the title.³⁹ A tax is invalid if it appears only upon a roll to which it does not belong, and is omitted from a roll to which the law authorizing it expressly assigns it.⁴⁰ Where the property of a railroad company had been sold by the tax collector, for the non-payment of taxes which have been remitted by act of the Legislature, before the sale and the purchaser made no attempt to assert his right to the property, but allowed the company to retain possession—the court annulled the sale, canceled the deed made to the purchaser, and enjoined him from asserting any claim to the property.⁴¹ But where an assessment is void upon the record of the proceedings in making it, there can be no cloud upon title within the equity powers of the court; it is only when the invalidity is to be proved outside

the plaintiff hereinbefore described, when neither adjacent to nor abutting on the street graded," stated a cause of action, such tax being not merely irregular but absolutely void, and liable to cloud plaintiff's title. *Touzalin v. City of Omaha*, 25 Neb. 817; *Hamilton v. City of Omaha*, 25 Neb. 826.

37. *Siegel v. The Supervisors*, 26 Wis. 70.

38. *Hare v. Carnall*, 39 Ark. 196.

39. *Johnson v. The City*, 40 Wis. 315.

40. *Folkerts v. Power*, 42 Mich. 283, 3 N. W. 857. Such a tax is a cloud on the title and may be enjoined.

41. *Mobile R. Co. v. Peebles*, 47 Ala. 317.

of the record, that chancery will interpose its preventative remedies.⁴²

§ 1214. **Property not subject to taxation.**—Injunction is an appropriate remedy to prevent the enforcement of the collection of taxes against property not the subject of taxation.⁴³ So where a bank, under the law, is not liable at all to taxation on its personal property, and the levy is made in such a way as to directly interfere with its business, equity will interfere, by injunction, to

42. California.—*Bucknall v. Story*, 36 Cal. 67; *Robinson v. Gaar*, 6 Cal. 273.

District of Columbia.—*Harkness v. District of Columbia*, 1 McArthur, 121.

Michigan.—*Curtis v. East Saginaw*, 35 Mich. 508.

New York.—*Bouton v. Brooklyn*, 15 Barb. 393; *Van Rensselaer v. Kidd*, 4 Barb. —; *Van Doren v. Mayor*, 9 Paige, 388; *Wiggin v. New York*, 9 Paige, 17.

Wisconsin.—*Dean v. Madison*, 9 Wis. 402.

See, also, following citations:

United States.—*Minturn v. Smith*, 3 Sawy. 142.

Arkansas.—*Greedup v. Franklin County*, 30 Ark. 101.

Indiana.—*Goring v. McTaggart*, 92 Ind. 200; *Morrison v. Bank*, 81 Ind. 335; *Abbott v. Edgerton*, 53 Ind. 196.

Iowa.—*Burlington R. Co. v. Spearman*, 12 Iowa, 112.

Michigan.—*Scofield v. Lansing*, 17 Mich. 437; *Palmer v. Rich*, 12 Mich. 414.

Minnesota.—*Minnesota Co. v. Palmer*, 20 Minn. 468.

Missouri.—*McPike v. Pen*, 51 Mo. 63.

Nebraska.—*Touzalin v. City*, 25 Neb. 817.

New York.—*Hanlon v. Supervisors*, 8 Abb. Pr. (N. S.) 261.

West Virginia.—*Koon v. Snodgrass*, 18 W. Va. 320.

Wisconsin.—*Milwaukee Iron Co. v. Town*, 29 Wis. 51; *Crane v. Janesville*, 20 Wis. 305; *Jenkins v. Rock County*, 15 Wis. 11; *Head v. James*, 13 Wis. 641; *Dean v. Madison*, 9 Wis. 402.

43. United States.—See *Railroad Company v. McShane*, 22 Wall. 444, 22 L. Ed. 747; *Railway Co. v. Prescott*, 16 Wall. 603, 21 L. Ed. 373; *Louisville R. Co. v. Gaines*, 3 Fed. 266.

Alabama.—*Mobile R. Co. v. Peebles*, 47 Ala. 317.

Arkansas.—*Oliver v. Memphis R. Co.*, 30 Ark. 128.

Colorado.—*Colorado Farm & L. S. Co. v. Beerbohm* (1908), 96 Pac. 443.

Delaware.—*Philadelphia R. Co. v. Neary*, 5 Del. Ch. 600.

Florida.—*Gonzales v. Sullivan*, 18 Fla. 791.

Illinois.—*New Haven Clock Co. v. Kochersperger*, 175 Ill. 383, 51 N. E. 629; *Illinois Central R. Co. v. Hodges*, 113 Ill. 323; *Illinois Central*

restrain the enforcement of the tax.⁴⁴ So a person owning real estate which is exempt from taxation is not required to take notice of its illegal assessment, nor to appear before the local tribunals to protect his property from taxation; and when it is illegally assessed he may resort to a court of equity for an injunction.⁴⁵ It is within the constitutional power of the Legislature to exempt property from taxation, or to commute the general rate for a fixed sum, and when this is done, an injunction lies to restrain taxation.⁴⁶ And in this connection it has been decided that where there is a doubt whether a bridge used by a railroad company is subject to taxation by the local authorities, an injunction against the collection of such a tax until the question is determined, will be granted by the court which has appointed a receiver who is in possession of the railroad.⁴⁷ And in a bill by a railroad company to enjoin the collection of a tax levied upon its lands, on the ground that the lands were exempt from taxation under the statute, an allegation that the lands taxed are necessary for the proper operation of complainant's railroad, and have been for a year

R. Co. v. McLean, 17 Ill. 291.

Kansas.—Missouri River R. Co. v. Morris, 13 Kan. 302.

Michigan.—Lenawee County Sav. Bank v. City of Adrian, 66 Mich. 273, 33 N. W. 304; Marquette R. Co. v. Marquette, 35 Mich. 504.

Mississippi.—Mobile R. Co. v. Mosely, 52 Miss. 127.

Missouri.—North St. Louis Society v. Hudson, 85 Mo. 32; Valle v. Ziegler, 84 Mo. 214; Mechanics Bank v. City, 73 Mo. 555; Ewing v. Board, 72 Mo. 436; Ranney v. Bader, 67 Mo. 476; Overall v. Ruenzi, 67 Mo. 203; Rubey v. Shain, 54 Mo. 207; Newmeyer v. M. & M. R. R. Co., 52 Mo. 81; State v. Saline County Court, 51 Mo. 350.

Nebraska.—Thatcher v. Adams County, 19 Neb. 485.

New Jersey.—Morris Canal Co. v. Jersey City, 12 N. J. Eq. 227.

Ohio.—Hawk v. Bonn, 6 Ohio Cir. Ct. R. 452.

Texas.—International R. Co. v. Smith County, 65 Tex. 21; County of Anderson v. Kennedy, 58 Tex. 616.

Compare King v. King, 24 App. Div. (N. Y.) 605, 49 N. Y. Supp. 1.

44. Lenawee County Sav. Bank v. City of Adrian, 66 Mich. 273, 33 N. W. 304.

45. The Illinois Central R. Co. v. Hodges, 113 Ill. 323, holding that the remedy provided by the Ill. Revenue Act, § 97, is cumulative merely.

46. The Illinois Central R. Co. v. McLean County, 17 Ill. 291.

47. Clark v. McGhee, 87 Fed. 789, 31 C. C. A. 321, 59 U. S. App. 69.

past and upwards, is equivalent to an assertion that the lands are made use of for that purpose, and is a sufficient averment that the lands were such as were by the statute exempt from taxation.⁴⁸ The ground upon which an injunction is granted to restrain the collection of a tax on exempt property, is that it thus prevents a multiplicity of suits.⁴⁹ But in the case of railroad property about to be sold to enforce the payment of an exempt tax, there is a further ground, that the sale of the road would result in the stoppage of its trains and the suspension of its business.⁵⁰ Again, an injunction will issue to restrain the illegal levy of taxes on property not within the district when the tax should be levied.⁵¹ But while courts of equity will, in many cases, enjoin the collection of a tax sought to be enforced against property exempt from taxation, they will not enjoin the collection of the whole tax because in determining the valuation of an aggregate property exempt property may have been included as a factor.⁵² Where a court of equity has acquired jurisdiction of a suit to enjoin the enforcement of a tax on property which is exempt by law from taxation, the subsequent wrongful conduct will not deprive it of its power to grant such ultimate relief as the plaintiff may be entitled to upon the facts occurring during the pendency of the suit and which were fully presented by the supplemental complaint.⁵³

§ 1215. **Exempt property; cemetery.**—It is the general policy

48. *The Marquette R. Co. v. Marquette City*, 35 Mich. 504.

49. *The Morris Canal Co. v. The Mayor*, 12 N. J. Eq. 227.

50. *Oliver v. Memphis R. R. Co.*, 30 Ark. 128.

51. *Thatcher v. Adams County*, 19 Neb. 485. Where a resident of New York, and a resident of Ohio, who spent most of his time in New York with his family, where his business kept him, were appointed under a will of a New Yorker as executors, and qualified, and made return to the

New York surrogate, and all testator's property was held in New York, and was never in Ohio, such executors may enjoin the auditor of the county of the Ohian's residence from placing any part of testator's personalty on his tax duplicate—such property not being within the jurisdiction of the Ohio taxing power. *Hawk v. Boun*, 6 Ohio Cir. Ct. R. 452.

52. *Huck v. The Chicago & Alton R. Co.*, 86 Ill. 352.

53. *Colorado Farm & L. S. Co. v. Beerbohm* (Colo. 1908), 96 Pac. 443.

of the law that all property of the inhabitants of a State shall be taxed. Exemptions are therefore construed strictly, and are not to be enlarged by construction. If a party claims that certain property is exempt, the burden is on him to show clearly that it comes within some exception.⁵⁴ In Illinois, courts of equity have jurisdiction to enjoin the collection of taxes assessed on exempt property, even though the owner has not endeavored to avoid the tax either before the municipal authorities or in the county court, on application for judgment for delinquent taxes.⁵⁵ Land owned by a cemetery company, and platted by it for future use for burial purposes, but only used for the present for raising sod and flowers for use in the cemetery, and for draining the cemetery and feeding horses used therein, is not "subservient to burial purposes," within the meaning of an exemption clause in the company's charter.⁵⁶ Under the article of the Louisiana consti-

54. *Redemptorist Fathers v. Boston*, 129 Mass. 180; *Appeal Tax Court v. Rice*, 50 Md. 302; *Cooley, Tax'n* (2d Ed.), 208.

55. *Rosehill Cemetery v. Kern*, 147 Ill. 483, 35 N. E. 240, per *Curiam*: "It is contended by appellee that the court below had no jurisdiction to entertain the bill, because it failed to allege that the complainant had endeavored to avoid the tax sought to be enjoined, either before the municipal authorities or the county court, on application for judgment. We have expressly held otherwise. *Railroad Co. v. Hodges*, 113 Ill. 323. It is well settled in this State that the collection of a tax levied upon property not subject to taxation will, on application of the owner, be enjoined. He has a right to assume that the exemption will be respected, and is not required to take notice of its illegal assessment and valuation, 'nor to appear before the local tribunals in that regard.' *Id.* He must, how-

ever, be prepared to maintain his claimed right of exemption, by clear and satisfactory proof. In *re Swigert*, 119 Ill. 83, 6 N. E. 469, and cases cited. The claim here being that the property was exempt because of its use, the burden was upon the complainant to satisfactorily show that it was appropriated to the use specified in the law under which the exemption is claimed. In *re Swigert*, 123 Ill. 272, 14 N. E. 32, and cases cited."

56. *Rosehill Cemetery v. Kern*, 147 Ill. 483, 35 N. E. 240, per *Curiam*: "As we understand the testimony of Mr. Scott and other witnesses testifying on behalf of the company, lots were not offered for sale, or bodies buried on the grounds, until after the sections were improved; hence only the one section could be said to be in actual use by the corporation for burial purposes. It is not claimed, nor could it be, under the evidence, that it was appropriated to the 'gen-

tution which provides that property used exclusively for colleges or other school purposes shall be exempt from taxation, provided it is not used for purposes of private profit, a school building in which stenography and typewriting are extensively taught is not exempt from taxation, and the tax officers will not be enjoined from selling it for the taxes assessed against it.⁵⁷

eral use of lot holders,' and so it only remains to be seen whether it was 'subservient to burial uses,' within the proper meaning of that language in section 5. On this question we are unable to see how the case is distinguished from *People v. Grace-land Cemetery Co.*, 86 Ill. 336. The section of the charter of the Grace-land Cemetery Company exempting its property from taxation is an exact copy of section 5 of the charter of this company. The decision in that case is conclusive in this, to the effect that the mere purchase of the land in question for future use as burial grounds, and platting it, does not make it 'subservient to burial purposes' within the meaning of the charter. The language of section 5 is expressly so—it must have 'been platted and recorded as cemetery grounds,' and also actually used for burial purposes, or for the general use of lot holders, or subservient to burial purposes. It will be observed that the subserviency is not merely to cemetery uses, or for the general purposes of the company, but to 'burial uses.' This clearly means 'useful as an instrument to promote interments of the dead,'—actual burials. If it be said this is a narrow view of the language, the answer is the intention of the State to bind itself by an exemption of property from taxation must be clear, as all presumptions are against it. *Cooley*,

Tax'n, 54. The word 'subservient' sometimes means 'useful in an inferior capacity; serving to promote some end.' As here used, it may properly be construed to mean grounds not for actual burial purposes, viz., in which it deposits bodies, but useful in connection with such grounds; 'serving to promote the end of burying the dead;' 'subservient to burial uses,' not subservient to sodding grounds, or ornamenting graves, or draining grounds, or feeding horses used in the cemetery; subservient, not to the general purposes of the cemetery, but to the one thing—burial uses. We do not wish to be understood as holding that cemetery grounds are only exempt from taxation when burials have been actually made upon them, or that the necessities of the corporation may not be reasonably anticipated by appropriating grounds to burial purposes before they are absolutely demanded, so as to bring them within the exemption. This, we think, is done by this company when it 'makes up' sections or otherwise, and acting reasonably, in good faith, actually devotes its grounds as a body to immediate use for burials. It cannot, however, by platting a large body of land, and appropriating a fraction of it to actual burial purposes, escape taxation of the whole."

57. *Lichentag v. Tax Collector*, 46 La. Ann. 572, 15 So. 176.

§ 1216. **Same subject; Montana and Tennessee.**—The Montana constitution, and the revenue act of 1891, passed in pursuance of it, which exempt from taxation the property of the State and Federal governments, and “such other property as may be used exclusively for certain societies, and institutions of purely public charity,” do not exempt purely public charitable institutions, as such, from the payment of taxes, but only such of their property as is used exclusively for charitable purposes; and a mere intention of such an institution to use its property for charitable purposes at some time in the future is not sufficient to entitle it to exemption, and to injunctive relief from taxation.⁵⁸ Under the constitution of Tennessee which provides that the Legislature shall except from taxation one thousand dollars worth of personal property in the hands of “each taxpayer,” a married woman is entitled to such exemption, though her husband is entitled to, and has been allowed, the same exemption; such exemption being to the taxpayer, and not to the family. And where the situs of such taxpayer’s personal property is within the limits of a certain municipal corporation, she is entitled to such exemption, though she resides without the corporation, unless it has been allowed to her elsewhere, on other taxable personal property.⁵⁹

58. Montana, etc., *Missions v. Lewis County*, 13 Mont. 559, 35 Pac. 2, per *Curiam*: “Such intention is not sufficient to constitute the use contemplated by the Constitution and the law. *Green Bay & M. Canal Co. v. Outagamie Co.*, 76 Wis. 587, 45 N. W. 536. In Pennsylvania the court went further than we do, or need to, and held that the exemption would not apply to premises on which a church was in process of erection. *Mullen v. Commissioners*, 85 Pa. St. 288. How much stronger against the appellant is the fact that in its case there is not even a commencement of the alleged intended use. See, also, *Detroit*

Y. M. Soc. v. Mayor, etc., of Detroit, 3 Mich. 172; *Mulroy v. Churchman*, 60 Iowa 717, 15 N. W. 583; *Redemptorist Fathers v. Boston*, 129 Mass. 178; *Washburn College v. Commissioners*, 8 Kan. 344. We are, therefore, clearly of opinion that, as the property in question is not all used for an ‘institution of purely public charity,’ it is not exempt from taxation.”

59. *First Nat. Bank v. Morristown*, 93 Tenn. 208, 23 S. W. 975, per Caldwell, J.: “The exemption is to ‘each taxpayer,’ not to each head of a family, nor to each person residing within the particular town or county in which the assessment may be

§ 1217. **Restraining municipal taxes.**—The rule that the mere illegality of a tax is no ground of itself for the interposition of a court of equity, but that there must exist in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, applies only to taxes levied by the sovereign; it would seem not to be properly applicable to the case of an illegal tax levied by a municipal corporation.⁶⁰ And a court of equity has assumed jurisdiction of an action to enjoin further proceedings by local officials, such as the board of aldermen, on the ground that their action was *ultra vires* and void,⁶¹ or unreasonable and oppressive.⁶² So where a common council purchased lands for a manifest private purpose, to the exclusion of corporate purposes, and for private gain, the tax to pay for the land was enjoined.⁶³

made. No citizen answering the designation of 'taxpayer' is excluded from the exemption. 'Each taxpayer,' without exception, is entitled to its benefit; that is, each citizen owning taxable personal property is entitled to the exemption. The citizen owning the property, and to whom it may be rightfully assessed, is the taxpayer, and as such is the person for whose benefit the exemption is provided, whether that person be a married or unmarried woman, a resident of the particular town or county in which the assessment is made, or of some other part of the State. The citizen's ownership of personal property otherwise subject to taxation is the criterion by which his or her right to the exemption is to be determined; and, wheresoever the property is taxable, there the owner should be allowed the exemption, unless it has been allowed elsewhere on other taxable personalty. The exemption is from State, county and municipal taxation—from all alike. Neither State, county nor municipality can exercise the taxing power against the owner of personal property without

at the same time allowing him the constitutional exemption."

60. *The Alexandria Bridge Co. v. District of Columbia*, 1 Mackey, 217; *State Railroad Tax Cases*, 92 U. S. 575, 615, 23 L. Ed. 663, per Miller, J.: "These reasons, and the weight of authority by which they are supported, must always incline the court to require a clear case for equitable relief before it will sustain an injunction against the collection of a tax, which is part of the revenue of a State. Whether the same rigid rule should be applied to taxes levied by counties, towns and cities, we need not here inquire; but there is both reason and authority for holding that the control of the courts in the exercise of power over private property by these corporations, is more necessary, and is unaccompanied by many of the evils that belong to it when affecting the revenue of the State."

61. *Strathford v. Greensboro*, 124 N. C. 127, 32 S. E. 394.

62. *Skinker v. Heman*, 148 Mo. 349, 49 S. W. 1026.

63. *Sherlock v. The Village*, 59 Ill. 389.

And a municipal corporation has been enjoined from collecting a tax, where a person resided in the town, and his personal property belonged elsewhere.⁶⁴ And where an occupied farm lay partly in each of two adjoining towns and was assessed and taxed in both towns, and warrants for the collection of the taxes were placed in the hands of the respective town collectors, a bill of interpleader was allowed against the two collectors for the purpose of determining in which town the farm was properly taxed.⁶⁵ And where the taxes on the lands of one had been illegally increased by reason of the illegal exemption of other lands from taxation, an injunction was granted against the municipality.⁶⁶ In West Virginia it has been decided that an injunction against a municipal tax can only be obtained under like circumstances as against the State itself; there must exist special circumstances bringing the case under some head of equity jurisdiction.⁶⁷

§ 1218. **Same subject; illustrations.**—Where a municipal corporation is created without any express restriction upon its power to levy taxes or raise money, it can exercise that power only for legitimate municipal purposes, the power of the corporation in that respect being limited by the object and purpose of its creation. Any abuse of this power will be restrained by injunction.⁶⁸ So an injunction will lie in behalf of a taxpayer to prevent the collection of taxes in excess of the constitutional limitation, he having paid all the taxes except those he claims to be illegal.⁶⁹ And where the requirements of the law are disregarded in reference to municipal improvements, the tax may be enjoined.⁷⁰ Again, where the

64. *Eversole v. Cook*, 92 Ind. 222.

65. *Dorn v. Fox*, 61 N. Y. 264.

66. *Weeks v. City*, 10 Wis. 242.

67. *Douglass v. The Town*, 9 W. Va. 162.

68. *Foster v. City of Kenosha*, 12 Wis. 616.

69. *Arnold v. Hawkins*, 95 Mo. 569, where a county tax was enjoined. See *Cincinnati v. James*, 55 Ohio St. 180, 44 N. E. 925.

70. *Florida*.—*Smith v. Longe*, 20 Fla. 697.

Illinois.—*City v. Edwards*, 84 Ill. 626.

Indiana.—*Toledo v. Lafayette*, 22 Ind. 262.

Maryland.—*Mayor v. Grand Lodge*, 44 Md. 436; *Mayor v. Porter*, 18 Md. 284; *Holland v. Mayor*, 11 Md. 186.

Missouri.—*Overall v. Rienzi*, 67 Mo. 203.

municipal authorities are required to give notice of an application for the passage of an ordinance, their failure to do so will warrant an injunction restraining the tax levied by such ordinance.⁷¹ Where the law requires the taxes to be uniform on all property, equity will restrain a tax violative of the requirement.⁷² The remedy, though, of injunction to restrain the collection of municipal taxes upon real estate, regularly assessed in pursuance of general ordinances to raise revenue for the current wants of the city, which ordinances are attacked for the sole reason that they do not burden all taxable property alike, is subject to the sound discretion of the chancellor; and where he has refused an injunction, the appellate court will not review his action.⁷³ An illegal tax ordinance which requires returns and payment to be made within an hour after the tax accrues, then in case of default, doubles the tax, and prescribes penal punishment for non-payment, is better resisted by injunction than any common law remedy; and this on account of the remediless condition a trader would be in if only allowed the common law remedy.⁷⁴ Whenever an assessment is invalid, and such invalidity is shown only by matters *dehors* the record, which in itself is in all respects regular, and within the power and jurisdiction of the authority laying the same, an action in equity may be maintained by any one, upon whose real estate an apparent lien has been created by the assessment in behalf of himself and others in like situation who may come in and contribute, to have the same canceled, and to restrain the enforcement thereof.⁷⁵ The require-

New York.—Hassan v. City, 67 N. Y. 528.

Texas.—City v. Davis, 57 Tex. 225.

71. The Mayor v. The Grand Lodge, 44 Md. 436.

72. Young v. Henderson, 76 N. C. 420.

73. Wayne v. The Mayor, 56 Ga. 448.

74. Gould v. The Mayor, 55 Ga. 678. In Virginia it is well settled that an illegal tax may be enjoined. County authorities are not there authorized, independent of the action of

the legislature, to assess railroad or other property for taxation and county levies; and if they do so, injunction is the proper remedy. Shenandoah Valley R. Co. v. Supervisors, 78 Va. 269; City of Richmond v. Crenshaw, 76 Va. 936; Goddin v. Crump, 8 Leigh (Va.), 121; Bull v. Read, 13 Gratt. (Va.) 78; Eyre v. Jacob, 14 Gratt. (Va.) 422.

75. Clark v. The Village, 12 Hun (N. Y.), 181, but to justify such an action it must be alleged in the complaint that the assessment is regular

ments generally found in city charters that the council shall cause to be made an estimate of the expense of any public improvement before it shall be commenced, is mandatory, and non-compliance with this will warrant an injunction.⁷⁶

§ 1219. **Controlling municipal affairs.**—When a court of equity grants an injunction against a municipal tax, it does not proceed to control or conduct the affairs of the corporation. A court of equity is not invested with jurisdiction to conduct the affairs of a municipality, or to supervise and control the action of its officers, or the people, so long as they confine themselves to the powers conferred by statute, though such action may be unwise and not for the best interests of the people.⁷⁷ Thus questions in relation to the validity of judgments rendered against a parish, and appropriations made by the police jury to pay them, with other accounts of the receiving and disbursing officers of the parish, cannot be inquired into in an injunction suit taken out by a taxpayer against the tax collector of the parish. Nor can the right to the office of tax collector, or any other officer in the parish be tested in such a proceeding.⁷⁸ And the validity of the corporate existence of a corporation can be tested only by proceedings in behalf of the people, and such existence cannot be attacked in a proceeding to enjoin a tax.⁷⁹ The mere fact that the voters at a town meeting have voted an illegal tax, is not sufficient ground for enjoining the town officers from assessing or collecting the tax.⁸¹ Where the assessment upon which a sale of lands for taxes is based was made by the officers of a town in which said lands were not and never had been situated, and whose officers had never before exercised any jurisdiction over the lands, the deed issued upon such sale is void, and the statute of limitations cannot

upon its face, and apparently in accordance with the provisions of the charter authorizing it.

76. *Pound v. Supervisors*, 43 Wis. 63; *Kennedy v. City*, 14 Hun (N. Y.), 308; *Massing v. Ames*, 37 Wis. 645; *Weeks v. Milwaukee*, 10 Wis. 242.

77. *The Town of Lemont v. The Singer Co.*, 98 Ill. 94.

78. *Lambeth v. De Bellevue*, 24 La. Ann. 394.

79. *Dean v. Davis*, 51 Cal. 406.

81. *Judd v. The Town of Fox Lake*, 22 Wis. 583.

be invoked in its support.⁸² The motives which may have induced a city to take within its corporate limits certain lands cannot be inquired into, in an action to restrain the collection of taxes levied on the same by the city.⁸³ But where the annexation of contiguous territory is clearly illegal, it has been held that the levy and collection of municipal taxes, on such lands, may be enjoined.⁸⁴

§ 1220. **Municipal improvements; council's discretion.**—Where the measure of assessments for street improvements in a city is limited to the amount of benefits derived, and the common council is invested with a discretion in determining that amount, the courts will not review the determination of the council so long as its discretion is honestly exercised, and not abused. But where it appears that there is no necessity for the improvement; that, as made, it never has been used, though completed over two years, and probably never will be used; and that property assessed for benefits was not benefited, but actually damaged,—a decree enjoining the collection of such assessment is proper.⁸⁵ Where city

82. *Wadleigh v. Marathon Bank*, 58 Wis. 546, 17 N. W. 314.

83. *The City of Logansport v. Seybold*, 59 Ind. 225.

Where by an unconstitutional statute the boundaries of a city are extended so as to include property which the city claims the right to sell to enforce a local tax thereon based on such statute, such proceedings do not create a cloud on the title which authorizes a court of equity to interfere by injunction. *City of Ensley v. McWilliams* (Ala. 1906), 41 So. 296.

Where a new sewer district has been formed one seeking an injunction against the collection of a special assessment and who alleges that the division is unlawful must show an injury in consequence of the division complained of. *Shannon v. City of Omaha* (Neb. 1906), 106 N. W. 592.

Lapse of time may preclude right.—*Sage v. Plattsmouth*, 48 Neb. 558, 67 N. W. 455.

84. *City of Logansport v. La Rose*, 99 Ind. 117. See preceding note.

85. *Oregon R. Co. v. Portland*, 25 Oreg. 229, 35 Pac. 452, per Moore, J.: "The streets of a city having been dedicated by the proprietor to the public, the State, by its legislative assembly, may determine the necessity for, and character of, any improvement thereto, and what property will be benefited thereby; and whatever power the legislature possesses over the streets of a city it may delegate to its corporate authorities, to be exercised in the mode, and to the extent, prescribed in the act conferring such power. This delegation of power invests the municipal corporation with all the discretion the legislature possessed, and hence it follows

ordinances are wholly void the city may be enjoined from the collection of street assessments under their authority.⁸⁶

that the common council, as agent of the corporation, is clothed with exclusive discretion in determining the necessity for and character of all street improvements, what property will be benefited thereby, and the amount of benefits conferred. If the courts were invested with authority to review these questions of policy, but few assessments could ever be collected without an action, and the adjudication of purely legislative questions would be substituted for the discretion of a city council. The only recognized exceptions to this rule are to be found in those cases in which, under pretense of apportionment, a work of general benefit has been treated as one of merely local consequence, and the cost imposed on some local community in disregard of the general rules which control legislation in matters of taxation. *Cooley, Tax'n*, 450. The presumption is that the council has done its duty; but this presumption may be overcome by facts showing that the rule prescribed for the apportionment or the assessment made under it is so grossly and palpably unjust and oppressive as to give demonstration that the proper authority had never determined the case on the principle of taxation. *Cooley, Tax'n*, 662. Thayer, J., in speaking of the discretion of a common council in assessing benefits, said: 'It exercises such authority as agent of the State, and for the public good; and, so long as it keeps within the scope of its power, the courts have no control over it, nor jurisdiction in a collateral proceed-

ing to question its acts. If it were to assess property for the cost of constructing a sewer, so laid as to render it physically impossible to benefit the property, as in the case of *Hansecom v. City of Omaha*, 11 Neb. 37, 7 N. W. 739, it would exceed its authority, and it would be the duty of the courts to interfere, and prevent the wrong from working injury; but where the property is directly benefited by the prosecution of such an enterprise, and the common council has assessed what it deems a proportionate share of the cost upon the owner thereof, the courts are not authorized to institute an inquiry in order to ascertain whether or not the assessment exceeds the benefits.' *Paulson v. Portland*, 16 Or. 450, 19 Pac. 450. 'We have no doubt,' said the court in *Allen v. Drew*, 44 Vt. 174, 'that a local assessment may so far transcend the limits of equality and reason that its exaction would cease to be a tax or contribution to a common burden and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name.'

The assessment must not amount to a confiscation of property.—*Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408; *Brooks v. Norwood*, 12 Ohio C. C. 257.

86. *Parker v. Astoria*, 25 Or. 425, 36 Pac. 293; *Babbidge v. Astoria*, 25 Or. 417, 36 Pac. 291. See, also, *Verdin v. St. Louis*, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; *Providence Retreat v. Buffalo*, 29 App. Div. (N. Y.) 160, 51 N. Y. Supp. 654.

§ 1221. **Where a municipal tax has been restrained.**—An injunction has been granted against a municipal tax where the city commissioner failed to advertise for proposals to do the work, in the requisite number of newspapers, as required by the ordinances,⁸⁷ and where the right of way of a railroad was assessed both as a right of way and as town lots.⁸⁸ Again, an injunction was granted where a person, through whose lands an improvement had been laid out, had no actual notice that the improvement was being made, and was not guilty of any want of diligence in asserting his rights before the work was completed.⁸⁹ And an injunction was granted where a tax was levied to improve the property of the city at the expense of abutting property.⁹⁰ So where an owner of abutting property failed to enjoin the prosecution of an improvement upon a street, which was illegally ordered by the city council, and paid an assessment for the same under protest, he was allowed an injunction against the collection of a subsequent and further assessment for the same work.⁹¹ In a general taxpayers' action to enjoin the payment of city funds under a contract for paving, which is alleged to be void, the plaintiff's are not estopped because they did not commence their action until the completion of the work.⁹² And generally where there is a want of power to tax, or there is a disregard of constitutional provisions, a municipal tax will be enjoined.⁹³ And where the owners of land conveyed it

87. *The Mayor v. Johnson*, 62 Md. 225. He advertised in one newspaper, when he was required to advertise in three.

88. *The Chicago and Northwestern R. Co. v. Miller*, 72 Ill. 144.

89. *Teegarden v. Davis*, 36 Ohio St. 601. But had he known of the improvement it would be otherwise. *Kellogg v. Ely*, 15 Ohio St. 64; *Gordin v. C. & W. Canal Co.*, 18 Ohio St. 169; *Reckner v. Warner*, 22 Ohio St. 275; *Neff v. Bates*, 25 Ohio St. 169; *Quinlan v. Myers*, 29 Ohio St. 500.

90. *City of Fort Wayne v. Shoaff*, 106 Ind. 66, 5 N. E. 403.

91. *Tallant v. Burlington*, 39 Iowa, 543.

92. *Cawker v. City of Milwaukee* (Wis. 1907), 113 N. W. 417, where in the court distinguishes between an action by the individual owner to restrain the collection of an assessment and a general taxpayers' action.

See *Harmon v. Omaha*, 53 Neb. 164, 73 N. W. 671.

93. *Banger's Appeal*, 109 Pa. St. 79. See, also, *Dean v. Charlton*, 23 Wis. 590; *Stebbins v. Challiss*, 15 Kan. 55; *Hobart v. Detroit*, 17 Mich. 246; *Deason v. Dixon*, 54 Miss. 585; *Scobey v. Decatur County*, 72 Ind. 551; *Jackson v. Detroit*, 10 Mich.

to a city on the condition that the city lay it out and improve it as a street, and keep it in repair as such, an owner of land abutting on such street was held entitled to an injunction against the sale of such land by the city, and the collection from him of the cost of improving or repairing the street.⁹⁴

§ 1222. **Tax in aid of railroads, etc.**—A great deal of litigation has taken place over the validity of bonds issued by municipalities to help in the building of railroads, and other public improvements. The rule is that unless restrained by a constitutional prohibition of some sort, the Legislature of a State may properly authorize a county to aid, by issuing its bonds, and giving them as a donation to a railroad company.⁹⁵ When an act of the Legis-

248; *L. L. & G. R. Co. v. Clemmens*, 14 Kan. 82; *Byram v. Detroit*, 50 Mich. 56; *Weber v. St. Francisco*, 1 Cal. 455; *Beck v. Allen*, 58 Miss. 143; *Peoria v. Kidder*, 26 Ill. 351; *Barker v. City of Omaha*, 16 Neb. 269; *Montgomery v. Wasem*, 116 Ind. 343; *Olmstead v. Koester*, 14 Kan. 463; *Sexsmith v. Smith*, 32 Wis. 299; *Quinlan v. Meyers*, 29 Ohio St. 500; *Mayor v. Dehoney*, 55 Ga. 33; *Blessing v. City*, 42 Tex. 641.

94. *Omaha v. Megeath*, 46 Neb. 502, 64 N. W. 1091.

95. *Railroad Company v. County of Otoe*, 16 Wall. 667, 673, 21 L. Ed. 375, per Strong, J.: "The legislature of a State may exercise all powers which are properly legislative, unless they are forbidden by the State or national constitution. This is a principle that has never been called in question. If, then, the act we are considering was legislative in its character it is incumbent upon those who deny its validity to show some prohibition in the constitution of the State against such legislation. And that it was an exercise of legislative power is not difficult to maintain. No one ques-

tions that the establishment and maintenance of highways, and the opening facilities for access to markets, are within the province of every State legislature upon which has been conferred general legislative power. These things are necessarily done by law. The State may establish highways or avenues to market by its own direct action, or it may empower or direct one of its municipal divisions to establish them, or to assist in their construction. Indeed, it has been by such action that most of the highways of the country have come into existence. They owe their being either to some general enactment of a State legislature or to some law that authorized a municipal division of the State to construct and maintain them at its own expense. They are the creatures of law, whether they are common county or township roads, or turnpikes, or canals, or railways. And that authority given to a municipal corporation to aid in the construction of a turnpike, canal, or railroad is a legitimate exercise of legislative power, unless the power be expressly denied,

lature has been passed enabling a city to aid in the construction of a railroad, and when a donation has been made in pursuance of such an act, and a tax has been levied to pay the interest on the bonds issued, and to create a sinking fund to pay the principal when due, the collection of such tax can be enjoined by a taxpayer in a suit against such city and her treasurer, not on grounds sufficient merely to enjoin the making of such donation, but only on grounds constituting a valid legal defense to the payment of the bonds in the hands of the present holders.⁹⁶ The validity of the order of the county commissioners in appropriating a railroad aid tax and the subsequent proceedings in ordering the levy of the tax cannot be attacked collaterally by way of injunction, and where no forfeiture of the tax levied has been legally declared its collection cannot be enjoined because the construction of the road was not commenced within two years or because the road was not completed through the township within three years after the levy of the tax.⁹⁷

is not only plain in reason, but it is established by a number and weight of authorities beyond what can be adduced in support of almost any other legal proposition. The highest courts of the States have affirmed it in nearly a hundred decisions, and this court has asserted the same doctrine nearly a score of times."

96. *Wilkinsin v. The City of Peru*, 61 Ind. 1. When the term "donation" is used in a statute it means an absolute gift or grant, made without condition or consideration.

97. *Pittsburgh, etc. R. Co. v. Harden*, 137 Ind. 486, 37 N. E. 324, per Howard, C. J.: "It is, perhaps, a sufficient answer to these propositions to say that no forfeiture of the taxes levied was ever declared, and that without such declaration of forfeiture the collection of the special tax cannot be enjoined. *Nixon v. Campbell*, 106 Ind. 47, 4 N. E. 296,

and 7 N. E. 258. The railroad company not being able to begin or complete the road in the time contemplated when the tax was first voted, the county commissioners, under provisions of section 5369, Rev. St. 1894 (section 4069, Rev. St. 1881), suspended the collection of the taxes; but there was and could be no forfeiture, unless expressly declared in the manner provided by law. *Wilson v. Board*, 68 Ind. 507; *Board of Com'rs of Marion Co. v. Center Tp.*, 105 Ind. 422, 2 N. E. 368, and 7 N. E. Rep. 189. We may further note that the petition did not fix a time within which the extension of the road should be completed. Time was not, therefore, made an element in the agreement of the company to build the road, and so long as the road was not completed the money might be withheld by the commissioners. The road might be com-

§ 1223. **Same subject.**—Taxes in aid of railroads can only be levied and collected in the manner provided by the statute, and where the methods therein prescribed are not pursued the tax will be enjoined.⁹⁸ The State cannot properly be made a party plaintiff, at the relation of a private citizen, to a bill of injunction to restrain the municipality from issuing its bonds or levying a tax to pay for a subscription to the stock of a railroad company; the State has no interest in the subject matter.⁹⁹ Where it is conceded that bonds issued in aid of railroads are void, a levy of taxes to pay them may be prevented by injunction.¹ When the electors of a township are induced by fraudulent representations to vote a tax to aid in the construction of a railway, the collection of the tax may be enjoined.² A State court cannot enjoin the collection of a tax levied pursuant to a mandamus issued by a Federal court to enforce the payment of its judgments.³ A vote taken upon a proposition to appropriate an entire sum to be apportioned between two railroads, to aid in their construction by a county, is illegal, and the collection of the taxes levied in accordance therewith may be enjoined.⁴ All preliminary questions, such

pleted, however, before the tax could be collected, and the failure to have it completed before that time would not authorize an injunction against the collection. *Brokaw v. Board*, cited above; 15 Am. & Eng. Enc. Law, 1284, 1285. And as to the question of collateral attack, see *Faris v. Reynolds*, 70 Ind. 359; *Reynolds v. Faris*, 80 Ind. 14; *Montgomery v. Wasem*, 116 Ind. 343; *Hilton v. Mason*, 92 Ind. 157; *Board v. Montgomery*, 106 Ind. 517; *Davidson v. Koehler*, 76 Ind. 398; *Ricketts v. Spraker*, 77 Ind. 371; *Argo v. Barthand*, 80 Ind. 63; *Town of Cicero v. Williamson*, 91 Ind. 541; *Kennedy v. Montgomery County*, 98 Tenn. 165, 38 S. W. 1075.

98. *The State v. Hager*, 91 Mo. 452, holding that the county court has no power to levy a tax to pay

the judgment of a United States court based upon coupons attached to bonds issued under the provisions of the township aid act, without first complying with the provisions of the statute.

99. *State v. The Parkville R. Co.*, 32 Mo. 496. This case holds that an injunction will not be granted at the instance of a taxpayer, to restrain a county court from levying a tax, upon the ground that the court had no jurisdiction, and that its action was a nullity.

1. *Hayes v. Dowis*, 75 Mo. 250; *Webb v. Lafayette County*, 67 Mo. 353; *State v. Brassfield*, 67 Mo. 331.

2. *Sinnett v. Moles*, 38 Iowa, 25.

3. *Gaines v. Springer*, 46 Ark. 502.

4. *Bronenberg v. The Board of Commissioners*, 41 Ind. 502.

as whether the property and franchises of a railroad company are owned by a foreign corporation, or whether there is a prior existing levy on the township to aid the same road, or whether proper notices of election concerning the levy of the taxes were given, are all matters to be decided by the municipal authorities before granting the prayer of the petition, and such decision can only be reviewed upon a direct appeal, and cannot be questioned by a suit to enjoin the collection of the tax.⁵ Where bonds have been issued by a township to a railroad company, under a vote at an election held without authority of law, neither the State nor the local officers have authority to cause a tax to be levied for the payment of the principal or interest of such bonds, and they may be enjoined from attempting to do so.⁶

§ 1224. **Further illustrations.**—Where a County Court ordered a special election to vote on a proposition to subscribe to the capital stock of a railroad, but no sufficient notice was given of the election, an injunction was granted.⁷ A petition to a board of county commissioners, praying the board to order an election upon a proposed appropriation by a township, to aid in the construction of a railroad, is not invalid because it asks that the tax to be levied shall be paid to the proper railroad company named, “or its assigns.”⁸ An election was held in an incorporated town, resulting in a majority vote in favor of issuing bonds for railroad purposes, there being at that time no law authorizing such a vote. By a subsequent act of the Legislature, a new town was incorporated including the old town, which act recited the prior election and authorized the town to issue bonds as voted, under which the new town subscribed to the capital stock of a railroad company and issued its bonds in payment thereof; it was held that a taxpayer of the town had a right to have the collection of the tax on his property enjoined.⁹ Where an appropriation to aid in the

5. *Reynolds v. Faris*, 80 Ind. 14.
For the purpose of a tax in aid of a railroad, an incorporated town within the township is part of the township.

6. *Rutz v. Calhoun*, 100 Ill. 392.

7. *McPike v. Pen*, 51 Mo. 63.

8. *Faris v. Reynolds*, 70 Ind. 359.

9. *Flack v. Hughes*, 67 Ill. 384.

construction of two railroads has been voted by a county in one entire sum, to be apportioned in the amounts specified in the petition asking for such appropriation, the vote is a nullity, and the collection of a tax levied to pay such appropriation may be enjoined.¹⁰ A court of equity has jurisdiction to restrain by injunction the collection of a tax which has been certified by mistake by the clerk to have been voted, when in fact the proposition for the levy of the tax was defeated.¹¹ Taxes voted to a railroad, after the corporation has transferred its road in pursuance of a purpose entertained from the beginning, cannot be collected, and may be enjoined.¹² The omission to insert in the notice of election the conditions on which a railroad aid tax is levied, does not invalidate the tax or justify an injunction.¹³ Where a petition to a board of commissioners to make an appropriation of money, by taxation of a certain township, to aid in the construction of a railroad, specifies a certain sum, "or a sum equal to two per centum of all taxable property in said township," as the appropriation desired, it sets out the amount of the appropriation with sufficient certainty.¹⁴ A petition asking for an appropriation to aid in the construction of a railroad is not invalid for the reason that it does not ask for the annexing of conditions to the appropriation.¹⁵ Where the question of subscription to two different railway corporations is to be submitted to a vote, it is improper and irregular to submit them as a single proposition, at the same election and on the same ballot.¹⁶

10. *Finney v. Lamb*, 54 Ind. 1.

11. *Cattell v. Lowry*, 45 Iowa, 478.

12. *Blunt v. Carpenter*, 68 Iowa, 265, 26 N. W. 438.

13. *Marshall v. Silliman*, 61 Ill. 218.

14. *Wilson v. The Board*, 68 Ind. 507.

15. *Goddard v. Stockman*, 74 Ind. 400.

16. *Goforth v. The Rutherford R. Co.*, 96 N. C. 535; *McDowell v. The Massachusetts Co.*, 96 N. C. 514. See

the following cases where the subject of injunction against a municipal aid tax is discussed: *Cumines v. The Board*, 63 Barb. 287; *City of Mount Vernon v. Hovey*, 52 Ind. 563; *Zorger v. The Township*, 36 Iowa, 175; *Board of Commissioners v. Hinchman*, 31 Kan. 729; *Harcourt v. Good*, 39 Tex. 455; *Garrigus v. The Board*, 39 Ind. 66; *Lockhart v. The City*, 48 Ala. 579; *Board of Supervisors v. Weider*, 64 Ill. 427; *Foster v. City of Kenosha*, 12 Wis. 616.

§ 1225. **Gratuities.**—If there is a valid legislative authority therefor, a gratuity given by a municipality will not be enjoined. Thus, where the supervisors of a town, under the acts of the Legislature, and pursuant to the vote of the town, allowed bounties for the destruction of wolves, the amount of which was inserted in the annual tax list, to be levied and collected of the owners of lands, an injunction, to restrain the collection of the sums so allowed for bounties, was denied.¹⁷ The Legislature may tax the people for a gratuity if there be the least possibility that making the gift will be promotive in any degree of the public welfare.¹⁸ And it is not contrary to natural justice that all the inhabitants of the State should be taxed for gratuities to a part of their number who are called upon to render military service to the general government.¹⁹ But the power to confer gratuities rests in legislative authority; the towns of a State have no general power to vote or expend money by way of bounty to soldiers, unless authorized by statute.²⁰ The towns of a State have no original power of legislation and taxation in aid of the general government in times of public peril, and any tax imposed by them, under such an assumption, will be enjoined.²¹ Where, however, sundry towns, having, without legal power, passed votes appropriating money as bounty for men drafted for the military service of the United States, and the Legislature by an act authorized such towns at meetings legally called within a time limited to confirm their previous action, it was held, that under this act all the invalidity of the previous action of the town, including a want of notice in the warning of the meeting, was cured.²²

§ 1226. **Same subject.**—Where individuals have voluntarily paid money for the benefit of the town, the town cannot, under the general law, afterward levy a tax for the purpose of refunding that money. Thus, where individuals in a town, for the purpose

17. *Mooers v. Smedley*, 6 Johns. Ch. (N. Y.) 27.

18. *Booth v. The Town of Woodbury*, 32 Conn. 118.

19. *Booth v. The Town of Wood-*

bury, 32 Conn. 118.

20. *Fiske v. Hazard*, 7 R. I. 438.

21. *Webster v. The Town of Hallowell*, 32 Conn. 131.

22. *Baldwin v. Town*, 32 Conn. 47.

of avoiding a draft, contributed money to obtain recruits for said town, it was held that the town could not levy and collect a tax for the benefit of these individuals by whose generosity the town had profited, even if the money was advanced with a general expectation that it would be refunded by the town.²³ And a tax imposed by a town for the purpose of celebrating Independence Day, was declared illegal, and the town and its treasurer were enjoined from levying the same.²⁴ Generally, though, a court of equity will only enjoin the giving of a bounty under like circumstances that it enjoins other taxes, that is, it must come under some recognized head of equity jurisdiction.²⁵ Under a call for volunteers, a number of men were drawn to fill the quota of a township. Before they had been accepted, the supervisors, in pursuance of a previous resolution to pay bounties, paid for substitutes and laid a tax to meet the payment; it was held, that the draft was not complete till those drawn had been accepted, and that the tax was lawful.²⁶

§ 1227. **Qualification of officers, etc.**—The officers who levy the tax must properly qualify. Thus, where the person appointed, under a statute, to estimate the work and audit the amount of each owner's tax for the improvement of a turnpike, did not take an oath as required by the statute, the collection of the tax was enjoined.²⁷ But it was held that the failure of the treasurer of the board of school directors to give bond, as required by law, will not warrant the enjoining of a school tax.²⁸ Where the machinery provided by law for the collection of taxes levied by a county has failed because of the refusal of the County Court to appoint tax collectors, and the refusal of the sheriff to act in their behalf, the liens of the county on property taxed for the payment of bonds

23. *Drake v. Phillips*, 40 Ill. 388.

24. *City v. Brainard*, 22 Conn. 552.

25. *Hoagland v. The Inhabitants*, 17 N. J. Eq. 106; *Scribner v. Allen*, 12 Minn. 148.

26. *Truesdell's Appeal*, 58 Pa. St.

148. See, also, *Board v. Campbell*, 42 Ill. 490; *Vieley v. Thompson*, 44 Ill. 9; *Bartholomew v. Town*, 33 Conn. 408.

27. *Webb v. Cutsinger*, 48 Ind. 246.

28. *Hall v. The Houston & Texas Central R. Co.*, 39 Tex. 286.

cannot be enforced in a court of equity by holders of the bonds, as the chancellor cannot be transformed into a tax collector.²⁹

§ 1228. **Parties; one suing for others.**—Private persons cannot assume to themselves the right to institute proceedings in chancery to redress grievances on behalf of the public. They can only proceed where their individual grievances are distinct from those of the public at large, and such as give them a private right to redress. Thus an individual has no right, as a taxpayer, either in his own name or on behalf of himself and the other taxpayers, to file a bill to enjoin proceedings in advance of the actual levy of the tax. He cannot seek redress until his own tax can be ascertained and he cannot then proceed in equity except to protect his individual interests from injuries not remediable otherwise.³⁰ As each individual tax is a separate and distinct burden, wholly disconnected from that of other persons, each has the legal right to contest the validity of the tax imposed upon him, but no taxpayer has the right to enjoin the collection of similar taxes imposed upon other persons for whom he is not agent, trustee, or acting

29. *Louisville Trust Co. v. Muhlenburg County*, 15 Ky. Law Rep. 397, 23 S. W. 674, per Hozelrigg, J.: "These liens cannot be enforced in courts of equity; courts cannot be transformed into tax collectors. In speaking of the power of the chancellor in a similar case, this court said: Because 'the remedy had been suspended by reason of the failure or refusal of those living within the precinct to accept the office [meaning the office of tax collector], or had been temporarily obstructed by reason of a defect in the law under which the collection was to be made, did not enlarge the jurisdiction of the chancellor, or confer upon him the exercise of such an extraordinary power.' *McLean County Precinct v. Deposit Bank of Owensboro*, 81 Ky.

254. To the same effect are the decisions of this court in *Johnston v. City of Louisville*, 11 Bush. 527, and *Pennington v. Woolfolk*, 79 Ky. 13. These powers and duties belong exclusively to the legislative department of the government, and their exercise by the executive or judiciary departments would be subversive of the fundamental principles of our organic law."

30. *Miller v. Grandy*, 13 Mich. 541, which holds that the only cases where individuals can sue on behalf of themselves and others, are where the interests, though numerous, are all separate, individual and not joint or public interests, identical in character and origin, but all private and independent rights, springing out of the same transaction or fund

in some other fiduciary relation.³¹ But the collection of an entire school district tax, assessed without authority of law, may be perpetually enjoined, on a bill brought by all the taxpayers of the district jointly, or by any number thereof on behalf of themselves and all the others.³² And where assessors in making an assessment for a local improvement, have, by acting upon an erroneous principle, omitted from the assessment property benefited by the improvement, and which should have been assessed therefor, it was held that an action might be maintained by one or more of the persons assessed in behalf of themselves and others similarly situated, to restrain the collection and enforcement of the same.³³ Where a complaint is filed by one on behalf of himself and others, it must aver such fact. Such an averment is essential to a complete determination of all the rights affected by the suit.³⁴ The reason one may sue on behalf of others is that a multiplicity of suits is thereby avoided.³⁵

§ 1229. **Municipality a party.**—Neither the county nor its treasurer is a necessary party to an action to restrain town officers from collecting certain taxes on lands of the plaintiff, on account

31. *The Board v. Jenks*, 65 Ill. 275.

32. *Carlton v. Newman*, 77 Me. 408.

33. *Kennedy v. City of Troy*, 14 Hun (N. Y.), 308. See *Clark v. Village of Dunkirk*, 26 Hun (N. Y.), 181.

34. *Wood v. Draper*, 24 Barb. (N. Y.) 187.

35. *Williams v. County Court*, 26 W. Va. 488.

In a bill filed to restrain the collection of taxes for school purposes, in a certain township, the plaintiff must aver that he sues, not only in his own behalf, but also on behalf of all others, similarly situated. Such averment is essential to a complete determination of all the rights affected by the suit. *McClung v. Livesay*, 7 W. Va. 329.

Any taxpayer, on behalf of himself and others, has the right to institute proceedings in a court of equity to prevent the misapplication of public funds by municipal officers, on the ground that the threatened illegal corporate act will increase the burden of taxation, and thus burden the plaintiffs. *Davenport v. Kleinschmidt*, 8 Mont. 467, 13 Pac. 249.

In an action by one property holder, suing for himself and others similarly interested, to annul an illegal assessment, where no other person becomes a party, it is an error to enjoin the collection of an assessment against the property of any other person except plaintiff. *Knell v. City of Buffalo*, 7 N. Y. Supp. 233.

of illegal and fraudulent proceedings in the assessment and valuation of the land, although the taxes sought to be avoided include those levied for county purposes.³⁶ And where a school district had issued bonds in excess of its powers and which were void in the hands of the holders; and thereafter on the maturity of the bonds a tax had been levied to pay them off, and proceedings had advanced so far that the tax roll was in the hands of the county treasurer, and where the taxpayers, without multiplicity of suits and by a single action, had adequate and complete protection against this illegal tax; it was held that the State could not maintain an action for injunction to restrain the treasurer from proceeding to collect said tax.³⁷ And the remedy by injunction in the name of the State does not lie against a board of education to prevent the collection of a tax levied by the board, the validity of which is disputed on the ground that the board has no corporate existence, nor to prevent the collection of one which has been extended on the tax books and placed in the hands of the collector. The remedy in the latter case is injunction in the name of the taxpayer against the collector.³⁸ And one municipality cannot obtain an injunction to restrain the collection of a tax levied by another municipality. That remedy can be invoked only by the taxpayer.³⁹ And a township cannot maintain an action to enjoin the collection of an illegal tax levied on the taxable property belonging to the private individuals of such township.⁴⁰ Again,

36. *The Milwaukee Iron Co. v. The Town of Hubbard*, 29 Wis. 51.

37. *The State v. McLaughlin*, 15 Kan. 228.

38. *Ewing v. The Board*, 72 Mo. 436.

39. *The Village of Nunda v. The Village of Chrystal Lake*, 79 Ill. 311.

40. *Center Township v. Hunt*, 16 Kan. 430. An action to vacate an audit by a town board of a fraudulent claim, and to restrain the collection of a tax therefor, may be brought by a taxpayer under N. Y. Laws 1872, ch. 161. The right to maintain the

action is not confined to cases where, before the passage of the act, an equitable action could have been brought by the town for the same relief. *Osterhoudt v. Rigney*, 98 N. Y. 222. To such an action, the persons in whose favor the audits were made are proper and necessary parties. *Osterhoudt v. Ulster County Supervisors*, 98 N. Y. 239. A bill to restrain a town and its sergeant from collecting from complainants' employer the amount of a road tax which it is alleged the sargeant had threatened to do, though not authorized by any or-

where a school district issued a bond and a taxpayer brought an action against the treasurer of the county for the purpose of enjoining the collection of the tax levied to pay the bond, it was held that the school district was a necessary party.⁴¹

§ 1230. **Joinder of parties.**—Where an alleged illegality in taxation extends to the whole assessment, or where it affects in the same manner a number of persons, so that the question involved can be presented by one bill, filed by all or any number thus interested, such joint bill may properly be filed;⁴² but the court can adjudicate upon the rights of those only who do so unite, or who appear as parties before it; and the court cannot restrain the collection of any tax upon any property belonging to any person who is not a party to the suit, or who does not ask that the collection thereof shall be restrained.⁴³ But where a tax, considered in the abstract, is legal and valid, but when applied to the separate property of two or more particular persons, becomes as to such property illegal and invalid, such persons have no joint action for an injunction to restrain the collection of the tax.

dinance or general law, and to restrain the employer from paying the tax and deducting the amount from complainants' wages, cannot be maintained against the town, as it shows that the town had not authorized the collection; nor against the employer, because as against him complainants have a remedy at law, though they allege that to assert their rights would cause their discharge. *Buffalo v. Town of Pocahontas*, 85 Va. 222, 7 S. E. 238. When the tax roll is placed in the hands of the tax collector, and levying and assessing officers have become *functi officio*, the legality of such tax cannot be tested with the collection alone in an injunction suit. *Gaither v. Green*, 40 La. Ann. 362, 4 So. 210. An action to enjoin a sale of plaintiff's property under a void assess-

ment for the repair of a public ditch is properly brought against the county treasurer, without making the county a party defendant. *Davis v. Lake Shore & M. S. Ry. Co. (Ind.)*, 16 N. E. 639. Certain taxpayers voluntarily paid a tax illegally assessed by a city. It was held that there was no such public interest as to justify a proceeding in the name of the State to enjoin the county treasurer from paying out the money. *Atchison v. State*, 34 Kan. 379.

⁴¹. *Hays v. Hill*, 17 Kan. 360. See *Voss v. Union School District*, 18 Kan. 467.

⁴². *Brandirff v. Harrison County*, 50 Iowa, 164; *Bristol v. Johnson*, 34 Mich. 123.

⁴³. *Wyandotte & Kansas City Bridge Co. v. The Board of County Commissioners*, 10 Kan. 326.

Each has his separate action.⁴⁴ And where several persons owning distinct tracts of agricultural lands, lying within an incorporated town, joined in an injunction suit to restrain the collection of municipal taxes thereon, and the land was not similarly situated in respect to the town, and the parties did not all ask the same relief, it was held that there was a misjoinder of parties.⁴⁵

§ 1231. **Parties to have interest in the land.**—One who fails to show an interest in land sold for taxes cannot maintain an action to restrain the execution of a deed therefor.⁴⁶

44. *Hudson v. The Commissioners*, 12 Kan. 140.

45. *Lewis v. Eshleman*, 57 Iowa, 633, 11 N. W. 617. See, also, *Glenn v. Waddel*, 23 Ohio St. 605. In *Harkness v. The District of Columbia*, 1 McArthur, 121, it is held that individual taxpayers whose property has been separately assessed have not that community of interest which will allow them to unite in a bill of complaint to restrain the collection of taxes.

46. *Johnson v. Brett*, 64 Iowa, 162, 19 N. W. 895.

On a bill by a mortgagee to restrain a purchaser of the premises at tax sale from taking out a deed, on the ground of irreparable injury to him by destruction of his security, it is competent to show what additional security he holds for the debt. *Cook v. Miller*, 26 Ill. App. 421.

A citizen and taxpayer has a sufficient interest in the subject matter to entitle him to maintain an action to enjoin the refunding of taxes illegally ordered by a county board of supervisors. *Hospers v. Wyatt*, 63 Iowa, 264.

Where it appears, in an action to enjoin defendant from collecting

certain taxes, that plaintiff was avoiding taxation on money held as a trust fund by asserting that in paying taxes on his own real estate he paid taxes on the trust property, the treasurer has the right to bring the beneficiaries into court, so that all questions concerning the ownership of the property and its liability to taxation may be determined in one suit. *Thiebaud v. Tait* (Ind.), 31 N. E. 1052.

A bill to enjoin the collection in a certain district of a tax assessed by the county court on all dog-owners in the county, on the ground that the assessment was illegal and the act under which it was made unconstitutional, brought by several owners of dogs in said district, for themselves and all other dog-owners in that district, against the county court, county sheriff and district constable. It was held properly dismissed, being maintainable, if at all, only to prevent a multiplicity of suits, for which purpose it should have been brought by one or more in behalf of all dog-owners in the county, and against all district constables. *Williams v. Grant County Court*, 26 W. Va. 488, 53 Am. Rep. 94.

§ 1232. **Taxpayer bound by his election.**—A taxpayer commenced a suit on behalf of himself and other taxpayers against the county treasurer to restrain the collection of a tax alleged to have been illegally levied, and obtained a temporary order restraining the collection of the tax until the final hearing on the merits. Subsequently he filed a supplemental petition, alleging that, since the commencement of the suit, the injunction being in full force and unmodified, all had been involuntarily compelled to pay the tax by the refusal of the treasurer to receive the taxes due from them, though tendered, unless they paid the taxes that had been enjoined, and threatened to return their lands as delinquent, and cause them to be sold, unless they did so. It was held that a payment made under such circumstances is not an involuntary one, and a recovery back cannot be had, for the taxpayers having elected to have an injunction, and being protected by it, could not have another remedy.⁴⁷

§ 1233. **Void taxes.**—A court of equity has jurisdiction to restrain the collection of taxes where they have been levied without

Evidence that plaintiff was "supposed" by witness to own a mortgage on certain land, and by another witness that plaintiff was prosecuting a suit to foreclose the mortgage. It was held not to show sufficient interest in plaintiff to maintain an action to restrain the county treasurer from executing a deed of the land when sold for taxes. *Johnson v. Brett*, 64 Iowa, 162.

A resident and taxpayer of a school district, who lives only one-half mile from a legally located school house in said subdistrict, and who has children of school age to send to school, and whose taxes will be materially increased by a removal of the schoolhouse two and one-half miles further from his residence, has such an individual inter-

est in the subject matter, not common with all other residents and taxpayers, as gives him the right to sue to restrain the illegal removal of the schoolhouse by residents or by the township school board. *Graves v. Jasper School Twp. of Hanson County* (S. D.), 50 N. W. 904.

Since a schoolhouse, having been located and built in accordance with law, can, under the statute, only be removed from that locality upon a vote of a majority of the electors of the subdistrict in which it is situated, a removal will be enjoined without that vote. *Graves v. Jasper School Twp. of Hanson County* (S. D.). 50 N. W. 904. See, also, *McMahon v. Welsh*, 11 Kan. 280.

47. *Trustees v. Thoman*, 51 Ohio St. 285, 37 N. E. 523.

any authority of law.⁴⁸ Thus, if back taxes are extended upon the assessment of the current year, they will be without warrant of law, and enjoined.⁴⁹ And it has been held proper to enjoin the collection of a special assessment levied for a system of drainage where the assessment was illegal, on the ground that being levied without authority of law, equity would interfere to restrain its collection in order to prevent a multiplicity of suits.⁵⁰ And so, if any material increase is made by a county board in the aggregate amount of all the towns or districts, in equalizing the valuation

48. United States.—*Norwood v. Baker*, 172 U. S. 269, 43 L. Ed. 443, 19 Sup. Ct. 187; *Railroad & Telegraph Co. v. Board of Equalizers*, 85 Fed. 302.

Alabama.—*Davis v. Petrinovich*, 112 Ala. 654, 21 So. 344, 36 L. R. A. 615.

Georgia.—*Albany Bottling Co. v. Watson*, 103 Ga. 503, 30 S. E. 270; *Cumming v. Perett*, 97 Ga. 247, 22 S. E. 933.

Illinois.—*Rusk v. Berlin*, 173 Ill. 634, 50 N. E. 1071.

Iowa.—*Montis v. McQuiston*, 107 Iowa, 651, 78 N. W. 704.

Louisiana.—*Dees v. Lake Charles*, 50 La. Ann. 372, 23 La. 382.

Nebraska.—*Chicago B. & Q. R. Co. v. Nebraska City*, 53 Neb. 453, 73 N. W. 952; *Harmon v. Omaha*, 53 Neb. 164, 73 N. W. 671.

New York.—*Landon v. Syracuse*, 19 App. Div. 41, 46 N. Y. Supp. 1053.

North Carolina.—*Wrought Iron Range Co. v. Carver*, 118 N. C. 328, 24 S. E. 352.

Oklahoma.—*Gray v. Stiles*, 6 Okla. 455, 49 Pac. 1083; *Atchison, T. & S. F. R. Co. v. Wiggins*, 5 Okla. 477, 49 Pac. 1019.

Texas.—*Kerr v. Corsicana* (Tex. Civ. App.), 35 S. W. 694.

Wyoming.—*Standard Cattle Co. v. Bond*, 56 Pac. 598.

Compare Wason v. Major, 10 Colo. App. 181, 50 Pac. 741; *Southern R. Co. v. Asheville*, 69 Fed. 359.

The certification of illegal lists may be enjoined.—*Taylor v. Louisville & N. R. Co.*, 88 Fed. 350, 60 U. S. App. 166, 31 C. C. A. 537.

A court will not enjoin a void tax on a franchise.—*Insurance Co. v. Bonner*, 24 Colo. 220, 49 Pac. 366.

Injunction is the appropriate remedy for avoiding the enforcement of an illegal or unconstitutional tax. *Southern R. Co. v. Board of Commissioners* (N. C. 1908), 61 S. E. 690, citing *Purnell v. Page*, 133 N. C. 125, 45 S. E. 534.

In Illinois it is said that the doctrine is established in that State that a court of equity will enjoin a tax that is void or levied without authority of law or where the property is exempt from taxation or where there has been a fraudulent assessment as too high a rate. *Hanberg v. Western Cold Storage Co.*, 231 Ill. 32, 82 N. E. 842.

49. The Town of Lebanon v. The Ohio and Mississippi R. Co., 77 Ill. 539.

50. Drainage Commissioners v. Kinney, 233 Ill. 67, 84 N. E. 34.

between the different towns, beyond what is actually necessary or incidental, such a tax will be enjoined.⁵¹ And where lands are unlawfully included within a taxing district, a tax thereon is void and injunction lies.⁵² And where a tax is unauthorized by law it is declared that it is the duty of a court of equity to interfere, especially when the recovery of the tax will necessitate a multiplicity of suits.⁵³ Although legislative authority be given to impose a tax for a certain purpose, yet if the tax levied be clearly in excess of the sum required for the purpose, a court of equity will enjoin its collection to the extent of the excess, on the ground of its being void.⁵⁴ And it is held that any tax is void, and should be enjoined, where there has been in no proper sense an assessment and levy.⁵⁵ And where a board of equalization adds to the return of a taxpayer for taxation an item of property not taxable, and directs the county auditor to carry the amount so added on the duplicate, and assess against it the rate of taxation fixed for State, county, and city purposes, an injunction will lie to enjoin the auditor from so doing.⁵⁶ But where a portion only of a tax is illegal, and that portion can be separated from the portion in controversy, it is the usual practice not to enjoin the entire levy.⁵⁷

§ 1234. **Illegal tax; West Virginia; Ohio.**—Under the assessment laws of West Virginia, property, and the valuation thereof, as ascertained for municipal assessments, in all municipalities of less population than 10,000 inhabitants, should be identical with the property, and values thereof, ascertained for State, county, and district assessments, and an injunction is the proper remedy to prevent municipal officers from collecting taxes assessed against

51. *Kimball v. The Merchants Savings Co.*, 89 Ill. 611.

52. *Simpkins v. Ward*, 45 Mich. 559, 8 N. W. 507.

53. *Drainage Commissioners v. Kinney*, 233 Ill. 67, 84 N. E. 34, wherein Carter, J., said: "This court has many times held that, where a tax or assessment has been levied or imposed where there was no law authorizing it to be levied courts of

equity will interfere and by injunction prevent the collection of such tax."

54. *Appeal of Conners*, 103 Pa. St. 356.

55. *Grandriff v. Harrison County*, 50 Iowa, 164.

56. *Jones v. Davis*, 35 Ohio St. 474.

57. *Southern Ry. Co. v. Board of Commissioners* (N. C. 1908), 61 S. E. 690.

persons or property which the municipality has no legal right to tax.⁵⁸ If a municipal corporation, in taxing property, acts *ultra vires* by taxing property which it has the right to tax, beyond the limit fixed by the organic law conferring the power to tax, a court of equity will, on a bill filed by the owner of the property so illegally or excessively taxed, enjoin the collection of the taxes illegally assessed; and a court of equity has jurisdiction in such a case to remove a cloud from the title of real estate where the property assessed is partly of that character. It also has jurisdiction to restrain the collection of such taxes so illegally assessed because the action of the municipal corporation was *ultra vires*.⁵⁹

58. *Crim v. Philippi*, 38 W. Va. 122, 18 S. E. 466, per Dent, J.: "The only question now properly presented to this court is, did the Circuit Court Judge do right in sustaining the demurrers? By them the allegations of the bill are admitted to be true, but the right of equitable remedy is denied because of plain, adequate legal remedy; that is, that, although the plaintiff and his property were wrongfully assessed and taxed by said town authorities, a court of equity would not interfere to prevent the consummation of the wrong, and confine the municipality within the limits of its taxing power, as prescribed by law, but that the victim of their oppression must suffer himself to be legally robbed or apply to a court of law for redress of his grievances. This is clearly not the law, for it has been held by this court: 'If municipal authorities tax persons or property not legally taxable, or if they exceed the limit prescribed by the statute conferring their power to tax, their action being *ultra vires* and void, equity has jurisdiction to grant relief.' 'No other forum can afford such prompt, complete, and adequate relief.' The hand of the would-

be spoiler is stayed before it seizes its intended booty. *Christie v. Malden*, 23 W. Va. 671. Of course, it must clearly appear that the municipality is going beyond the line of its authority."

59. *Tygarts Val. Bank v. Philippi*, 38 W. Va. 219, 18 S. E. 489, per *Curiam*: "In the case of *City of Richmond v. Crenshaw*, 76 Va. 936, it was held (second point of syllabus) that 'by a long course of decisions it has been settled that the remedy against the attempt to coerce the payment of an illegal tax is by injunction.' Can there be any question as to the fact that the tax is illegal which said municipal corporations sought to enforce the payment of as set forth in the pleadings in this case? There can be but one answer to this question. It was a tax levied in contravention of the plain provisions of the statute. Said town transcended its powers by levying its rate beyond the limit prescribed by law. *Dillon* (2 Mun. Corp. § 922) says: 'Upon a survey of decisions in Great Britain and the United States, while they exhibit some diversity of opinion, it seems to

In Ohio there is a statute which gives jurisdiction to the courts of common pleas to enjoin the collection of taxes illegally assessed. Where the county commissioners are authorized to construct roads and assess the costs thereof upon lands thereby benefited, the commissioners are not authorized, after the report of the apportion-

us, in view of the nature of municipal powers, the danger of abuse, the necessity for prompt remedy on the part of those most interested in the proper administration of municipal affairs, to wit, the taxable inhabitants, that the following conclusions rest upon sound reason, and have also the support of the decided preponderance of judicial authority: (1) The proper parties may resort to equity, and equity will, in the absence of restrictive legislation, entertain jurisdiction of their suit against municipal corporations and their officers, when these are acting *ultra vires*, or assuming or exercising a power over the property of the citizen, or over corporate property or funds which the law does not confer upon them, and where such acts affect injuriously the property owner or the taxable inhabitant.' It is claimed by the appellant in its bill that the taxes illegally assessed upon its land created a cloud thereon, and that this fact would confer jurisdiction upon a court of equity. This position, however, is earnestly controverted by counsel for the appellee. This, however, is no longer an open question in this State, as we find that this court held in the case of *Powell v. City of Parkersburg*, 28 W. Va. 698, 'that, as taxes assessed on real estate without any lawful authority create a cloud upon the title thereof, a court of equity will for that cause alone entertain a bill to remove the cloud by perpetually enjoining the collection of such illegal

taxes.' The only question, then, is whether said sum of \$145 was illegally assessed against the appellant's property. If so, it creates a lien upon the real estate and is expressly so declared to be by statute whether it was assessed upon the value of the realty or personalty, and, as we have seen, constitutes a cloud upon the title, which alone would confer jurisdiction upon a court of equity. So, also, in the case of *Christie v. Malden*, 23 W. Va. 667, this court held in the third point of the syllabus, that "if a municipal corporation erroneously or illegally taxes property which it has the power to tax in a proper manner, the remedy for such error must be sought generally in a court of law; but if it acts *ultra vires* by taxing property not subject to taxation, or taxes property which it may tax beyond the limit fixed by the organic law conferring the power to tax, a court of equity will, on a bill filed by the owner of the property so illegally or excessively taxed, enjoin the collection of such taxes.' The distinction established and recognized by the decisions between the cases in which equity will and in which it will not take jurisdiction, is well defined by Lord Cottenham in *Frewin v. Lewis*, 4 Mylne & C. 249, 255. He says: 'So long as the public functionaries strictly confine themselves within the exercise of those duties which are confided to them by law, this [chancery] court will not interfere . . . to see whether any regulation they make

ment committee has been affirmed, to order the assessment of additional lands. If additional lands are assessed the several parties whose lands are so charged, may join in an action and secure an injunction from the common pleas court against such tax.⁶⁰ But where it appears, in an action to enjoin the collection of a tax irregularly assessed to pay the expense of a road improvement, that the lands assessed were benefited by the improvement, and ought to have been assessed and that the assessment made was equitable and just, an injunction will not be granted.⁶¹ An assessment made upon land for the construction of a levee, is unconstitutional, and its collection may be enjoined at the suit of the owner of the land.⁶² In cases arising under the road improvement statutes, where no remedy is named, and the jurisdiction of the board of county commissioners is made the question, proceedings in equity to inquire into the jurisdictional facts, and for injunction, is a proper remedy.⁶³

is good or bad, but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this court no longer treats them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority. While the court avoids interfering with what they do while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; if they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this court by injunction." See *Carter v. City of Chicago*, 57 Ill. 288. In the case before us the allegations made in the bill in the light of the authorities I have cited in my opinion clearly confer jurisdiction upon a court of

equity to restrain the collection of the taxes improperly assessed, for the reason that the act of making such assessment was *ultra vires*, and for the further reason that such assessment cast a cloud upon the appellant's title to said real estate which it had a right to come into a court of equity to have removed.

60. *Glenn v. Waddel*, 23 Ohio St. 605.

61. *Burgett v. Norris*, 25 Ohio St. 308.

62. *Wright v. Thomas*, 26 Ohio St. 346. Where the levee so constructed passed near to but did not touch the land, and the owner had knowledge of the construction of the ditch, and that the land was to be assessed therefor. It was held that his right to enjoin the collection of the assessment was not barred by delaying his action until the work was completed. *Ibidem*.

63. *Hays v. Jones*, 27 Ohio St. 218.

§ 1235. *Res judicata*.—The doctrine of *res judicata* applies as well to an equity suit to enjoin the collection of a tax, as to any other. Thus, in an action to enjoin the collection of taxes alleged to have been illegally assessed, the fact that the validity of the taxes in question had been fully adjudicated in a prior suit between the same parties, involving the same issues as the second suit, is a complete defense.⁶⁴

§ 1236. *Personal property*.—Equity will not interfere to restrain the collection of a tax upon personal property, the remedy at law being ample and plain.⁶⁵ Thus, where personal property sufficient in amount has been levied upon to satisfy a tax on bank stock which is claimed to be illegal and void, the remedy at law is adequate; an action of trover for the value of the property seized would raise the question, or the tax might be paid under protest, and then suit might be brought to recover the amount paid.⁶⁶ And it is decided that a court of equity should not entertain a bill for an injunction against a tax collector who threatens to seize and sell personal property, except in rare cases, where the property is peculiarly valuable and cannot be compensated adequately in damages. And this is declared to be true, even if the officer is acting without lawful authority, as such seizure is a mere trespass remediable in an action at law.⁶⁷ And a bill to restrain further proceedings to enforce a tax upon lands cannot be sustained as a bill to remove a cloud from the title to the lands, where a levy has been made upon personal property to satisfy the tax,

64. *Breeze v. Haley*, 11 Col. 351.

65. *Insurance Co. v. Bonner*, 24 Colo. 220, 49 Pac. 366; *Mears v. Howarth*, 34 Mich. 19; *McDonald v. Teague*, 119 N. C. 604, 26 S. E. 158.

66. *Hagenbuch v. Howard*, 34 Mich. 1. And see the following cases where an injunction was refused:

Florida.—*Baldwin v. Tucker*, 16 Fla. 258.

Iowa.—*Spencer v. Wheaton*, 14 Iowa, 38.

Minnesota.—*Bradish v. Lucken*, 38 Minn. 186.

Missouri.—*Lockwood v. City*, 24 City, 24 Mo. 20; *Deane v. Todd*, 22 Mo. 90.

Nevada.—*Conley v. Chedic*, 6 Nev. 222.

Wisconsin.—*Quinney v. The Town*, 33 Wis. 505; *Van Cott v. The Board*, 18 Wis. 247.

67. *Metcalf Co. v. Martin* (Fla. 1907), 45 So. 463.

since presumptively the cloud is already removed.⁶⁸ Rolling stock is personal property within the meaning of the rule which refuses an injunction where it is the subject matter.⁶⁹ And a building may be.⁷⁰ And a ferry-boat is personal property.⁷¹ A liquor tax is a personal tax, and equity has no jurisdiction to restrain the collection of a personal tax; the ordinary legal remedies being ample for the party's protection.⁷² But where the taxes have been paid an injunction will be granted.⁷³ And personal property not liable to taxation is not within the rule; an injunction will be granted in such case.⁷⁴ But generally the only time equity will interfere to protect personal property from an illegal tax, is when special circumstances bring the case within some recognized head of equity jurisprudence.⁷⁵ And where the jurisdiction of equity has attached for the purpose of annulling a certificate of sale for an invalid tax, the court may give all the relief to which the party may be entitled and may restrain the sale of personal property seized for the tax, although for that purpose alone a court of equity would not have interfered by injunction upon the ground that the plaintiff might have had an adequate remedy at law.⁷⁶

68. *Henry v. Gregory*, 29 Mich. 68.

69. *Chicago & North Western R. Co. v. The Borough of Ft. Howard*, 21 Wis. 44.

70. *Witherspoon v. Nickels*, 27 Ark. 332.

71. *Mayor of Mobile v. Baldwin*, 57 Ala. 61.

72. *Youngblood v. Sexton*, 32 Mich. 406. See, also, *Brewer v. Springfield*, 97 Mass. 152; *Durant v. Eaton*, 98 Mass. 469; *Loud v. Charlestown*, 99 Mass. 208; *Whiting v. Boston*, 106 Mass. 89; *Humewell v. Charlestown*, 106 Mass. 350; *Rockingham Bank v. Portsmouth*, 52 N. H. 17; *Dodd v. Hartford*, 25 Conn. 232; *Ritter v. Patch*, 12 Cal. 298; *Berri v. Patch*, 12 Cal. 299; *Worth v. Fayetteville*, Winst. Eq. (N. C.) 70; *Van Cott v. Supervisors*, 18 Wis. 247; *Greene v. Mumford*, 5 R. I. 472; *McCoy v. Chil-*

icthe, 3 Ohio, 370; *Conley v. Chedic*, 6 Nev. 222; *Deane v. Todd*, 22 Mo. 90; *Sayre v. Tompkins*, 23 Mo. 443; *Barrow v. Davis*, 46 Mo. 394; *McPike v. Pew*, 48 Mo. 525; *Brooklyn v. Mesrole*, 26 Wend. 132; *Intendant v. Pippin*, 31 Ala. 542; *Baltimore v. Baltimore & Ohio R. Co.*, 21 Md. 50; *Dows v. Chicago*, 11 Wall. 109; *Hannewinkle v. Georgetown*, 15 Wall. 547.

73. *Lewis v. Spencer*, 7 W. Va. 689.

74. *Valle v. Ziegler*, 84 Mo. 214; *Searing v. Heavysides*, 106 Ill. 85.

75. *Clarke v. Ganz*, 21 Minn. 387.

The sale of a vessel may be enjoined where irreparable injury will result. *Johnson v. De Bary-Baya M. L.*, 37 Fla. 499, 19 So. 640, 37 L. R. A. 518.

76. *Hamilton v. City of Fond du Lac*, 25 Wis. 490.

§ 1237. **Same subject; rolling stock.**—Where an exemption from a personal tax is claimed in virtue of the constitution of the United States, then the Federal courts will grant an injunction to restrain the tax. Thus, where the amount of the tax, in tax-receivable coupons, was tendered by a railroad to the State, which was refused, an injunction was granted to prevent the collection of the tax by distraint upon the rolling stock of the railroad.⁷⁷

§ 1238. **Personal property in hands of assignee.**—Personal property, whether in the form of moneys, bills receivable, bonds, certificates of stock, or otherwise, held by an assignee of an insolvent debtor, whose estate is being settled in the probate court, is not subject to taxation; and it is not the duty of such assignee to make return of the assets of such estate to the county auditor for taxation, and he may enjoin the county officers from placing such property upon the tax duplicate as taxable assets in his hands.⁷⁸

77. *Allen v. Baltimore & Ohio R. Co.*, 114 U. S. 311, 316, 5 Sup. Ct. 925, 962, 29 L. Ed. 200, per Matthews, J.: "Where the rights in jeopardy are those of private citizens, and are of those classes which the Constitution of the United States either confers or has taken under its protection, and no adequate remedy for their enforcement is provided by the forms and proceedings purely legal, the same necessity invokes and justifies, in cases to which its remedies can be applied, that jurisdiction in equity vested by the Constitution of the United States, and which cannot be affected by the legislation of the States." See *Osborn v. United States Bank*, 9 Wheat. 739, 6 L. Ed. 204; *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903; *Dodge v. Woolsey*, 18 How. 331, 15 L. Ed. 401; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Transportation Co. v. Parkersburg*,

107 U. S. 691, 2 Sup. Ct. 732, 27 L. Ed. 584; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. Ed. 189; *Litchfield v. County of Webster*, 101 U. S. 773, 25 L. Ed. 925.

78. *McNeill v. Hagerty*, 51 Ohio St. 255, 37 N. E. 526, per Spear, J.: "To hold that property in possession of an assignee, as in these cases, must be listed, and taxes paid on it, is, in effect, to hold that the creditors must be taxed twice on the same value. While the legal title to the property is in the assignee, it is so only for the purpose of facilitating the settlement of the trust. Equitably, the property is vested in the creditors. Every dollar paid in taxes by the assignee reduces by that amount the dividend which the creditors will receive. That it is the duty of creditors, under the law, to list their claims as credits, admits, we suppose, of no doubt; and we submit that it is no answer to say that creditors cannot know the value

§ 1239. **Taxation of stock.**—The right to tax the stock in a corporation which from necessity is inherent in every government, is vested in the Legislature, which possesses plenary power over

of such credits. Such condition attaches to a very large proportion of credits held by the commercial, and especially the mercantile, world. Nor, is it any answer to say that, as matter of fact, they will not list the claims. No good reason why they should not exists, unless it would be furnished by a requirement compelling the assignee to do so. A statutory construction which, to use the language of Judge Cooley, 'requires that one person, or any one subject of taxation, shall directly contribute twice to the same burden, while other subjects of taxation belonging to the same class are required to contribute but once,' is to be avoided, because, in the judgment of that author, it is duplicate taxation, and is not permissible under a Constitution which requires equality and uniformity. This proposition seems to be applicable to the present cases, as our Constitution requires both equality and uniformity. It is not necessary to hold that the Legislature might not include assignees in the class of trustees who are required to list property in their hands, even though duplicate taxation results. It is enough, for the disposition of the present cases, if the purpose to do so has not been expressed. The assignee is, in every essential particular, an officer of court. The fund is in his hands as such, and he is bound to do with it just what the court directs. The fund, therefore, is really in the custody of the court; and, as before stated, the beneficial interest is in the creditors. They cannot, it is true, receive their own

at once, but that is because it requires some time to reduce the assets to money, and for the adjustment of the debts and claims. To require the listing of any of the property thus held by the assignee, and the payment of taxes on it, would manifestly interfere with the orderly execution of the trust. And if, as claimed in argument, in case payment of taxes so levied is not voluntarily made by the assignee, distraint might be resorted to by the tax collector, and the property seized, and taken forcibly from the possession of the assignee, thus taking it from the control of the court, so much the more apparent is it that the construction claimed by the defendants in error is inadmissible, because it would result in unreasonable interference with the rightful exercise of authority by the Probate Court. It cannot have been the purpose of the Legislature, by one statute, to lodge exclusive jurisdiction and dominion over property in a court, and, by another statute, authorize a taxing officer to cast contempt upon the court by ousting its jurisdiction, and overriding its powers. If the clause of section 2734, relating to the listing of trust property by trustees, requires a listing of property by the assignee of an insolvent whose estate is being settled in the Probate Court, no reason can be given why the same duty would not devolve upon receivers of partnerships, clerks of courts, sheriffs, or master commissioners, as to funds which may chance to be in their hands on the day preceding the

the subject.⁷⁹ The capital stock, franchises, and all the real and personal property of corporations, are liable to taxation; and a fair rule is one which ascertains the value of all this, by ascertaining the cash value of the funded debt and of the shares of the capital stock as the basis of assessment; deducting from this the assessed value of all the tangible real and personal property, which is also taxed, leaves the real value of the capital stock and franchise subject to taxation as justly as any other mode.⁸⁰ The capital stock of a railroad corporation which is not invested in its railways or other real estate, is to be taxed as personal property, in the town or ward where the principal office or place for transacting the financial concerns of the company is situate.⁸¹ The Legislature may rightfully provide for taxing the capital stock of corporations, instead of the shares in the hands of the holders; but if the officers provided by law for assessing property for taxation, value certain property as a franchise at too great a sum, or more than in proportion to other property, in the absence of fraud, or want of power, the courts can afford no relief against the over-valuation.⁸² And a bill by a corporation to enjoin the collection of a tax upon its capital stock, including its franchise, on the ground of an excessive valuation, which does not show the fair cash value of all the property, tangible and intangible, belonging to the corporation,

second Monday of April, subject to payment upon order of court. To state such a proposition is to refute it; and this because it is unreasonable to assume that, in the absence of express authority, the duty to list embraces property which the law has taken into its own hands simply to collect and distribute, and of which it has designated a temporary trustee for the better accomplishment of its work. Our conclusion is that neither by the Constitution nor by the statute, when construction is given to all the sections bearing upon the subject, is it made the duty of an assignee of an insolvent whose estate is being settled in Probate Court to list

the property so held by him for taxation. Authorities bearing one way or the other upon the question are not abundant; but the conclusions here announced are fully supported by decisions in two well-considered cases. *School Directors v. Rathvon*, 30 Pa. St. 533; *Brooks v. Hartford*, 61 Conn. 112.

79. *Porter v. The Rock Island R. Co.*, 76 Ill. 561.

80. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663.

81. *The Mohawk & Hudson R. Co. v. Clute*, 4 Paige (N. Y.), 384.

82. *The Ottawa Glass Co. v. McCaleb*, 81 Ill. 556.

and does not show clearly and distinctly that the aggregate valuation of all its property is so excessive, when compared with the valuation of other property, as to raise the presumption of fraud in the State board of equalization in making the assessment, presents no case for the intervention of a court of equity.⁸³

§ 1240. **National banks.**—A national bank may, on behalf of its stockholders, maintain a suit to enjoin the collection of a tax which has been unlawfully assessed on their shares by the State authorities. Thus where, under a State statute, such stockholder has presented to the proper board of assessors his affidavit, by showing that his personal property subject to taxation, including such shares after deducting therefrom his just debts, is of no value, and they refuse on his demand to reduce the assessment of the shares, an injunction should be awarded to restrain them from collecting the tax.^{83a} Although for purposes of taxation the statutes of a State provide for the valuation of all moneyed capital, including shares of the national banks, at its true cash value, the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while those shares assessed at their full value, is a violation of the act of Congress; and in such a case, on the payment or the tender of the sum which such shares ought to pay under the rule established by that act, a court of equity will enjoin the State authorities from collecting the remainder.^{83b} But a bill to restrain the collection of a State tax upon the shares of a national bank is bad on demurrer, where it does not appear that there is any statutory discrimination against them, or that they, under any rule established by the as-

83. The Pacific Hotel Co. v. Lieb, 83 Ill. 602.

83a. Hills v. Exchange Bank, 105 U. S. 319, 26 L. Ed. 1052. The taxation of national bank shares by a State statute, without permitting the owner of them to deduct from their assessed value the amount of his *bona fide* indebtedness, as he may in the case of other invest-

ments of moneyed capital, is a discrimination forbidden by the act of Congress, and an injunction lies. Evansville Bank v. Britton, 105 U. S. 322, 26 L. Ed. 1053; Supervisors v. Stanley, 105 U. S. 305, 26 L. Ed. 1044.

83b. Pelton v. National Bank, 101 U. S. 143, 25 L. Ed. 901. See Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903.

assessing officers, are rated higher in proportion to their actual value than other moneyed capital.^{83c} And shares in banks being taxable and no excessive valuation being complained of, equity will not restrain the collection of the taxes, though the assessing officers may have arrived at a correct result by some erroneous method.^{83d}

The business of a national bank, operating under the laws of the United States, is not liable to a tax by the municipal authorities of the city where it is located, and if attempted to be enforced, the attempt will be restrained by injunction.⁸⁴ And where a tax should have been assessed upon the shares of stock and against the stockholders individually an attempt to enforce an assessment against the bank by a sale of its real estate may be enjoined.⁸⁵

83c. *National Bank v. Kimball*, 103 U. S. 732, 26 L. Ed. 469. It must be distinctly alleged that the shares are valued higher than other moneyed capital generally, and it is not sufficient to allege that such is the fact in particular instances. *First National Bank v. Farwell*, 10 Biss. 270. Section 5219 of the Revised Statutes of the United States, which provides that national bank stock may be taxed by a State, but not "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State," has reference to the entire process of assessment and prevents as well an unequal valuation of such shares, as an unequal rate of percentage thereon. *National Bank v. Britton*, 10 Biss. 503.

83d. *St. Louis National Bank v. Papin*, 4 Dill. 29.

84. *The Mayor v. The First National Bank*, 59 Ga. 648. See, further, *Wagoner v. Loomis*, 37 Ohio St. 571, where the petition of a stockholder in a bank showed that his

property was valued only at 80 per cent. of its true value in money, while other property in the county was valued at only 40 per cent. of its value; it was held not to warrant an injunction. *Evansville Bank v. Britton*, 8 Fed. 867. In *Wells v. The Central Vermont R. Co.*, 14 Blatch. 426, a *quere* was raised as to whether § 3224 of the Revised Statutes of the United States, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," applies to a suit in a Federal court to restrain the collection of a State tax. *National Albany Exchange Bank v. Wells*, 18 Blatch. 478; *The Albany Bank v. Maher*, 19 Blatch. 175; *The First National Bank v. Waters*, 19 Blatch. 242; *The First National Bank v. Meredith*, 44 Mo. 500, holding that the assessments for taxes on bank shares should be against the shareholders personally, and not against the bank. *Frazer v. Seibern*, 16 Ohio St. 614; *Burke v. Speer*, 59 Ga. 353.

85. *Brown v. French*, 80 Fed. 166.

§ 1241. Bank stock and property.—Banks may sue to enjoin the collection of an illegal tax assessed on their stock, and the fact that the stock is owned by private individuals is no reason why such a suit may not be maintained by a bank.⁸⁶ But two banks, against whose stock illegal taxes have been separately assessed, cannot join in a suit to enjoin the tax collection, for in such a case there cannot be a joint action because there is no joint cause of action.⁸⁷ Where, without any appeal, the State Board of Tax Commissioners raised the assessment, made by the county board of review on the property of a national bank, the action of the State board was void and the collection of the tax on the increased value could be enjoined.⁸⁸

§ 1242. Internal revenue tax.—The Circuit Courts of the United States have power, in a proper case, to grant an injunction against threatened proceedings of a collector of internal revenue, to collect a tax which is not authorized by act of Congress.⁸⁹ But, as a general rule, a court of equity has no right to interfere with the strict legal rights of the United States under the revenue laws. Relief against the injustice of enforcing their provisions in respect

86. *Jones v. Rushville Nat. Bank*, 138 Ind. 38, 37 N. E. 338.

87. *Darkies v. Bellows*, 94 Ind. 64; *Martin v. Davis*, 82 Ind. 38; *Stephenson v. Martin*, 84 Ind. 160; *Harris v. Harris*, 61 Ind. 117; *Parker v. Small*, 58 Ind. 349; *Maple v. Beach*, 43 Ind. 51; *Lipperd v. Edwards*, 39 Ind. 165; *Goodnight v. Goar*, 30 Ind. 418; *Berkshire v. Shultz*, 25 Ind. 523. And compare *Heagy v. Black*, 90 Ind. 534.

88. *First Nat. Bank v. Brodhecker*, 137 Ind. 693, 37 N. E. 340, per Coffey, J.: "This action was brought in the Jackson Circuit Court to enjoin the collection of the tax assessed on the increased value of the appellant's property placed upon it by the State board of tax commissioners. The court sustained a demurrer to the

complaint. In this ruling the Jackson Circuit Court erred. In the absence of an appeal, the State board of tax commissioners had no jurisdiction over the matter, and its action was a mere nullity. *Cummings v. Stark*, 138 Ind. 94, 34 N. E. 444; *Jones v. Rushville Nat. Bank*, 138 Ind. 87, 37 N. E. 338.

89. *State of Georgia v. Atkins*, 1 Abb. U. S. 22, where it was held that the word "corporation" as used in a revenue law declaring that every person or corporation owning a railroad shall be subject to a tax in respect thereof, does not include a State; and the tax was enjoined because the railroad was wholly owned by the State. See *The State of Georgia v. Atkins*, 35 Ga. 315.

to penalties and forfeitures must proceed from the Treasury Department.⁹⁰

§ 1243. **Property of third person, etc.**—An injunction will not lie to prevent the sale of personal property of a third person, levied on by an officer for unpaid taxes, when the property is not of peculiar value to the owner and it does not manifestly appear that great injury would result to the owner from consequential or collateral damages occasioned by such sale. In such case the owner has a complete and adequate remedy at law to which he may resort for redress.⁹¹ So in a recent case it is decided that though a tax has been assessed against the wrong person, yet where there is an adequate remedy at law to have the assessment corrected in this respect, such error is no ground for an injunction against the collection of the tax.⁹² But when the collector of taxes levies upon the property of one for the taxes of another, and the collector is insolvent and not able to respond in damages, a court of equity will enjoin the sale of such property.⁹³ A person, though, against whom no illegal tax has been assessed or levied, cannot, by injunction, restrain the collection of an illegal tax against another person.⁹⁴ A complaint to enjoin the sale of lands for taxes, which shows that the taxes have been paid, and also that the former owner against whom the taxes were assessed had abundant personal property subject to distress and sale for the taxes, shows two good reasons for the injunction.⁹⁵ The Legislature may authorize a municipal corporation to reassess a tax or special assessment which is void, or has been adjudged void, by reason of any defect or irregularity in the proceedings, provided the proceedings actu-

90. *Powell v. Redfield*, 4 Blatch. 45.

91. *White v. Stender*, 24 W. Va. 615.

92. *City of Norfolk v. Perry Co.* (Va. 1908), 61 S. E. 867.

93. *Deming v. James*, 72 Ill. 78.

94. *Missouri River & Fort Scott R. Co. v. Wheaton*, 7 Kan. 232, holding that injunction will not lie to restrain

the commission of a pure, simple and naked trespass. If an officer holding a warrant for the collection of taxes assessed against A., levy the warrant on the property of B., the latter has his remedy by action of replevin against the officer, or by action for damages.

95. *City of Logansport v. Carroll*, 95 Ind. 156.

ally had as the foundation of the levy were such as the Legislature might have authorized in the first instance.⁹⁶ It is a general rule that a statute which operates to annul or set aside the final judgment of a court of competent jurisdiction is void, but the reassessment of a tax under a new grant of authority is not a reopening of the judgment by which the former assessment was declared invalid and proceedings thereunder restrained.⁹⁷ And the Legislature has power to pass an act to remedy defects in a law which authorizes taxation.⁹⁸

§ 1244. **Levy after bill filed, etc.**—The lawful levy of a tax after a complaint filed to restrain its collection under an alleged unlawful levy, will not defeat the action.⁹⁹ But where the law provides that mortgages shall be assessed for taxation at their face value, and lands at their true cash value, and lands are in fact assessed for only one-third thereof, the holder of a mortgage is entitled to an injunction against the collection of two-thirds of his tax.¹ And equity will enjoin the collection by a county of an illegal tax, where the county is insolvent, and if required to repay the tax would do so in warrants worth less than par.² But in an action to enjoin the collection of back taxes assessed upon omitted personal property by the county auditor, an answer which admits that a certain amount of loans and credits had been duly assessed, but that a specified amount had been omitted, consisting of “moneys on deposit” subject to check, “also moneys loaned out either on time or on call, and credits due,” does not sufficiently identify and describe the omitted property, and is no defense.³ Proceed-

96. *Dean v. Boschenius*, 30 Wis. 236.

97. *Mills v. Charleton*, 29 Wis. 400.

98. *Cougell v. Long*, 15 Ill. 202. See *Lallassee Mfg. Co. v. Glenn*, 50 Ala. 489.

99. *Lake Shore R. Co. v. Smith*, 131 Ind. 512, 29 N. E. 1075.

1. *Dundee Mortgage Trust Investment Co. v. Parrish*, 24 Fed. 197.

2. *Northern Pac. R. Co. v. Car-*

land, 5 Mont. 146. Equity will enjoin the collection of an illegal tax, regular on its face, on the ground that the tax creates a cloud on the title of the land.

3. *Florer v. Sherwood*, 128 Ind. 495, 28 N. E. 71. An allegation that the owner purposely undervalued the property listed for taxation, and did not inform the assessor thereof, or give him any information as to the

ings to enforce an additional road assessment, begun before the additional assessment was made and placed on the roll, will be enjoined, though the assessment was duly made after the injunction suit was commenced, but was not pleaded in the answer.⁴ Where a suit is not essential to the collection of a tax, and a penalty is imposed for delay in paying the tax, and no action lies to recover back the tax if paid, equity has jurisdiction to determine the legality of the tax, and enjoin its collection if illegal.⁵

§ 1245. **Non-residence, etc.**—One who seeks an injunction against the collection of taxes on the ground that he is not a resident of the district wherein they are assessed, must clearly show the fact of non-residence.⁶ And a bill to enjoin the collection of a tax on the capital stock of a corporation on the ground of fraud in the assessment, which merely charges fraud in general terms, and alleges that the board of equalization assessed the stock at a higher valuation than that stated in the corporation's return to the board, without any further knowledge or information than that furnished by said return, is demurrable.⁷ And the collection of a special tax, alleged to have been illegally assessed, to pay interest on bonds issued in aid of the construction of a gravel road, will not be restrained where the complaint shows that the original tax, whose validity is not questioned, has not been paid by the complainant.⁸ But delay in bringing an action to enjoin the collection of assessments on land for opening a road, during which time other owners pay their assessments, does not of itself estop to maintain such action.⁹

items of the property, is insufficient to charge fraud, the statements as to value being mere matter of opinion. *Ibidem*. Where certain taxes assessed by the county auditor against an estate are held to be illegal, the decree enjoining the collection thereof may properly include a direction to the auditor to make a memorandum on the duplicate showing such cancellation; and a decree directing him to "strike out and obliterate" such taxes will be construed to have only this meaning.

4. *Tucker v. Sellers*, 130 Ind. 514, 30 N. E. 531; *Same v. O'Neal*, 130 Ind. 597, 30 N. E. 533.

5. *Pacific Exp. Co. v. Seibert*, 44 Fed. 310; *Hoey v. Same*, *Id*.

6. *Blake v. Jordan*, 45 Ark. 265.

7. *Sterling Gas Co. v. Higby*, 134 Ill. 557, 25 N. E. 660.

8. *Board of Com'rs v. Dailey*, 115 Ind. 360, 17 N. E. 619.

9. *Speir v. Town of New Utrecht*, 121 N. Y. 420, 24 N. E. 692. A landowner signed, circulated and presented a petition to the board of county commis-

§ 1246. **Multiplicity of suits, etc.**—Equity will enjoin the collection of an illegal tax where a multiplicity of suits will thus be prevented.¹⁰ And where an entire district school tax was assessed without authority of law, it was held that equity would take jurisdiction of a bill to enjoin its collection brought by all the taxpayers, or by any number, on behalf of themselves and the others, on the ground of preventing a multiplicity of suits.¹¹ And equity will enjoin the collection of an invalid tax which would otherwise be levied on complainant's personal property, in a suit brought by numerous taxpayers having no joint interest.¹² Injunction is also the proper remedy to prevent the collection of an illegal tax.¹³ And a court of chancery will enjoin collection of a tax based on an illegal assessment.¹⁴ Again, where property has been levied on to enforce the payment of a void tax, injunction is the proper remedy.¹⁵ An injunction granted to restrain the levy of a tax probably illegal should be continued until final hearing.¹⁶

sioners, under Sess. Laws 1887, ch. 214, for the improvement of a country road contiguous to his land, and continued to live in the immediate vicinity of the improvement during the time it was in progress. The improvement greatly enhanced the value of his property, much in excess of the tax or special assessment attempted to be imposed therefor. It was held that he was estopped from suing to restrain collection of the tax. *Stewart v. Commissioners*, 26 Pac. 683, 45 Kan. 708, followed. *Board Com'rs Wyandotte County v. Arnold*, 49 Kan. 279, 30 Pac. 486.

10. *Little Rock v. Prather*, 46 Ark. 471. See *Southern R. Co. v. Asheville*, 69 Fed. 359; *Western Un. Tel. Co. v. Norman*, 77 Fed. 13.

11. *Carlton v. Newman*, 77 Me. 408.

12. *Clee v. Sanders*, 74 Mich. 692, 42 N. W. 154. The fact that the invalid tax has been so covered up in the assessment roll as not to show its

identity, is an additional reason for equitable interference.

13. *Davis v. Burnett*, 77 Tex. 3, 13 S. W. 613.

14. *Allwood v. Cowen*, 111 Ill. 481.

15. *St. Louis & S. F. Ry. Co. v. Apperson*, 97 Mo. 300, 10 S. W. 478.

16. *Savannah, Florida, etc., Ry. Co. v. Morton*, 71 Ga. 24. Va. Act of Jan. 14, 1882, providing a mode of verifying the genuineness of tax-receivable coupons, puts the initiative on the tax-receiver. If he fails to act, the tender is equivalent to a payment of the tax, and a levy, on the ground of delinquency, will be enjoined. *Norfolk Trust Co. v. Marye*, 25 Fed. 654. A sale for taxes will be enjoined either when they have been paid or when it appears that the owner had abundant personalty. *Logansport v. Carroll*, 95 Ind. 156. A judgment debtor, who had consented to the entry of a judgment against him bearing 12 per cent. interest, subsequently filed an affidavit of illegal-

§ 1247. **Federal interference in States.**—The Federal courts will exercise great caution in interfering with the collection of revenues by the States, or their municipal or public agencies.¹⁷

ity, which was dismissed. When the affidavit was filed, the judgment creditor moved to amend the judgment so that it should bear 7 per cent. interest, to which the debtor objected. Afterwards, on the levy of an execution against his land, the judgment debtor filed a petition to enjoin the sale, alleging that the motion to amend the judgment was still pending, that the debt on which the judgment was based bore interest only at the rate of 7 per cent., and that it would be inequitable to allow execution to proceed at 12 per cent. The attorneys for the judgment creditor testified that they had dismissed the motion to amend, and that they had directed the clerk to enter the dismissal on the docket; but the clerk testified that he had no recollection of having received such instruction, and the dismissal had not been entered. It was held that the judgment debtor could not complain of an order restraining the sale on condition that he pay the judgment with 7 per cent. interest, as an unconditional dismissal of his petition would have been the more appropriate judgment. *Allen v. Etheredge*, 84 Ga. 550, 11 S. E. 136. Acts 1891, ch. 391, enabling sureties on the bond of a former sheriff to protect themselves by collecting taxes in arrear for the years 1881 to 1886, both inclusive, provides (section 1) that purchasers without notice are relieved from the incumbrance of a lien for such taxes on land bought by them; but the act contains no provision restricting the power of courts to grant restraining orders, and no clause (us-

ually inserted in such acts) forbidding collection, where the taxpayer makes affidavit that he has paid the tax. It was held that where a complainant in an action for an injunction against a tax collector alleges that plaintiff purchased the property which defendant threatens to sell for the taxes of such years subsequent thereto, without "notice, either actual or constructive," that it was encumbered by a claim for unpaid taxes, and the answer alleges that plaintiff had actual notice thereof, it is not error to grant an injunction restraining a sale until the final hearing. *Moore v. Sugg*, 112 N. C. 233, 17 S. E. 72.

17. *Union Pacific Railroad Co. v. Lincoln County*, 2 Dill, 279, 281, per Dillon, J.: "This bill is in equity, and as no unjust burden is sought to be imposed upon the complainant, the very groundwork of equitable interference fails. Courts of equity, and particularly the Federal courts, sitting in equity in the States, will exercise great caution in interfering with the collection of revenues by the States, or their public or municipal agencies. There must be a plain case of injury, and a plain case of equitable jurisdiction and want of adequate remedy at law to justify the chancellor in arresting, by injunction, the ordinary processes of collection under the revenue laws." See *Wells v. The Central Vermont R. Co.*, 14 Blatch. 426, where a *quere* is raised as to whether § 3224 of the Rev. St. of the United States, which provides that "no suit for the purpose of restraining the assess-

Courts will not interfere with an assessment where the rule or system of valuation is not adopted with the design that it shall operate unequally, or where it does not violate some fundamental principle of the constitution. The constitution of South Carolina directs all lands to be assessed every five years, and requires a uniform and equal rate of assessment and taxation; but, in practice, all railroad property, including the land forming part thereof, is assessed annually. It is held that a railroad is to be regarded as a unit, of which the land forms a part, and, therefore, that the annual valuation works no such discrimination against railroads as would constitute a denial of the equal protection of the laws, and justify the interposition of a Federal court by injunction. As between a State and its citizen a Federal court cannot afford him injunctive relief against unjust or oppressive taxation, unless it violates some right secured by the Federal Constitution.¹⁸

ment or collection of any tax shall be maintained in any court," applies to a suit in a Federal court to restrain the collection of a State tax.

See, also, *Pittsburgh, C. C. & St. L. R. Co. v. West Virginia Public Works*, 172 U. S. 32, 19 Sup. Ct. 90, 43 L. Ed. 354; *Taylor v. Louisville & N. R. Co.*, 88 Fed. 390, 31 C. C. A. 537, 60 U. S. App. 166.

18. *Chamberlain v. Walter*, 60 Fed. 788, per Simonton, J.: "The bill also charges that the act of the board in raising the assessment is in itself null and void, and the assessment is illegal, because this is not within the powers of the board. It is averred that the complainant has paid the amount of tax lawfully and justly due on a proper assessment. The answer denies that the return made by complainant is true and correct in valuation of the property thereon. It denies that the sum paid is the amount of taxes really and justly due. It avers that complainant has a plain, adequate, and complete remedy

at law. It is well at the threshold, to define the limit of power of this court over the subject-matter of this suit. It cannot review the assessment made by the State officials simply upon the ground that it is excessive. *Stanley v. Supervisors*, 121 U. S. 549, 7 Sup. Ct. 1234, 30 L. Ed. 1000. Nor can it make a new assessment, or direct another to be made. *State Railroad Tax Cases*, 92 U. S. 615, 23 L. Ed. 663. Nor can it interfere upon the ground that the tax is illegal. *Williams v. Supervisors*, 122 U. S. 154, 7 Sup. Ct. 1244, 30 L. Ed. 1088; *Lyon v. Alley*, 130 U. S. 177, 9 Sup. Ct. 480, 32 L. Ed. 899. Nor can it interfere because the court would prefer, and would have adopted a different system. *W. U. Tel. Co. v. Attorney-General*, 125 U. S. 533, 8 Sup. Ct. 961, 31 L. Ed. 790; *Davenport Nat. Bank v. Davenport Board of Equalization*, 123 U. S. 83, 8 Sup. Ct. 73, 31 L. Ed. 94. 'So long as a State by its laws prescribing the mode and subjects of taxation, does

not intrench upon the legitimate authority of the union, or violate any right recognized or secured by the Constitution of the United States, this court, as between the State and its citizen, can afford him no relief against State taxation, however unjust, oppressive, or onerous' it may be. *Kirtland v. Hotchkiss*, 100 U. S. 491; *Memphis Gas-Light Co. v. Taxing Dist. of Shelby Co.*, 109 U. S. 398, 3 Sup. Ct. 205, 27 L. Ed. 976. All these are questions for State alone, and are within its police power. But when the overvaluation of property assessed for taxation has arisen from the adoption of rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally, not merely on a single individual, but on a large class of individuals or corporations, the courts can give redress to the party aggrieved thereby. *Stanley v. Supervisors*, 121 U. S. 551, 7 Sup. Ct. 1234, 30 L. Ed. 1000. It is put clearly and tersely in *Cummings v. Bank*, 101 U. S. 157, 25 L. Ed. 903. 'When a rule or system of valuation is adopted by those whose duty it is to make the assessment which is designed to operate unequally, and to violate a fundamental principle of the Constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations.' We see that there is an essential ingredient. Those whose duty it is to make the assessment must adopt a rule or system of valuation with the design that it shall operate unequally, and violate some fundamental principle of the Constitution. Another objection to the action of the board of equalization for railroads is that, notwithstanding the fact that a large part of the property of railroad companies is land, they

are assessed annually. The State Constitution directs that lands shall be assessed every five years, and this practice is observed with respect to all lands except those of railroad companies. This indicates design to oppress railroad companies, and at all events violates the fourteenth amendment. The Constitution of South Carolina, article 9, § 1, directs the general assembly to 'provide by law for a uniform and equal rate of assessment and taxation.' It gives the general assembly full discretion 'to prescribe such regulations as shall secure a just valuation for taxation of all property.' The general assembly obeyed the direction by requiring all property to be assessed at its true value in money. Exercising its discretion, it prescribed a set of regulations, which, in its judgment, secured a just valuation of railroad property for taxation. A railroad is a unit, every part contributing to its purposes as a whole. If it be a corporation, its corporate purpose is the maintaining of a railroad, and all and every part of this property must contribute to this purpose. Its right of eminent domain is limited to this purpose. This unit is made up of lands, personal property, choses in action, easements, all dependent upon and inseparable from each other, deriving their value from this inseparability—from the fact that they contribute to this unit. They differ from every other species of property, and the discrimination made, as between them and other corporations and individuals, in the methods and instrumentality by which the value of their property is ascertained, is not invalid. *Kentucky Railroad Tax Cases*, 115 U. S. 337, 6 Sup. Ct. 57, 29 L. Ed. 419; *State Railroad Tax Cases*, 92 U. S. 611, 23 L. Ed. 673.

The mode prescribed by the Legislature of this State is to get at the value of the plant—that is, of all these elements going to make up the railroad—and to ascertain what their combined contributions making up this unit are worth. If they separated the component parts, and attempted to fix separate values upon them, they would enter into an impossible task. The value of the lands of a railroad depend much on the charter and condition and completeness of its rolling stock. The utility

and consequent value of the rolling stock depend largely upon the facilities at stations and at termini; the amount, location, and character of the land used therefor. After careful consideration, there appears no evidence of such a design as will alone give this court jurisdiction. Let an order be taken authorizing and instructing the receiver of the South Carolina railroad Company to pay from the funds in his hands as such receiver the remainder of the tax unpaid, and the costs of these proceedings."

CHAPTER XLII.

RELATING TO LANDLORD AND TENANT.

- SECTION 1247a.** Restraining summary proceedings, etc.
 1248. Same subject.
 1248a. Same subject—Dissolution of injunction.
 1249. Mandatory injunctions in tenant's favor.
 1250. Tenant's exemptions in Florida.
 1251. Disturbing lessee's possession—Light and air.
 1251a. Interference with right of tenant to water-power.
 1251b. Rights of sub-lessee—Purchaser of crops.
 1252. In landlord's favor—Fixtures—Subletting.
 1253. Waste by tenant—Signs.
 1254. Same subject.
 1255. Restraining lessee's trade pending suit, etc.
 1256. Remedy at law—Balancing inconvenience—Doubtful right.

Section 1247a. **Restraining summary proceedings, etc.**—An injunction staying proceedings by a landlord under the statute for the removal of a tenant will not be granted, unless it appears that the justice had no jurisdiction or that the proceedings were fraudulent.¹ And where plaintiff seeks to restrain summary proceedings in ejectment before a justice on the ground that by the terms of an alleged oral modification of the lease, partly executed, plaintiff has incurred no forfeiture, and defendants deny all the material allegations of the complaint and affidavits in support thereof, the court will not interfere by injunction.² Nor will persons who have in

1. *Sherman v. Wright*, 49 N. Y. 227.

2. *Johnston v. Mortimer*, 5 N. Y. Supp. 381, per Patterson, J.: "By section 2265 of the code of procedure it is provided that an injunction shall not be granted to stay summary proceedings before final order, except in a case where an injunction would be granted to stay proceedings in an action for ejectment and upon the like

terms or after the final order, except in a case where an injunction would be granted to stay the execution of the final judgment in such an action and upon like terms. The final order has not been issued in this case, although the justice has made his decision in the matter. It has been held that the equitable power of this court will be exercised in proceedings of this character, where the justice has

violation of an act of Congress obtained leases of lands allotted as Indian reservations be entitled to an injunction to restrain their removal therefrom by an Indian agent.³ And an injunction will not lie to restrain the issuance of a process on a judgment obtained in proceedings against a tenant holding over after the expiration of his term, or after default in the payment of rent, where the tenant might have availed himself of the right of appeal expressly in such cases provided by the Code.⁴ And ordinarily a solvent landlord, though liable in damages to a tenant for breach of contract, will not be enjoined from collecting rent from him by distress, as the tenant has his remedy at law in the recovery of damages.⁵ And proceedings at law to dispossess a tenant will not be enjoined on the ground that a covenant which has not been performed by the lessor was a condition precedent to the payment of rent as such defense can be made in a suit at law.⁶ The Georgia rule is that violations of independent covenants by a landlord do not warrant an injunction to restrain him from dispossessing a tenant who is holding over, and especially if the landlord is not charged with insolvency.⁷ An allegation in a bill that judgment was rendered against complainant in proceedings under the New Jersey landlord and tenant act, ousting her from certain premises at the suit of one who was not her landlord, which judgment was procured by fraudulently substituting such premises in the proceedings, in the place of those which were really the subject of lease between the parties many years before, is not sufficient to warrant an injunction against the enforcement of the judgment, as it is not shown that complainant was prevented from making his defense by the fraud of the

no jurisdiction, or the proceeding is fraudulent, or where an oppressive use is being made of the judgment, or the defendant has some clear, equitable right which cannot be enforced in the ejectment proceeding. *Rapp v. Williams*, 1 Hun, 716; *Armstrong v. Cummings*, 20 Hun, 313; *Chadwick v. Spargur*, 1 N. Y. Civ. Pro. Rep. 423."

3. *Pilgrim v. Beck*, 69 Fed. 895.

4. *San Reno Hotel Co. v. Brennan*, 19 N. Y. Supp. 276.

5. *Leopold v. Judson*, 75 Ill. 536.

6. *White v. Young Men's Christian Ass'n*, 233 Ill. 526, 84 N. E. 658.

7. *Huff v. Markham*, 70 Ga. 284. Compare *Hall v. Holmes*, 42 Ga. 179, where the injunction was refused, though the landlord's insolvency was alleged.

other party, or by accident or mistake of her own, unconnected with negligence.⁸

§ 1248. **Same subject.**—In an action by a lessee to restrain a lessor from maintaining dispossessory proceedings for non-payment of the rent reserved in the lease on the ground that there had been a subsequent parol agreement reducing the rent, a bond given by the lessee for a sum exceeding the difference between the rent reserved in the lease and the amount payable under the parol agreement, as claimed by the lessee, would be sufficient; and it has been held that the injunction should be continued till trial of the issue as to the condition of the premises at the beginning of the term, as the lessor would be protected from loss by a proper undertaking, but if the injunction was dissolved and the lease terminated by dispossession, the lessee would suffer irreparable injury.⁹ In such a case the ground for injunctive relief would be the plaintiff's inability to avail himself, in summary proceedings, of the parol agreement by which the rent was reduced, for the original instrument of lease being in writing could not be thus modified in proceedings at law.¹⁰

8. *Brick v. Burr*, 47 N. J. Eq. 189; 19 Atl. 942, per Green, V. C.: "To secure the interference of equity, it must appear that complainant had an equitable defense, of which he could not avail himself at law, or that she was prevented making her defense by fraud or mistake, unmixed with any negligence of her own, etc. *Mechanics' Nat. Bank v. Burnet Mfg. Co.*, 33 N. J. Eq. 488; *Powers v. Butler*, 4 N. J. Eq. 471; *Quackenbush v. Van Riper*, 1 N. J. Eq. 476; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Kinney v. Ogden*, 3 N. J. Eq. 168; *Cairo, etc., R. Co. v. Titus*, 27 N. J. Eq. 102; *Knox Co. v. Harshman*, 133 U. S. 152, 10 S. Ct. 257, 3 L. ed. 586. If the point was litigated in the court of law and was within its jurisdiction, equity will not interfere. *Vaughn v. Johnson*, 9 N. J. Eq. 173; *Phillips v. Pul-*

len, 45 N. J. Eq. 5, 16 Atl. 9; *Simpson v. Hart*, 1 Johns. Ch. 98. . . . If she availed herself of her statutory right, the claimant, Burr, must have been required to prove the relationship of landlord and tenant between them, with reference to the premises in question, involving the very point here raised, to the satisfaction of the justice, or the jury if there was one. If she did not require, she has slept upon her rights. It must either have been actually litigated, or it was not litigated because of the neglect of the complainant. In either event, under all the decisions the complainants are not entitled to an injunction."

9. *Appeal of Pittsburgh Yard Co.*, 123 Pa. St. 250, 15 Atl. 625.

10. *Coe v. Hobby*, 72 N. Y. 141; *Smith v. Kerr*, 108 N. Y. 31, 15 N. E. 70; *McKenzie v. Harrison*, 120 N. Y.

And where summary proceedings have been commenced against a tenant for his removal upon the expiration of an instrument purporting to constitute a tenancy at will, he may maintain an equitable action to cancel the instrument for fraud, and also to enjoin the summary proceedings.¹¹ And an injunction will lie against distress for rent in lands in the possession of the receiver of the court, the title thereto being in litigation.¹² But a lease of premises at a fixed yearly rent is not merged into a subsequent contract under which the tenant has the option of purchasing the premises at any time during his term; and a tender of the purchase price agreed on in the contract of purchase, not accompanied by the rent in arrear, is not sufficient to entitle the tenant to an injunction against summary proceedings instituted by the landlord to recover possession for the rent in arrear.¹³ And where a tenant under a lease containing a privilege of renewal, holds over his term without any formal renewal, or any notice to the landlord that he intends to renew, equity will not enjoin the landlord from ejecting him, or require him to renew the lease. If, under the terms of the lease and the facts of the lease, the tenant is entitled to a renewal, his defense to an action at law for possession is adequate and complete.¹⁴

§ 1248a. **Same subject; dissolution of injunction.**—In Florida it is decided that a temporary injunction restraining eviction proceedings in the county judge's court should not be dissolved on the ground that the relief sought may be obtained by a plea on equitable grounds in such court.¹⁵ Thus it was so held where the appel-

260, 24 N. E. 458; *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198.

11. *Becker v. Church*, 115 N. Y. 562; 22 N. E. 748, per Gray, J.: "If the fraudulent instrument affects the title to land, equity entertains the action for its cancellation, in order to remove the cloud thrown upon the plaintiff's title. *Hamilton v. Cummings*, 1 Johns. Ch. 520; *Pettit v. Shepherd*, 5 Paige (N. Y.), 493. . . . The power to control and restrain the proceedings in pending actions in such

a case is a necessary part of the remedy which a court of equity is supposed to be capable of completely administering."

12. *Marshall v. Lockett*, 76 Ga. 289.

13. *Campbell v. Babcock*, 13 N. Y. Supp. 843. And see, *Bostwick v. Frankfield*, 74 N. Y. 207.

14. *Flanneken v. Wright*, 64 Miss. 217; 1 So. 157.

15. *Hobbs v. Chamberlain* (Fla. 1908), 45 So. 988.

lants had obtained an injunction restraining the appellee from prosecuting a cause at law in the county judge's court to evict the former from the possession of certain described premises. The equities alleged in the bill of complaint were that appellants were in possession of the land by virtue of an agreement to renew a prior lease, which renewal was provided for in such lease; that in faith of such agreements the appellants expended large amounts in improving the property and to be evicted by the summary proceedings invoked, with no right to supersede a judgment of eviction pending appellate proceedings to finally adjudicate the rights of the parties, would ruin appellants' livery stable business and cause a loss of the improvements which would be an irreparable injury to the appellants. The answer admitted the provisions of the lease for a renewal but denied the renewal of the lease and the large expenditures on the land. By statute the right was given to present an equitable plea in an action at law and on this ground it was sought to dissolve an injunction granted which restrained the eviction proceedings. It was, however, decided that the statute was merely permissive and that if the equitable defense were not presented in the action at law under the statute any proper equitable remedy might be invoked.¹⁶ And an injunction was held to be properly dissolved which restrained the defendant, a lessor, from dispossessing or attempting to dispossess the lessee or from commencing or prosecuting any suit for rent where the injunction was the only relief asked, and ground upon which it was asked was that a covenant by the lessor to improve the premises was a condition precedent to payment of rent and that such covenant had not been performed.¹⁷

§ 1249. **Mandatory injunction in tenant's favor.**—A court of equity will in some cases interfere by mandatory injunction to restore to a tenant or lessee a right or privilege to which he is entitled as such. Thus, where a lessor or lessee has forcibly taken possession of the leased premises in violation of the terms of the lease he may be compelled by mandatory injunction to surrender

¹⁶ *Hobbs v. Chamberlain* (Fla. 1908), 45 So. 988.

¹⁷ *White v. Young Men's Christian Ass'n*, 233 Ill. 526, 84 N. E. 658.

possession to the one entitled thereto.¹⁸ So where plaintiff had leased premises from a landlord by a lease giving him access to a heater through the basement of the building, which was an appurtenance to plaintiff's premises, giving heat to no other part of the building, and subsequently, the landlord gave a lease to defendant of the basement, and defendant notified plaintiff that he would not thereafter be permitted to pass through the basement to the heater, to which there was no other means of access, it was held that this was such an irreparable injury to a settled legal right in real estate as equity would protect by mandatory injunction, on an interlocutory application.¹⁹ And where the tenant of an apartment, by consent of the owner of the house, put in water pipes, to connect with the main pipes, to furnish water to his apartment, it was held that the right to receive water through the main pipes was not a mere license, revocable at will of the owner of the premises; and a mandatory injunction would issue to com-

18. *Pokegama Sugar Pine L. Co. v. Klamath River L. & I. Co.*, 86 Fed. 528.

Assignee of lessee not entitled to such relief where the lessee or one holding under him has surrendered possession. *Koehler v. Brady*, 22 App. Div. (N. Y.) 624, 47 N. Y. Supp. 984.

Performance of contract by lessee may be compelled, as in case of a lease of a railroad. *Southern R. Co. v. Franklin & P. R. Co.*, 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297.

19. *Hodge v. Giese*, 43 N. J. Eq. 342, 11 Atl. 484, *per* Van Fleet, V. C.: "A court of equity may protect and enforce legal rights in real estate where the right, though formally denied, is yet clear on facts which are not denied and according to legal rules which are well settled, and the injury against which protection is asked is of an irreparable nature. *Hart v. Leonard*, 42 N. J. Eq. 416, 7

Atl. 865 The right involved here is an easement. The complainant on the undisputed facts of the case has a right to pass through the defendant's shop to and from the heater. Courts of equity exercise a very liberal jurisdiction in the protection of such rights. Mandatory injunctions may, contrary to the general rule, be issued at the very inception of the suit for the protection of such rights. *Locomotive Works v. Railway Co.*, 20 N. J. Eq. 379. The case of *Shivers v. Shrivvers*, 32 N. J. Eq. 578, shows that a mandatory injunction was granted on filing the bill and without hearing the defendant, commanding the defendant forthwith to take down and remove a gate which he had erected across a private way running through his land. Like injunctions have recently been granted in several similar cases. The true rule on this subject is also declared in *Whitecar v. Michenor*, 37 N. J. Eq. 14."

pel the owner to permit the water to flow through the main pipes, which he had stopped up.²⁰ But where an addition to a building has been almost completed after the erroneous refusal of an injunction sought by the lessee of rooms therein, on the ground that the addition would obstruct the view of the street in violation of his rights under the lease, the supreme judicial court, to which the case has been reported, will not, if the lease has only a short time to run, grant a mandatory injunction compelling the lessor to pull down the addition, as that would be an unnecessary destruction of property, but the lessee's remedy will be confined to compensation in damages.²¹

§ 1250. Tenant's exemption in Florida.—The constitutional exemption of personal property in favor of the head of a family residing in Florida cannot be claimed by a tenant as against the lien for rent in favor of the landlord on any of the agricultural products raised on the land rented; but the statutory remedy for the enforcement of a claim for rent is embraced within the terms "any process of law," contained in the exemption article of the constitution of 1868; and the personal property exemption secured by that instrument as to other than agricultural products raised on the land rented, may be claimed by the head of a family residing in that State, as against the lien for rent given by statute in

20. *Brauns v. Glesige*, 130 Ind. 167, 29 N. E. 1061.

21. *Brande v. Grace*, 154 Mass. 210, 31 N. E. 633, per Allen, J.: "The defendants might properly have been enjoined from proceeding with their proposed alterations. But the learned justice, before whom the case was heard in the superior court, took a different view of the rights of the parties, relying, it is said, upon *Keats v. Hugo*, 115 Mass. 204; and accordingly the plaintiff's prayer for an injunction was refused. The defendants thereupon proceeded with the work until now it is completed. The

lease to the plaintiffs will expire on the last day of February, and if the defendants were now ordered to pull down their structure, they might then restore it. The rules under which mandatory injunctions have been issued for such a purpose should not be applied in a case like this. *Attorney-General v. Algonquin Club*, 153 Mass. 447, 27 N. E. 2. It would seem an unnecessary destruction of property. In view of the early termination of plaintiff's lease their remedy should now be confined to compensation in damages."

favor of the landlord, and may be protected by injunction from a distress warrant.²²

22. *Hodges v. Cooksey*, 33 Fla. 715, 15 So. 549, per Mabry, J.: "While the lease in this case contains conditions to be performed by both lessor and lessee, there is no stipulation in it for a lien on any property to secure the rent agreed to be paid. It was decided in *Patterson v. Taylor*, 15 Fla. 336, that the exemption from forced sale under the constitution was expressly waived by voluntarily executing a mortgage on specific property, and the mortgagor was estopped from asserting his exemption as to such property in the face of such a contract. A waiver of any benefit of the exemption laws, or an agreement that all the debtor's property shall be subject to levy and sale, contained in a promissory note, was held in *Carter v. Carter*, 20 Fla. 558, to be inoperative as against the policy of the exemption laws. It is said in this case that 'the object of exemption laws is to protect people of limited means and their families in the enjoyment of such property as may be necessary to prevent absolute pauperism and want, and against the consequence of ill-advised promises which their lack of judgment and discretion may have led them to make, or which they may have been induced to enter into by the persuasions of others.' It was decided in *Baker v. State*, 17 Fla. 406, that the real-estate exemption of a party who had enjoyed the same accrued to his heirs, notwithstanding the deceased head of the family had not resorted to the statutory method of defining and placing on record the description of the property he intended should constitute his homestead. It cannot be

said that the property of the tenant carried on the leased premises or left off is the immediate product of the soil leased, nor does the tenant acquire the title to such property as a result of the tenancy and in subordination to the lien of the statute. If the legislature can declare a lien in favor of the landlord for his rent on all the property of his tenant other than agricultural products, and it follows that, by entering into the rental contract alone, the tenant hereby pledges his property to pay such claim, and waives his constitutional right of exemption therein, then it seems to us that the legislature can, by providing similar liens to secure the payment of other debts, avoid and annul, not only the policy, but the plain provisions, of the constitution on the subject of exemptions. Food and raiment are as essential to life as a habitation and shelter, and we might find insurmountable difficulty in discriminating against the lien for one class of demands and in favor of the other. The claim for rent was highly favored at the common law, but we are unable to discover any purpose in the constitution to except this demand from those against which the exemptions provided for may be claimed. The constitution exempts to the person entitled thereto \$1,000 worth of personal property from forced sale under any process of law, and the legislature cannot indirectly deprive him of such right any more than it can directly do it. The appellee, on the showing made, was entitled to his personal property exemption to the limit of \$1,000 worth in the personal property, other than

§ 1251. **Disturbing lessee's possession; light and air.**—An interference by the lessor or another with the possession or enjoyment of the premises by the lessee may be restrained by injunction.²³ So evidence that the lessor refused the lessee, at the time the lease was made, the use of an adjoining lot on the ground that he, or a purchaser from him, might want to build thereon, no kind of a building being specified, is held to be no bar to a bill to restrain a purchaser from erecting a building over the whole of said lot in such a manner as to obstruct the lessee's light and air.²⁴ And a gas company which has leased a premises using natural gas wells is entitled to an injunction against the lessor restraining him from interfering with them, since such interference is likely to result in irreparable injury.²⁵ And one who holds a lease from the State of tide lands which the State has classified with other public lands of the State, is entitled to the possession and control of the lands leased and to restrain others from trespassing thereon and removing clams without his consent, as an adequate compensation for the continuing trespass and the constantly recurring damages

agricultural products, levied upon by the sheriff; and the court did not err in refusing to dissolve the injunction restraining the sale until the further order of the court adjudicating such exemption right." And see, *Cathcart v. Turner*, 18 Fla. 837; *Blanchard v. Raines*, 20 Fla. 467; *Slaughter v. Winfrey*, 85 N. C. 159.

23. *Huxford v. Southern Pine Co.*, 124 Ga. 181, 52 S. E. 439; *Hoboken & M. R. Co. v. Jersey City H. & P. R. Co.* (N. J. Ch. 1905), 62 Atl. 539; *Genessee & W. V. R. Co. v. Retsof Min. Co.*, 15 Misc. R. (N. Y.) 187, 36 N. Y. Supp. 896; *Citizens Natural Gas Co. v. Shenango Natural Gas Co.*, 138 Pa. St. 22, 20 Atl. 947.

Irreparable injury must be shown to entitle one to injunction to enforce a right of possession. *Goldman v. Corn*, 111 App. Div. (N. Y.) 674, 97 N. Y. Supp. 926.

A lessee who admits the forfeiture of his lease and states to an intending purchaser that he will not oppose his tearing down a building, part of which he occupies, is not entitled to an injunction restraining the purchaser from so doing on the ground that he is entitled to possession of such part during the time required for an equitable adjustment of his claim for moving, to which adjustment the purchaser had agreed. *Pike v. New Hampshire Trust Co.*, 67 N. H. 227, 38 Atl. 721.

24. *Ware v. Chew*, 43 N. J. Eq. 493, 11 Atl. 746. And see *Sutphen v. Therkelson*, 38 N. J. Eq. 318.

25. *Citizens' Natural Gas Co. v. Shenango Natural Gas Co.*, 138 Pa. St. 22, 20 Atl. 947. And see *Westmoreland & Cambria Natural Gas Co. v. DeWitt*, 130 Pa. St. 235, 18 Atl. 724.

cannot be had by a mere judgment for damages.^{25a} But where a bill to enjoin threatened invasion of premises, of which complainants are tenants, alleges that their term will expire on a day named, and the answer denies a threatened invasion during that term, an amended bill, filed after the expiration of the term, which alleges that complainants did not receive notice to quit, and are therefore entitled to continue in possession for another year, shows no ground for injunction.²⁶ Again, where complainants, lessees of a quarry from defendant, filed a bill to enjoin an action of forcible detainer brought by him, alleging that he had leased them the quarry fraudulently stating that he had a leasehold interest therein; that other parties claimed the quarry, and that complainants had entered into a lease with them, and defendant, by his answer, denied all allegations of fraud, and alleged that he had a lease from the true owners of the property, it was held that a temporary injunction was properly dissolved on the answer.²⁷ And in this connection it is decided that a complaint alleging that the plaintiffs leased the upper floor of a building from defendant for use as a skating rink, expended money in putting it in condition for that purpose, and carried on the business with no more noise than is usual to such use, and that the lessor instigated other tenants occupying lower floors to perpetually enjoin the plaintiff from using the premises as a skating rink, and that the plaintiffs, after a request made to the defendant to defend the injunction suit, were charged with the cost of that action, states a cause of action and a dismissal of the complaint is error. And this was declared to be so in this case, although the plaintiffs, after being

25a. Sequim Bay Canning Co. v. Bugge (Wash. 1908), 94 Pac. 922.

26. Hatch v. Kaighn's Point, etc., Ferry Co. (N. J.), 17 Atl. 833. Under sections 3763-3766, Gen. St. Ky., allowing the court to assess damages upon the dissolution of an injunction to stay proceedings upon a judgment, or to delay the delivery of property, no right to damages accrues to a les-

see ousted from possession for failure to pay rent, the term of whose lease expires before the date of the hearing at which the dissolution of an injunction, issued to restrain him from annoying the lessor with continual trespasses, was granted. Morrow v. Wessell (Ky.), 2 S. W. 251.

27. Worthington v. Hatch (Ala.), 13 So. 518.

perpetually enjoined and deprived of the use of the premises, paid a portion of the rent.²⁸

§ 1251a. **Interference with right of tenant to water; power.**— A landlord may be restrained from interfering with the right of a tenant to access to a water supply, where such a right is secured by a lease.²⁹ So where the owner of a double apartment house leased one half of it, it was decided that he would be restrained from removing a single pipe which supplied water for domestic purposes to the entire house and would be compelled to restore the supply of water.³⁰ And where a lessor agreed to furnish certain water for a gin and to keep the water power in good running order so as to furnish plenty of water for the running of the gin, it was decided that the lessor would be restrained from erecting another gin house near the site of that built by his lessee where the proposed erection would deprive his lessee of the use of the water power and destroy the benefits derived from the lease.³¹ And in a case in New York it is decided that while a tenant is in lawful possession of premises under a lease by the terms of which the landlord is to furnish him power, the landlord will be enjoined from cutting off the power notwithstanding the fact that differences have arisen between the parties in regard to the payment of rent.³² And on the other hand, the use by a lessee of a water supply in excess or in violation of his rights under his lease may be restrained at the suit of the lessor. So where the owner of a water power leased the use of a specific quantity of water, and the lessee persistently used water in excess of the amount covered by the lease, and the extent of such use was difficult of estimation, it was decided that the owner could successfully invoke the aid of equitable intervention to prevent the lessee from using such excess without alleging that such excess was essential to the operation of other mills or was diverted therefrom.³³

28. Williams v. Getman, 114 App. 591, 23 So. 637.
Div. (N. Y.) 282.

29. Cooley v. Cummings, 1 N. Y. Supp. 631.

30. Brauns v. Glesige, 130 Ind. 167, 29 N. E. 1061.

31. Hendricks v. Hughes, 117 Ala.

32. Traitel Marble Co. v. Chase, 35 Misc. R. (N. Y.) 233, 71 N. Y. Supp. 628.

33. Lawson v. Menasha Wooden W. Co., 59 Wis. 393, 18 N. W. 440, 48 Am. St. Rep. 528.

§ 1251b. **Rights of sub-lessee; purchaser of crops.**—A provision as to the use of the property in a lease between the owner of property and the lessee is held to give a sub-lessee no right to an injunction restraining a use of a portion of the property in violation of such restriction where the lease between the sub-lessee and his lessor contains no such provision.³⁴ But one who has purchased from a tenant matured crops standing in the fields on the leased premises, has a right during the term of the lease to enter and harvest the crop in the usual manner, and such right is not affected by a provision in the lease as to sub-letting and cannot be interfered with by the landlord. An injunction, however, against the landlord will not be granted where the evidence fails to establish any active interference with such right and the only acts done have in no way operated to prevent the plaintiff from harvesting the crops.³⁵

§ 1252. **In landlord's favor; fixtures; sub-letting.**—A landlord can, by injunction, restrain a tenant from interfering with him in exhibiting the premises and fixing the bill "to rent" thereto in accordance with the terms of the lease,³⁶ or from entering upon the premises in accordance with the provision for purposes specified therein.³⁷ And generally an injunction in favor of the lessor may be granted to prevent an irreparable injury for which there is no adequate remedy at law,³⁸ or to prevent a multiplicity of suits.³⁹ And injunction will lie at the instance of a landlord to

34. *Beebe v. Tyra* (Wash. 1908), 94 Pac. 940, holding, also, that a sub-lessee of premises from a lessee where lease contained a restriction against the use of the premises for the sale of intoxicating liquors was estopped to enjoin the use of the premises for such purpose by one holding as lessee from a grantee of the owner and a transferee from the lessee where such person was permitted to equip, furnish and run the saloon for nearly a year without interruption except the mailing of a letter to the owner of the

premises and one to the proprietor of the saloon, the court declaring that the failure to act must be construed as a waiver of the right to do so.

35. *Kirkpatrick v. Founner* (Neb. 1908), 116 N. W. 778.

36. *United States Trust Co. v. O'Brien*, 18 N. Y. Supp. 798.

37. *Cole v. Manners* (Neb. 1906), 107 N. W. 777. See also *State Bank v. Rohren*, 55 Neb. 223, 75 N. W. 543.

38. *Webster v. De Bardeleben* (Ala. 1906), 41 So. 831; *State Bank v. Rohren*, 55 Neb. 223, 75 N. W. 543.

39. *Drake v. Black Diamond C. &*

enjoin a threatened removal by the tenant of a house from the demised premises.⁴⁰ And a sub-letting of an apartment in an apartment-house may be enjoined where the lease contains a covenant against it.⁴¹ Again, in a suit to enjoin the assignment of a lease, the answer of defendant that he has no intention of disposing of the lease does not affect plaintiff's right to the injunction.⁴² And the breach of a covenant in a lease not to underlet, will be restrained by injunction, where it appears that the damages arising from a breach cannot be accurately ascertained, and no facts are shown making it inequitable to enforce the covenant.⁴³ And a lessee may be restrained from a use of the premises in violation of the provisions of the lease.⁴⁴ And where personal property is accepted as security for the rent the lessor may be restrained from continuing in possession of the premises where the lease was signed by the lessor on the false representation that such property was not encumbered.⁴⁵ But where, in an action to restrain lessees from removing from the demised premises certain articles, as in violation of provisions of their leases, it appeared that such articles were not fixtures, but personal chattels, easily removed without injury to the buildings, and that their exact money value could be readily determined, it was held that there was no such injury to the freehold, or other irreparable injury, as to require the interference of equity.⁴⁶ And an agreement in a lease

M. Co., 28 Ky. Law Rep. 533, 89 S. W. 545.

40. Dougherty v. Spencer, 23 Ill. App. 357. And see Dooley v. Crist, 25 Ill. 551; Smith v. Park, 31 Minn. 70, 16 N. W. 490.

41. Barrington Apartment Assoc. v. Watson, 38 Hun (N. Y.), 545.

42. Lewis v. Wilson (Sup.), 17 N. Y. Supp. 128.

43. Sloan v. Martin, 54 N. Y. Sup. Ct. 87.

44. Spalding Hotel Co. v. Emerson, 69 Minn. 292, 72 N. W. 119. See Hudson v. Cripps (1896), 1 Ch. 265, 65 L. J. N. S. 328, 73 Law T. Rep. 741.

45. Newcome v. Ewing, 19 Ky. Law Rep. 821, 42 S. W. 105.

46. Loeser v. Liebman, 137 N. Y. 163, 33 N. E. 147; *affirming* 14 N. Y. Supp. 569. And see Thompson v. Matthews, 2 Edw. Ch. 212; Balcom v. Julien, 22 How. Pr. 349. Laws N. Y. 1885, ch. 342, § 1, provides that a mechanic shall have a lien only on the "interest in land" of the party for whom work is done, "whether owner in fee, or of a less estate, or whether lessee for a term of years," etc. Plaintiff fitted certain buildings of defendant, in the possession of leasehold tenants, with steam boilers and piping, and then claimed a lien,

not to let adjoining premises for the same purpose cannot be enforced by injunction against subsequent lessees thereof from the original lessee.⁴⁷

§ 1253. Waste by tenant; signs.—A court of equity may enjoin the commission of waste by a tenant. So where by the terms of a lease of lands, the lessee is given the way-going crop, if he take advantage of this provision to sow all the arable lands to wheat, and thus leave the farm practically worthless for the coming season, the act will be waste which a court of equity will enjoin; and if he disregards the injunction, and proceeds to plow the land, the court has power to ascertain the amount of damages the lessor has suffered, and decree the payment.⁴⁸ And an injunction is the proper remedy to prevent such alterations by a lessee or sub-lessee as will serve to weaken or change the appearance of the demised premises and in such a case the omission to allege in the bill that the alterations were attempted to be made for the purpose of converting the premises to uses inconsistent with the terms of the lease is not in itself sufficient to justify the refusing of an injunction.⁴⁹ In another case complainants asked a pre-

under the statute, on the tenants estate in the premises. The tenants abandoned and surrendered their lease, and the defendant entered. It was held that an injunction should not be granted to restrain the defendant owner of the fee from using the said boilers and pipes, because, if fixtures, they were not covered by the lien, and, if part of the realty, they were rightfully in his possession as landlord. *Chamberlin v. McCarthy*, 13 N. Y. Supp. 217. And see *Ward v. Kilpatrick*, 85 N. Y. 413. *Fox v. Lynch* (N. J. Ch. 1906), 64 Atl. 439.

47. *Napa Val. Wine Co. v. Boston Block Co.*, 44 Minn. 130, 46 N. W. 239.

48. *Chapel v. Hull*, 60 Mich. 167, 26 N. W. 874, per *Champlin, J.*: "There is in this case an implied

covenant on the part of defendant to use the farm in a husbandlike manner and not exhaust the soil by improper tillage. A due proportion of meadow land upon a farm of this size and kind in question is consistent with good husbandry in the neighborhood as appears from the record before us; and upon principle it would be waste for an out-going tenant to plow up all the meadow land on the farm as much as it would be for an out-going tenant of garden ground to plow up strawberry beds. *Watherell v. Howells*, 1 Camp. 227."

49. *Baugh v. Crane*, 27 Md. 36, per *Crain, J.*: "To prevent such waste the lessor had the right to ask for an injunction. It was the appropriate remedy to meet the case and afford the appellee full and adequate

liminary injunction to restrain certain of the respondents from drilling a gas well on premises which complainants averred were leased to them for the purpose, and afterwards leased to these respondents. It appeared that the lessor had retained possession of the land for tilling purposes, which right was reserved under the lease; that he had asserted to complainants that their lease was forfeited; and that he had ordered off the land complainant's men when at their well, and when preparing to sink a second well. Complainants had only to turn a valve to have the gas flow into their pipe, ready for use. It was held that a finding that complainants were not in possession, and must resort to law to establish their title before equity would interfere, was erroneous; and that the bill was maintainable as a bill to stay waste because the damage threatened even if not irreparable was incapable of measurement at law.⁵⁰ In those cases where it can be done it has been held proper to compel by mandatory injunction a tenant who has committed waste to restore the premises to the condition in which they were before it was committed.⁵¹ But where the tenant is required by the terms of the lease to reduce to cultivation during the term uncleared portions of the demised premises he will not be enjoined from cutting down timber on the lands for the purposes of such cultivation.⁵² And an action to enjoin defendant from making certain uses of premises alleged to be unauthorized by the terms of a license under which defendant occupies them

relief. *Shipley v. Ritter*, 7 Md. 408; *Maddox v. White*, 4 Md. 79; *Douglass v. Wiggins*, 1 Johns. Ch. (N. Y.) 435; *Steward v. Winters*, 4 Sandf. Ch. (N. Y.) 587; *Barret v. Blgrave*, 5 Ves. 555."

50. *Westmoreland Gas Co. v. De Witt*, 130 Pa. St. 235, 18 Atl. 724. And see *Allison's Appeal*, 77 Pa. St. 221. In the former case *Mitchell, J.*, said: "From the nature of gas the grant of well-rights is necessarily exclusive. It was so held even as to oil wells in *Funk v. Haldeman*, 53 Pa. St. 229, 247, although in that case the plaintiff had a mere right to enter

and not as complainants here, a lease of the land." A temporary injunction will not be granted to restrain defendants from maintaining a sign erected by them on premises leased from plaintiffs, where there is nothing in the lease which forbids defendants to maintain such sign, and it does not appear that to allow the sign to remain will cause irreparable injury to plaintiffs. *Stirn v. Nash*, 12 N. Y. Supp. 431.

51. *Klie v. Von Broeck*, 56 N. J. Eq. 18, 37 Atl. 469.

52. *McDaniel v. Callan*, 75 Ala. 327.

will be dismissed as premature, where it appears that defendant had not even threatened to make any use of the premises further than the license warranted, and that the particular acts charged in the complaint were expressly authorized.⁵³

§ 1254. **Same subject.**—Injunction will lie, at the suit of a purchaser of land sold by an executor, to restrain the tenant in possession from removing stone therefrom, where it appears that there is no adequate remedy at law, and that, if the writ is denied, a continuing trespass and a multiplicity of suits will result.⁵⁴ And where, under an agreement between the lessor and lessee of a farm the lessor is to furnish cattle and the lessee to feed them from the farm produce and after the lessor is repaid the purchase money from the proceeds of their sale, the remainder is to be equally divided, the lessee may be enjoined from disposing of or removing the cattle without the lessor's consent.⁵⁵ Again, where an insolvent tenant agreed to deliver to the landlord in payment of the rent of a farm one-half of the corn raised on it and fraudulently placed a part of it in the possession of others, it was held that as the landlord had no adequate remedy at law he could enjoin those having possession of the corn from selling it.⁵⁶ But a bill by the owner to restrain defendant from going on her land under a mining lease, and taking ocher therefrom, on the ground that the lease has become void through the failure of the lessee to pay the agreed royalty, cannot be maintained, since complainant has a remedy at

53. *Vernam v. Palmer*, 5 N. Y. Supp. 71.

54. *Ellis v. Wren*, 84 Ky. 254, 1 S. W. 440. And see *Musselman v. Marquis*, 1 Bush (Ky.), 463.

55. *Musser v. Brink*, 80 Mo. 350.

56. *Parker v. Garrison*, 61 Ill. 250. And see *Clark v. Flint*, 22 Pick. (Mass.) 231; *Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299, 6 L. Ed. 204; *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738, 7 L. Ed. 152; *Sullivan v. Tuck*, 1 Md. Ch. 59; *Wood v.*

Rowcliffe, 3 Hare, 303; *Adderley v. Dixon*, 1 Sim. & Stu. 608. In *Lewis v. Christian*, 40 Ga. 187, on a similar state of facts it was decided on appeal that the insolvent tenants should have been enjoined from removing their share of the cotton until the landlord's damages could be ascertained and decreed to be paid. Compare *Williams v. Green*, 37 Ga. 37, where the tenant was improperly enjoined from disposing of the cotton in order to carry out the contract.

law in *assumpsit* for the amount due, and in ejectment for possession of the land.⁵⁷

§ 1255. **Restraining lessee's trade pending suit, etc.**—In an action to restrain defendant from selling merchandise on lots leased to him by plaintiff under a lease for ninety-nine years, renewable forever, plaintiff is entitled to an injunction pending the action to compel defendant to comply with the reasonable covenants and conditions of the lease.⁵⁸ The acceptance of the lease even without becoming a party to it was sufficient to render the lessee and his assignee as subject to it as if they had signed it.⁵⁹ And yet it is a general rule that an injunction *pendente lite* should not be granted when it may cause damage to defendant, which cannot easily be imputed if it should prove to have been improperly granted, and when the alleged injury to plaintiff can be easily ascertained and compensated in money.⁶⁰ Where a lessee sublets the leased premises to another person for a business other than that prescribed in the lease, an injunction is properly allowed to restrain such occupation; and the lessor's waiver in favor of the lessee of the condition not to carry on any other kind of business applies only to the lessee and to his specified business.⁶¹ But a landlord is not entitled to an injunction to restrain the surviving partner of a lessee firm from disposing of the stock in trade except in the usual course of business, especially where he has ample means.⁶² But it might be otherwise if such partner were insol-

57. Appeal of Hoch, 133 Pa. St. 328, 19 Atl. 360.

58. Round Lake Ass'n v. Kellogg, 141 N. Y. 348, 36 N. E. 326. In this case as the lease was renewable forever the lessee was treated as a grantee and the restriction of trade which he took upon himself was held not to be unreasonable. See Hodge v. Sloan, 107 N. Y. 244, 17 N. E. 335; Trustees v. Lynch, 70 N. Y. 440; Tallmadge v. East River Bank, 26 N. Y. 105; Rowland v. Miller, 139 N. Y. 93, 34 N. E. 765.

59. Atlantic Dock Co. v. Leavitt, 54 N. Y. 35; Bowen v. Beck, 94 N. Y. 86; Post v. West Shore R. Co., 123 N. Y. 580, 26 N. E. 7.

60. Power v. Athens, 19 Hun (N. Y.), 165; Tracy v. Railroad Co., 7 N. Y. Supp. 892; Bronk v. Riley, 3 N. Y. Supp. 446; Mohawk Bridge Co. v. Utica R. Co., 6 Paige (N. Y.), 563.

61. Wertheimer v. Hosmer, 83 Mich. 56, 47 N. W. 47.

62. Milner v. Cooper, 65 Iowa, 190, 21 N. W. 558.

ent or incompetent, since in such a case an injunction might be the proper remedy in order to protect the landlord's lien upon the stock as a security for the rent to accrue.⁶³

§ 1256. **Remedy at law; balancing inconvenience; doubtful right.**—A tenant leasing on shares, he to furnish the labor and the landlord the team, cannot enjoin the landlord from taking possession of the entire crop on the ground that he failed to furnish the team, as the remedy at law for the violation of the contract is ample.⁶⁴ But a right of re-entry reserved in a lease is ordinarily not so effectual a remedy for a breach of covenant as to deprive the lessor of a right to an injunction to restrain the breach.⁶⁵ Since the lien which the Iowa Code provides that a landlord shall have upon any personalty of the tenant used on the premises during the term is not extinguished by removal of the property, a landlord cannot enjoin an electric light company, occupying his land under a lease for a term of years, from removing before the end of the lease to other premises within the city, on which the company intends to continue and enlarge its business, the company not being in arrears for rent, and its property being easily

63. *Garner v. Cutting*, 32 Iowa, 547; *Martin v. Stearns*, 52 Iowa, 345, 3 N. W. 92.

64. *Nicholson v. Cook*, 76 Ga. 24. And see *Flanneken v. Wright*, 64 Miss. 217, 1 So. 157, where the tenant could have had his remedy by appeal and an injunction was refused. See, also, *Hoch v. Bass*, 133 Pa. St. 328, 19 Atl. 360. A lessee of a portion of those lands of the town of Gravesend which certain trustees are by Laws N. Y. 1883, ch. 458, authorized to sell to the lessees thereof, is not entitled to enjoin the town against disposing of the land leased by him to another person, merely by virtue of the fact that he is lessee, without showing an offer to buy on his part, or a refusal

to sell on the part of the trustees; nor is he vested with any interest that will entitle him to such injunction by a resolution of the town requiring a new tenant, in case of a change of tenants, to pay for any improvements made by the former one, on the ground that such resolution bound the town to pay for improvements made by him, when it appears that judgment has been obtained by the town in ejectment against the lessee, and that he did not in that action claim a right to be paid for his improvements. *Furey v. Town of Gravesend*, 104 N. Y. 405, 10 N. E. 698.

65. *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241.

identified, for in such a case the inconvenience which the landlord may suffer in identifying his property is trifling compared with the tenant's damage if his removal were enjoined.⁶⁶ And in New York it has been decided that the permission given by the Seventh regiment to the organization called "The Veterans" of that regiment to exclusively occupy, subject to the military necessities, a room in the armory, the lease of which from the city provides that it shall be null and void if the premises are used for any other than the purposes of an armory and drill rooms, or the public purposes of the regiment, being of doubtful legality, an injunction will not be granted to restrain the regimental officers from interfering with such use and occupancy.⁶⁸

66. *Carson v. Electric Light Co.*, 85 Iowa, 44, 51 N. W. 1144. And see *Garner v. Cutting*, 32 Iowa, 547. And see as to the operation of the lien *Martin v. Stearns*, 52 Iowa, 345, 8 N. W. 92; *Gilbert v. Greenbaum*, 56 Iowa, 214, 9 N. W. 182; *Milner v.*

Cooper, 65 Iowa, 190, 21 N. W. 558.

67. *Hatch v. Kaighn's Point Ferry Co.* (N. J. Eq.), 17 Atl. 833.

68. *Veterans of Seventh Regiment v. Field Officers of Seventh Regiment*, 5 N. Y. Supp. 391.

CHAPTER XLIII.

RELATING TO MORTGAGES.

- SECTION 1257.** Preventing oppression by mortgagee.
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Section 1257. Preventing oppression by mortgagee.—The execution of a power of sale in a mortgage will be enjoined where the mortgagee is proceeding in an oppressive manner or is perverting the power from its legitimate purpose, as where, after refusing repeated tenders of the amount due and filing a bill to foreclose, he dismisses the bill without prejudice when ready for hearing, and advertises the land under the power with the avowed purpose of compelling payment of another claim not embraced in the mortgage and the correctness of which is disputed.¹ And

¹ *McCalley v. Otey*, 99 Ala. 584, 12 So. 406; *Same Case*, on former appeal, 90 Ala. 302, 8 So. 157. As to when, in such cases, an actual tender

where a mortgage contains no clause making the whole indebtedness due on the breach of any condition a mortgagee will be enjoined from foreclosing a mortgage for what is a mere technical breach of a condition as to insurance, which breach was promptly cured in such a way that no actual harm was suffered by the defendant, so far as it was possible for a cure to be effected by the mortgagor without the co-operation of the mortgagee.² And a purchaser of the mortgaged property may have an injunction to prevent an execution of the power of sale where the mortgagee is in collusion with third persons who are attempting to subject the land to an alleged outstanding vendor's lien.³ But allegations that the value of the mortgaged property greatly exceeds the amount of the mortgage debt; that the sale will greatly injure the mortgagor who is unable to pay the mortgage, and that the mortgagee threatens to sell unless a second mortgage is paid, and to obtain thereby an advantage over and oppress complainant, are not ground for enjoining the sale.⁴ And the fact, in such a case, that complainant is unable to pay is no reason for enjoining the sale, for the power to sell is given to enable the holder of the mortgage to collect the debt by selling if the debtor cannot or will not pay it.⁵ And the mortgagee's threat to oppress the mortgagor by unfairly bidding in the property at the sale is too vague because he will have to compete at the sale with other bidders.⁶ Again, a bill filed by a mortgagor seeking an account of the amount due on the mortgage

may be dispensed with, see *Rudolph v. Wagner*, 36 Ala. 702; and a payment into court, *McGuire v. Van Pelt*, 55 Ala. 344; *Carlin v. Jones*, 55 Ala. 624.

2. *McComb v. Elwes* (Mass. 1907), 83 N. E. 306. In this case it appeared that there was insurance upon the property, as required by the mortgage, which insurance was cancelled by the company. The mortgage contained the usual clause that the mortgagor should procure insurance to be approved by the mortgagee. The day after the insurance was cancelled the mortgagor procured other insur-

ance, but the mortgagee refused to accept a policy in any other company than that which had cancelled the insurance, and he sought to foreclose the mortgage for a breach of the condition as to insurance.

3. *Struve v. Childs*, 63 Ala. 473. See, also, *Robertson v. Norris*, 4 Jur. N. S. 155; *Foster v. Hughes*, 51 How. Pr. (N. Y.) 20.

4. *McCulla v. Beadleston*, 17 R. I. 20, 20 Atl. 11.

5. *Muller v. Bayly*, 21 Gratt. (Va.) 521.

6. *Holland v. Savings Bank*, 16 R. I. 734, 19 Atl. 654.

debt and an injunction of a sale of the mortgaged property conveyed by the mortgage under a power contained in it, is without equity when it does not show that the mortgagee claimed more than was due on the debt or that the accounts are so complicated that the parties cannot state them and ascertain the amount due, or that the mortgagee is making a fraudulent or oppressive use of the mortgage.⁷ And where a person executed to plaintiff a mortgage on his undivided interest in the land of his deceased father, and then assigned his interest to his sister, and accordingly two shares of the land were received by her, and she executed a mortgage on both to defendant, and it was admitted that either one was sufficient to pay defendant's debt, it was held that plaintiff cannot enjoin the foreclosure of defendant's mortgage in order that the mortgagor may elect which lot she will retain as her own, and which surrender to plaintiff as the mortgagee of his grantor.⁸ Under the South Dakota laws which provide that application may be made to the district court judge for an order enjoining a foreclosure by advertisement, and directing that all further proceedings be had in the District Court, the application by the mortgagor was designed to be so far *ex parte* as not to authorize or allow resisting affidavits.⁹

§ 1258. **Enjoining foreclosure of mortgage.**—The mortgagor can maintain an action to enjoin the foreclosure of a mortgage on the ground that it was without consideration, notwithstanding that

7. *Security Loan Ass'n v. Lake*, 69 Ala. 456, per Stone, J.: "Jones in his excellent treatise on mortgages, section 1805, says: 'The court will enjoin a sale only when the petitioner's rights are clear or free from reasonable doubt. He must show, also, a good reason for asking the interference of the court. He must show that the mortgagee is about to proceed in an improper or oppressive manner, and not merely that he might adopt a different remedy.' *Struve v. Childs*, 63 Ala. 473; *Vechte v. Brow-*

nell, 8 Paige (N. Y.), 212; *Powell v. Hopkins*, 38 Md. 1; *Meysenberg v. Schlieper*, 46 Mo. 209; *Sloan v. Coolbaugh*, 10 Iowa, 31; *Van Bergen v. Demarest*, 4 Johns. Ch. (N. Y.) 37; *Wilkins v. Gordon*, 11 Leigh (Va.), 547; *Crenshaw v. Seigfried*, 24 Gratt. (Va.) 272."

8. *Myers v. Pierce*, 86 Ga. 786, 12 S. E. 978.

9. *Commercial Nat. Bank v. Smith*, 1 S. D. 28, 44 N. W. 1024, holding that the judge's order refusing an injunction is not appealable.

it was executed for the purpose of hindering and delaying his creditors.¹⁰ And where an appeal has been taken from a judgment of foreclosure and the *supersedeas* bond required by statute has been given, a sale of the property under such judgment may be restrained by injunction although the bond does not strictly conform to the statute in all respects.¹¹ And where a mortgage is a lien upon different pieces of property it is held that where there is no second lien on one of the pieces, the mortgagee may be enjoined from foreclosing one of the other pieces, upon which there is a second lien, until he has exhausted the lien on the other property.¹² But the fact that the mortgagee in a chattel mortgage that has been paid, the property remaining in the possession of the mortgagor, threatens to foreclose and sell the property, is no ground for an injunction, as the mortgagor would have a complete and adequate remedy at law against such a trespass upon his personal property.¹⁴ And where a mortgage was executed by one a considerable time before a petition in bankruptcy was filed by him, it was decided that proceedings in a State court to foreclose the mortgage would not be enjoined by the bankruptcy court where

10. *Devlin v. Quigg*, 44 Minn. 534, 47 N. W. 258, per Mitchell, J.: "If the defendant had proceeded to foreclose by action there can be no doubt that this want of consideration would have been available as a defense and could not have been overcome by showing that the mortgage was executed to defraud creditors. *Wearse v. Peirce*, 24 Pick. (Mass.) 141; *Hannan v. Hannan*, 123 Mass. 441; *Briggs v. Langford*, 107 N. Y. 680, 14 N. E. 502; *Sackner v. Sackner*, 39 Mich. 39. But it can make no difference that the defendant is proceeding under the power of sale and, therefore, the plaintiffs put to a suit to enjoin."

11. *Deming Investment Co. v. Fariss* (Okla.), 50 Pac. 130.

12. *Union Nat. Bank v. Milburn & S. Co.*, 7 N. D. 201, 73 N. W. 527.

14. *Normandin v. Mackey*, 38 Minn. 417, 37 N. W. 954; *Linseed Oil Co. v. Maginnis*, 32 Minn. 193, 20 N. W. 85; *Bushnell v. Avery*, 121 Mass. 148. A suit to enjoin the foreclosure of a chattel mortgage, which secured a claim of about \$200, arose from a dispute over an item of \$20. A preliminary injunction, granted at the beginning of the suit, was dissolved after answer, without objection by plaintiff. Thereafter the suit itself was dismissed upon defendant's motion, supported by affidavits showing that the mortgage had been foreclosed, and the chattels, which were of small value, sold. It was held that a reversal should not be ordered, although the proceeding was not strictly regular. *Hoag v. Madden*, 70 Iowa, 612, 31 N. W. 954.

such proceedings did not conflict with the possession of the trustee in bankruptcy.¹⁵ Again, where a mortgage was held invalid because of an improper acknowledgment, it was held that the court would not enjoin a sale under the mortgage and cancel the same unless upon condition that the balance of the money due on the mortgage be returned by the mortgagor with legal interest.¹⁶

§ 1259. **In cases of fraud and usury.**—A general allegation of fraud as a ground for enjoining the foreclosure of a chattel mortgage is too indefinite; there must be a specific allegation of the facts in which the fraud consists.¹⁷ And the grantee of a mortgagor cannot, because of fraud practiced by the mortgagee upon the mortgagor in obtaining the mortgage, enjoin an assignee of the mortgagee from selling the mortgaged premises under a power in the mortgage, without paying the entire debt secured by the mortgage, though the mortgage was assigned to defendant as security for a less amount.¹⁸ But a trustee may be enjoined from proceeding to sell under a deed of trust given for the purpose of securing a loan at a usurious rate of interest.¹⁹ And if the answer admits the usury, it cannot avoid the effect of it by declining to exact it.²⁰ Again, where, in an action to redeem a mortgage on realty under which the trustee has advertised the land for sale, the complainant alleges that the contract to secure which the mortgage was given is usurious and made payable in another State to avoid the usury laws of North Carolina, the plaintiff is entitled to an injunction to restrain the sale until the hearing.²¹

15. *Heath v. Shaffer*, 93 Fed. 647, 2 Am. Bank. Rep. 98.

16. *Hayes v. Southern Home B. & L. A.*, 124 Ala. 663, 26 So. 527.

17. *Bennett v. Reef*, 16 Colo. 431, 27 Pac. 252. As to the effect of fraud, see *Briggs v. Langford*, 107 N. Y. 680, 14 N. E. 502.

18. *Foster v. Wightman*, 123 Mass. 100; *Fairfield v. McArthur*, 15 Gray (Mass.), 526.

19. *Hooker v. Austin*, 41 Miss. 717.

20. *Drury v. Roberts*, 2 Md. Ch. 157.

21. *Meroney v. Loan Ass'n*, 112 N. C. 842, 17 S. E. 637, per *Curiam*: "There is a 'serious issue' between the parties, which under the rule established by *Whittaker v. Hill*, 96 N. C. 2, 1 S. E. 639; *Harrison v. Bray*, 92 N. C. 488, and *Davis v. Lassiter*, 112 N. C. 128, 16 S. E. 899, entitles plaintiff to have the restraining order continued in force to the hearing."

But an injunction to restrain a sale under a mortgage, on the ground that usurious interest has been charged, will not be granted unless complainant has offered to pay what was justly due in principal and interest.²² In Maryland the exaction of usurious interest does not invalidate the mortgage or affect the power of sale which it contains. The complainant must pay or offer to pay the principal and legal interest before he can claim the relief of equity by injunction.²³ As against a *bona fide* purchaser of a mortgage, without notice of the payment of usurious interest to the mortgagee, the mortgagor cannot enjoin a sale of the mortgaged premises.²⁴

§ 1260. In cases of undue influence, etc.—A suit may be maintained by the administrator of a deceased wife to restrain the collection of a mortgage assigned by her to her husband, on the ground that she was insane at the time of her marriage and so continued until her death, and the injunction will not be dissolved upon the husband's answer merely setting up the marriage and assignment and denying the alleged sanity.²⁵ And where the owner of a homestead has given a mortgage on it, under a mistake of law and fact, and under the influence of surprise and duress proceeding from the mortgagee, the mortgagee will be enjoined

22. *Carver v. Brady*, 104 N. C. 219, 10 S. E. 565; *Cook v. Patterson*, 103 N. C. 127, 9 S. E. 402; *Manning v. Elliott*, 92 N. C. 48; *Purnell v. Vaughan*, 82 N. C. 134; *Simonton v. Lanier*, 71 N. C. 498. A court of equity will interfere by injunction to restrain the execution of a deed of trust executed to secure a debt tainted with usury, only upon condition that the party asking for the injunction tenders to defendant the amount admitted to be due on such indebtedness. *Casady v. Bosler*, 11 Iowa, 242, per Wright, J.: "Complainants appeal from the order of the district court dissolving an injunction obtained by them to stay the

sale of certain real estate, under a trust deed. The action of the court was warranted by the following cases: *Stringham v. Brown*, 7 Iowa, 33; *Sloan v. Coolbaugh*, 10 Iowa, 31; *Johnson v. Triggs*, 4 C. Greene (Iowa), 99; *Freeman v. Fleming*, 5 Iowa, 461." See, also, *Brantley v. Wood*, 97 Ga. 755, 25 S. E. 499.

23. *Powell v. Hopkins*, 38 Md. 1, 13; *Walker v. Cockey*, 38 Md. 75; *Gwynn v. Lee*, 9 Gill (Md.), 137; *Baughner v. Nelson*, 9 Gill (Md.), 299. And see *Tooke v. Newman*, 75 Ill. 215; *Alston v. Wheatley*, 47 Ga. 646.

24. *Gantt v. Grindall*, 49 Md. 311.

25. *French v. Snell*, 29 N. J. Eq. 95.

from selling the property under the mortgage until after a hearing upon the facts, and especially where the answer does not explicitly deny the material facts.²⁶

§ 1260a. **Where other adequate remedy.**—A court of equity will not grant relief by injunction against the foreclosure of a mortgage where the complainant has a complete and adequate remedy at law.²⁷ So it is a good defense against a suit to foreclose a first mortgage, brought against the second mortgagee, that nothing is due upon it, and that the first mortgagee is estopped from asserting against the defendant that anything is due thereon and therefore on these grounds alone the second mortgagee cannot maintain a bill in equity to enjoin the prosecution of such suit.²⁸ And where a bill was brought by a married woman to enjoin the foreclosure of a mortgage on property which she alleged was her statutory separate estate and that the mortgage was given to secure the debt of her husband, it was held that such a conveyance was a nullity; that this was a good and perfect defense to the action at law, and that the bill was therefore without equity. And it was also declared that this being the case, the fact that a fraud may have been perpetrated on the wife by the unauthorized use of her signature, would not give jurisdiction, because fraud alone, without some other ground of cognizance, does not authorize a party to seek redress in a court of chancery where he has a plain and adequate remedy at law.²⁹ And where a bill is brought to foreclose a mortgage on personal property it is decided that it is no ground for the maintenance of a bill to enjoin such suit that a cloud rests on plaintiff's title, even if such a bill could be main-

26. *Ponton v. McAdoo*, 71 N. C. 101; *Heilig v. Stokes*, 63 N. C. 612; *Jarman v. Saunders*, 64 N. C. 368; *Craycroft v. Morehead*, 67 N. C. 422; *Brown v. Hawkins*, 65 N. C. 645. And see *Smith v. Mechanics' Loan Ass'n*, 73 N. C. 372, where on appeal the injunction was sustained on the ground that the mortgage might have been obtained "with a view to oppressive

and wrongful exaction."

27. *Bergan v. Jeffries*, 80 Ala. 349; *Wolfe v. Titus*, 124 Cal. 264, 56 Pac. 1042; *Waymire v. San Francisco & S. M. R. Co.*, 112 Cal. 646, 44 Pac. 1086; *Hoss v. McWilliams*, 26 La. Am. 643.

28. *Dickinson v. Gunn*, 12 Allen (Mass.), 547.

29. *Bergan v. Jeffries*, 80 Ala. 349.

tained with regard to personal property, as the defendants having already commenced to assert their title by the mode provided for the foreclosure of chattel mortgages, the plaintiffs have full opportunity to contest the title thus asserted.³⁰

§ 1261. Foreclosure where property is in receiver's hands.—

Where a receiver of mortgaged property has been appointed the mortgagee may not proceed to foreclose the mortgage and make the receiver a party defendant without leave of the appointing court, and he may be enjoined from the prosecution of the foreclosure suit, but the failure so to obtain leave is not a bar to the jurisdiction of the court in which the foreclosure suit is brought, especially where there is no attempt to interfere with the actual possession of the property in the receiver's possession. In such a case the receiver will be afforded protection only upon his own application, and he waives the objection that leave of court was not obtained by his appearance in the suit to foreclose.³¹ In New York the Code

30. *Bushnell v. Avery*, 121 Mass. 148.

31. *Mulcahy v. Strauss*, 151 Ill. 70, 37 N. E. 702, per Magruder, J.: "While it is true that it is a contempt of the appointing court to make its receiver a party defendant to a suit without leave first obtained for that purpose, it does not necessarily follow that the court, in which such suit is brought is without jurisdiction. The appointing court may protect its officer, either by punishing the party bringing the suit for contempt or by enjoining him from the prosecution of the suit. But the failure to obtain leave is no bar to the jurisdiction of the court in which suit is brought. This is certainly true in all cases where there is no attempt to interfere with the actual possession of the property held by the receiver. A different doctrine seems to prevail in the federal courts. *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Bar-*

ton v. Barbour, 104 U. S. 126. But we are disposed to adopt the rule, laid down in quite a number of decisions in the State courts, that the failure to obtain leave does not affect the jurisdiction. The question is one of contempt, and not of jurisdiction. 'The ordinary jurisdiction of other courts is in no manner taken away or affected by the appointment of a receiver.' *Railroad Co. v. Smith*, 19 Kan. 225; *Bank v. Risley*, 19 N. Y. 370; *Kinney v. Crocker*, 18 Wis. 74; *Lyman v. Railroad Co.*, 59 Vt. 167; 10 Atl. 346; *Allen v. Railroad Co.*, 42 Iowa, 683. The protection which a court of equity thus gives to the possession of its receiver will only be accorded upon the application of the receiver. *Blumenthal v. Brainerd*, 38 Vt. 407. The objection that leave of court was not first obtained before bringing suit against a receiver may be waived by the appearance of the receiver. After such appearance, a

provision in respect to the appointment of a receiver for a corporation that if such receiver be appointed the court may "grant an injunction, restraining the creditors of the corporation from beginning any action against the said corporation for the recovery of a sum of money, or from taking any further proceedings in such an action theretofore commenced,"³² has been held not to apply to a foreclosure suit in which a deficiency judgment is asked.³³

motion to dismiss on that ground will not be entertained, as the defendant thereby admits that he was regularly brought into court. *Car Works Co. v. Ellis*, 113 Ind. 217; 15 N. E. 249; *Hubbell v. Dana*, 9 How. Pr. (N. Y.); 424 High, Rec. § 261. In the present case, Arnold answered the bill, merely setting up the fact that he had been appointed receiver of the personalty, and disclaiming any further interest in the matter. He made no motion to dismiss, because leave had not been obtained to file the bill for foreclosure; nor was any action taken, in the proceeding in which the receiver had been appointed, to enjoin the complainant in the foreclosure suit from prosecuting it, or to call her to account for contempt of court. In *Wiswall v. Sampson*, 14 How. (N. Y.) 52, it was held that, where a receiver in a chancery cause was in possession of land, parties holding prior judgments, and who had issued and levied their executions thereunder upon said land before the appointment of the receiver, and made sale of the land while it was in the receiver's possession, without obtaining leave of the appointing court, were not guilty of contempt, but that the sale itself was illegal and void, and passed no title to the purchaser. It appeared there that the judgment creditors so proceeding under their judgments had notice of the pending

suit in chancery. The action was ejectment, brought by the purchasers at the execution sale against the purchaser at a sale made by the master in chancery in the cause where the receiver had been appointed. The judgment of the lower court was in favor of the plaintiffs, but was reversed on appeal. In the case at bar, the chancery suit in which the receiver was appointed was settled, and the receiver was discharged, before the decree of foreclosure from which the present appeal has been prosecuted was entered. Therefore the question whether a sale made under the foreclosure decree would be void if made while the receiver was in possession of the land cannot arise here. In accordance with the authorities already referred to, which criticise and decline to follow the case of *Wiswall v. Sampson*, *supra*, we think that the court below had jurisdiction, under the circumstances of this case, to proceed with the foreclosure suit, notwithstanding the failure of the complainant therein to obtain leave to make the receiver, appointed in the pending case, a party defendant, and that the failure to obtain such leave cannot avail here as an objection to the entry of the foreclosure decree."

32. N. Y. Code Civ. Proc., § 2423.

33. *Re Hamilton Park Co.*, 1 App. Div. (N. Y.) 375, 37 N. Y. Supp. 310.

§ 1262. Enjoining mortgagee from taking possession, etc.—

The rule that equity will not enforce a hard and unconscionable contract does not authorize an injunction against the seizure of mortgaged chattels by the mortgagee, under a provision authorizing him to take possession whenever he deemed himself insecure, since the mortgagee is not seeking affirmative relief; nor can the provision of the mortgage be termed hard and unconscionable, as the execution of a chattel mortgage transfers the legal title, which carries with it the right of possession, in the absence of an agreement, express or implied, to the contrary.³⁴ But where the mortgagor has the right to retain possession of chattels for a stipulated period he may enjoin the mortgagee from taking possession before the expiration of that time.³⁵ Again, where mortgaged chattels, in the possession of the mortgagor, have been sold by her for her own use, with the consent of the mortgagee, who released them from the lien of the mortgage, the proceeds are not exempt from the claims of the mortgagor's other creditors; and she is guilty of a contempt in applying such proceeds to her own use, in violation of an injunction order in supplementary proceedings.³⁶

§ 1263. Enjoining sale under trust deed.—The attempt on the part of trustees to sell property under a deed of trust for the payment of a debt having no consideration to support it gives the party in interest standing in a court of equity to have the sale enjoined on the ground that it would cast a cloud on his title.³⁷ And where, in an action to cancel a deed of trust given by a wife conveying her land to secure her husband's debt, the affidavits in support of an injunction to prevent the sale of her land raised a well-defined issue involving the equity of exoneration and cancellation, the injunction was continued until the hearing.³⁸ Like

34. *Cline v. Libby*, 46 Wis. 123, 49 N. W. 832. And see *Huebner v. Koebke*, 42 Wis. 319; *Hall v. Sampson*, 35 N. Y. 274.

35. *Ford v. Ransom*, 8 Abb. Pr. (N. S.) 416.

36. *Millington v. Fox*, 13 N. Y. Supp. 334.

37. *Brooks v. Owen*, 112 Mo. 251, 19 S. W. 723; *Ryan v. Gilliam*, 75 Mo. 132; *Parks v. Bank*, 97 Mo. 130.

38. *Davis v. Lassiter*, 112 N. C. 128, 16 S. E. 899; *Whitaker v. Thill*, 96 N. C. 2, 1 S. E. 639; *Harrison v. Bray*, 92 N. C. 488; *Caldwell v. Stirewalt*, 100 N. C. 201, 6 S. E. 262.

wise a sale under the power contained in a mortgage will be enjoined when there are complicated disputed accounts which must be gone into before it can be known how much is due. And, in such case, the amount of the indebtedness being wholly uncertain, an injunction may issue, although the mortgagor makes no tender.³⁹ And where there is a cloud on the title, uncertainty as to the debts secured on their amounts, or a dispute as to priorities, a sale under a trust deed may be enjoined at the suit of the debtor, secured creditor, subsequent incumbrances or other interested person until such impediments to a fair sale are removed.⁴⁰ But unless some such impediments exist the trustee will not be enjoined from selling the trust property merely because there are liens upon it.⁴¹ And before a grantor can set aside a deed of trust or enjoin a sale under it on the ground that the consideration has failed, he must make out a case by a clear preponderance of the evidence.⁴²

§ 1264. **Restraining power of sale; grounds.**—The jurisdiction of a court of equity to restrain by injunction the execution of a

39. *Gooch v. Vaughan*, 92 N. C. 610; *Bridgers v. Morris*, 90 N. C. 32; *Pritchard v. Sanderson*, 84 N. C. 299; *Mosby v. Hodge*, 76 N. C. 387; *Kornegay v. Spicer*, 76 N. C. 95. And see *McCulla v. Beadleston*, 17 R. I. 20; *Prenatt v. Runyon*, 12 Ind. 174; *McNeil v. Garland*, 27 Ark. 346; *Gloninger v. Hazard*, 42 Pa. St. 389; *Ingram v. Sherard*, 17 Serg. & R. 347. On the hearing of a motion to dissolve an injunction restraining the sale under a deed of trust, complainant moved for a continuance to take additional and material evidence. The motion was denied, and the injunction dissolved, on the ground that the contract under which the deed of trust was given was not usurious, which was the principal point in issue. It appeared that the evidence intended to be introduced by the complainant was to the effect

that the notice stipulated for in the deed of trust was defective. It was held that it was error to deny the motion for a continuance, because, if the defective notice alleged could be proved, it would entitle complainant to the injunction prayed for. *Vaught v. Rider*, 83 Va. 659, 3 S. E. 293.

40. *Shultz v. Hansbrough*, 33 Gratt. (Va.) 567; *Shurtz v. Johnson*, 28 Gratt. (Va.) 657; *White v. Building Fund Ass'n*, 22 Gratt. (Va.) 233; *Rossett v. Fisher*, 11 Gratt. (Va.) 492; *Bryan v. Stump*, 8 Gratt. 241; *Wilkins v. Gordon*, 11 Leigh (Va.), 547; *Miller v. Argyle*, 5 Leigh (Va.), 460; *Gay v. Hancock*, 1 Rand. (Va.) 72.

41. *Muller v. Stone*, 84 Va. 834, 6 S. E. 223.

42. *Van Meter v. Hamilton*, 96 Mo. 654; *Worley v. Dryden*, 57 Mo. 226; *Forrester v. Moore*, 77 Mo. 651.

power of sale in a mortgage should be exercised only when, on account of fraud, want of consideration or other sufficient reason, the enforcement of the mortgage debt is against good conscience and would work irreparable injury.⁴³ And without an averment of the insolvency of a mortgagee, or other special circumstances, the execution of a power of sale in a mortgage pending a suit to settle partnership accounts between the mortgagor and mortgagee, not involved in the mortgage, will not be enjoined, as there does not appear to be danger of irreparable injury by a sale.⁴⁴ And an injunction will not issue at the instance of a mortgagee of chattels to restrain their sale under another mortgage which does not embrace them; the remedy at law is adequate, since by virtue of his mortgage he may pursue the chattels at any time into whatever hands they may pass by the sale.⁴⁵ Again, where a bill is filed by heirs to enjoin the enforcement of a decree of foreclosure and sale rendered against an administrator on a mortgage made by their ancestor and it is not shown that the bill of foreclosure did not state facts justifying a decree against the administrator it is error to enjoin the enforcement of the decree.⁴⁶ And an injunction to restrain a trustee's sale of land will not be granted where it appears that plaintiff is in possession of the land, that the legal title under which he claims is of record and is superior to any title that can be acquired by a purchaser at the sale, and that plaintiff has an adequate remedy at law against any claims that may be asserted by such purchaser.⁴⁷ And where a mortgagor in posses-

43. *Glover v. Hembree*, 82 Ala. 324, 8 So. 251; *Tate v. Evans*, 54 Ala. 16; *Cummings v. Morris*, 25 N. Y. 625.

See *Montague v. Raleigh Sav. Bank*, 118 N. C. 283, 24 S. E. 6. When a partition for an injunction to restrain a sale under a deed of trust alleged that it was executed to secure the payment of a part of the purchase money of certain personal property which the complainant purchased under a false impression and belief as to its character without al-

leging either warranty or fraudulent representations; it was held, that the petition was too barren of equity to warrant an injunction. *Street v. Rider*, 14 Iowa, 506.

44. *Glover v. Hembree*, 82 Ala. 324, 8 So. 251.

45. *Rankin v. Rankin*, 67 Iowa, 322, 25 N. W. 263.

46. *Merritt v. Daffin*, 24 Fla. 320.

47. *Wilcox v. Walker*, 94 Mo. 88.

sion has full defense to an action for ejectment when brought by a purchaser at a sale under a mortgage barred by the statute of limitations, an injunction will not be granted to prevent a sale threatened by the mortgagee.⁴⁸ It is otherwise if the contest is as to the amount due under the mortgage, for if any balance is due the purchaser at the mortgage sale will get a good title and the mortgagor would be put to a serious disadvantage if there should be a sale before the amount due is determined.⁴⁹ So in a case in Alabama it is decided that while a court of equity is reluctant to interfere with the legal rights of the mortgagee, still when a bill is filed which seeks an injunction of the sale under a power contained in a mortgage and asks for an accounting and ascertainment of the mortgage debt, alleging full payment and satisfaction thereof, and it appears that there was an account between the mortgagor and mortgagee running through many years, and that the value of the mortgage security was greatly in excess of the amount due on the mortgage, and it further appears that the damaging consequences resulting from a sale under the power would far outweigh the advantages to be gained by making the sale, the sale should be enjoined until the account is taken and the amount due on the mortgaged debt has been definitely ascertained.⁵⁰ And where a bill in equity to redeem and enjoin sale of land under mortgage alleged that, after tender of the full amount due under the mortgage had been twice made, defendant commenced foreclosure proceedings, and that, after answers had been filed, he dismissed the bill without prejudice, and advertised the land for sale under the power of sale in the mortgage, his purpose being to coerce the payment of another claim not connected with the mortgage, it was held, that these allegations, not having been met by answer, justified the retention of the injunction.⁵¹

48. *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78; *Capehart v. Biggs*, 77 N. C. 261; *Fox v. Kline*, 85 N. C. 173; *Southerland v. Harper*, 83 N. C. 200; *Browning v. Lavender*, 104 N. C. 69, 10 S. E. 77.

49. *Purnell v. Vaughan*, 77 N. C.

268; *Harrison v. Bray*, 92 N. C. 488; *Gooch v. Vaughan*, 92 N. C. 610; *Pritchard v. Sanderson*, 84 N. C. 299.

50. *Farmers Sav. & B. & L. Ass'n v. Kent*, 117 Ala. 624, 23 So. 757.

51. *McCalley v. Otey*, 90 Ala. 302, 8 So. 157.

§ 1264a. **Same subject; stock of merchandise; collateral agreement.**—The authority of the mortgagee of a stock of merchandise to sell in accordance with the terms of the mortgage may be limited by a collateral written agreement respecting the goods, made at the time the mortgage was executed, and, when such agreement exists, the instruments should be construed together in determining the rights of the parties.⁵² And a court of equity will not permit an agreement by the mortgagee to take charge of the business, and carry it on for the benefit of all the parties, to be ignored, and a sale under the mortgage proceeded with, unless it appears that the agreement has been violated by the mortgagor, or that the mortgagee was induced to enter into it by fraud.⁵³

§ 1265. **Set-off; mortgage against judgment.**—The plaintiff in an action to foreclose a mortgage of real estate cannot have an injunction to restrain the defendant therein from collecting or disposing of a judgment which he has recovered against the plaintiff and issued execution upon, until the determination of the foreclosure and the entry of judgment for a deficiency, if a deficiency there shall be, to the end that such deficiency may be set-off against the defendant's judgment and in payment thereof *pro tanto*.⁵⁴ Where the facts on which a mortgage debtor claims the

52. Rolfe v. Burnham, 110 Mich. 660, 68 N. W. 980.

53. Rolfe v. Burnham, 110 Mich. 660, 68 N. W. 980.

54. Elliott v. Smith, 77 Hun, 116, 28 N. Y. Supp. 288, per Dwight, P. J.: "We believe that the granting of the relief here prayed for, aside from the foreclosure of the mortgage, would be entirely unprecedented. So far as we are advised, the doctrine of equitable set-off has never been applied to restrain the collection of a judgment actually obtained, pending the prosecution of an action only just commenced, in anticipation of a possible judgment in the latter action which might be applied in pay-

ment of the former judgment. In no aspect of the case, based upon the proofs before us, does the plaintiff seem to be entitled to the relief in question. On general principles and aside from special considerations which arise in this case, the claims involved are not such as are subject to equitable set-off. Hatch v. The Mayor, etc., 82 N. Y. 442; Pond v. Harwood, 139 N. Y. 111, 34 N. E. 768. In both of these cases the rule is stated, in substantially the same language, that 'something more than the mere existence of reciprocal and independent demands is required to authorize a set-off in equity when not allowable

right to set off claims against the mortgagee are in dispute, a foreclosure is properly enjoined until such facts can be inquired into.⁵⁵

§ 1266. **Foreclosure by advertisement.**—In an action to re-

strain foreclosure of a mortgage by advertisement, prior to the maturity of the mortgage debt, for alleged breach of conditions of the mortgage, it being in issue and contested by affidavits as to whether there had been any such breach, it is within the discretion of the court to restrain the foreclosure sale until this issue should be judicially determined.⁵⁶ And though the Minnesota statute provides that application for injunction against foreclosure of a mortgage by advertisement shall be “immediately” after receiving notice of the publication of the notice of sale, it is within the discretion of the court to grant such injunction, though the application was delayed for a month after receiving such notice, and the delay is unexplained, where it does not appear that the delay

under the statute of set-offs. Circumstances must be shown from which it can be inferred that one debt was contracted on the faith of the other, or that there was an agreement between the parties that the one should be deducted from the other, or some other intervening equity which renders the interposition of that court necessary for the creditor's protection; and in the latter of the two cases the court refers with approval to the statement by the vice-chancellor in *Hackett v. Connett*, 2 Edw. Ch. 73, that ‘although chancery has sometimes exercised the power of decreeing a set-off, before or independently of the statute, it has only done so where mutual debts existed, and where there was either an express or implied agreement of stoppage *pro tanto*, or mutual credits.’ The case at bar is the farthest possible from meeting the requirements of the rule as last stated; and if it is to be

brought within the rule at all, it must be by virtue of some particular intervening equity which demands the extraordinary interposition of the court in the plaintiff's behalf. But it is very apparent, we think, that all the particular circumstances of this case make against the application of the rule and not in its favor. The fact chiefly urged as raising an equity in favor of the plaintiff is that of the insolvency of the defendant. But, as we have already said, that fact has no consequence if the claim of the plaintiff is sufficiently secured by his specific lien, and the proof largely preponderates in favor of the latter conclusion. And see *Glover v. Hem-bree*, 82 Ala. 324, 8 So. 251.”

55. *Harrison v. Bray*, 92 N. C. 488.

56. *O'Brien v. Oswald*, 45 Minn. 59, 47 N. W. 316; *Bidwell v. Whitney*, 4 Minn. 76; *Dickerson v. Hayes*, 26 Minn. 100.

prejudiced defendant.⁵⁷ In an action to restrain the foreclosure by advertisement of a mortgage by the purchaser of it the plaintiff may prove that the mortgage was given for the purpose of defending the mortgagor's creditors, and upon no other consideration.⁵⁸ For the defense of want of consideration is as available against the assignee of the mortgage as against the mortgagee.⁵⁹

§ 1267. **Where mortgage debt tendered or paid.**—Where a mortgagee of personal property used in the business of the mortgagor has advertised the property for sale and further proceedings under the mortgage threaten the latter with irreparable injury for which he has no adequate remedy at law, such proceedings may be restrained by a temporary injunction to the time of the trial on the merits.⁶⁰ So a sale of mortgaged property was enjoined on the ground that the mortgage had been satisfied, and leave was given to defendant to move to dissolve on filing his answer. Nothing more was done in the case until eighteen years later, after the mortgagor had died, and the papers in the case had been lost, when defendant answered, and moved to dissolve the injunction. On the hearing, evidence was introduced that, before the property was advertised for sale, a settlement was had between the parties by which it was ascertained that the mortgagor had performed services for the mortgagee equal in value to the mortgage debt. It was held that a decree making the injunction perpetual would not be disturbed.⁶¹ And upon the application of a mortgagor for an injunction to restrain the trustee under the mortgage from selling the land mortgaged, upon the ground that personal property previously sold by him was sufficient to pay the debt, and that the mortgagor was entitled to homestead in the land, the injunction was properly continued until the case should be heard on the merits, it appearing that the security would remain unimpaired, that the facts were in doubt, and important questions of law were

⁵⁷. O'Brien v. Oswald, 45 Minn. 59, 47 N. W. 316.

⁵⁸. Briggs v. Langford, 107 N. Y. 680, 14 N. E. 502.

⁵⁹. Bush v. Latrop, 22 N. Y. 535.

⁶⁰. Seabrook v. Mostowitz, 51 S. C. 433, 29 S. E. 202.

⁶¹. Frazier v. Keller, 71 Md. 58, 20 Atl. 134.

involved which could not be previously settled.⁶² And a motion to dissolve a temporary injunction against a sale under a mortgage upon an answer which merely denied payment was properly overruled where plaintiff prayed for an accounting and for leave to redeem.⁶³ And in such a case the court having jurisdiction of the controversy could properly entertain an action at law upon the notes secured by the mortgage.⁶⁴ And a bill to enjoin a foreclosure at law was sustained where the evidence tended to show that the mortgage had been satisfied by an off-set and written evidence of this fact was destroyed in the Chicago fire.⁶⁵ In Louisiana when a defendant in executory proceedings for the sale of mortgaged property sets up a plea of compensation, and makes the requisite affidavit, he is entitled to a preliminary injunction without bond.⁶⁶ But where a bill to enjoin a mortgagee from selling under a power in the mortgage averred payment, but offered to pay any amount that might be found due upon an accounting, and prayed cancellation, or, if something were found still due, to be allowed to redeem, a motion to dismiss for want of equity was properly denied.⁶⁷ And part payment of the debt would not entitle the trustees to an injunction to stay the sale entirely but only *pro tanto*.⁶⁸ When the mortgagor enjoins the sale, and the mortgagee, in his answer, prays judgment for the mortgage debt, his right thereafter to proceed under the writ of seizure and sale enjoined is abandoned and lost.⁶⁹

§ 1267a. **Breach of condition by mortgagor; what essential to injunction; excuse.**—A court of equity will not permit a mort-

62. Whitaker v. Hill, 96 N. C. 2, 1 S. E. 639; Harrison v. Bray, 92 N. C. 488; Turner v. Cuthrell, 94 N. C. 239.

63. Whitley v. Dunham Lumber Co. 89 Ala. 493, 7 So. 810. And see, as to court's discretion in such a case, Harrison v. Yerby, 87 Ala. 185, 6 So. 3; Chambers v. Iron Co., 67 Ala. 353; Railway Co. v. Witherow, 82 Ala. 190, 3 So. 23; Kinney v. Ensminger, 87 Ala. 340, 6 So. 72.

64. Northeastern Railway Co. v.

Barrett, 65 Ga. 601; Hadfield v. Bartlett, 66 Wis. 635, 29 N. W. 639.

65. Green v. Engelmann, 39 Mich. 460.

66. Newmann v. Frevin, 42 La. Ann. 720, 7 So. 799.

67. Whitley v. Dunham Lumber Co., 89 Ala. 493, 7 So. 810. And see Fields v. Helms, 70 Ala. 460; Gilmer v. Wallace, 79 Ala. 464.

68. Powell v. Hopkins, 38 Md. 1.

69. Learned v. Walton, 42 La. Ann.

455, 7 So. 723.

gagee to take an unconscientious advantage of the mortgagor, who is willing to pay at the time prescribed but is unable to do so in consequence of the act of the former and under such circumstances a suit to foreclose a mortgage may be enjoined.⁷⁰ And in New York it has been decided that where a suit to foreclose a mortgage has been begun on default in the payment of an instalment of interest the defendant may make an offer to pay the interest, and after a refusal to accept it and a reasonable excuse for the seeming want of precise punctuality obtain an order to stay all proceedings, till a further default, if any, should occur.⁷¹ And if there has been an eviction by a title paramount, or an action is pending by an adverse claimant to try the title to the mortgaged premises, it is held that the court will interfere.⁷² But it is held that an allegation that there is an outstanding paramount title will not enable the owner of the equity of redemption to arrest the enforcement of a purchase money mortgage.⁷³ And where the mortgagor has from mere negligence failed to perform his contract, whereby the whole debt becomes due and payable according to the terms of the mortgage, the court will not interfere to relieve him, without a tender or payment of the whole debt.⁷⁴

§ 1268. **Where mortgage not due; when injunction refused.**—

An injunction arresting executory process for the sale of mortgaged property for cash will be perpetuated, on proof that time was allowed to pay the debt, although part of the claim was due at the institution of the proceedings, in the absence of any prayer by the creditor to restrict the injunction to instalments not yet due.⁷⁵ But a mortgage sale will not be enjoined because of want of legal

70. *Noyes v. Clark*, 7 Paige (N. Y.), 179, 32 Am. Dec. 620.

71. *Thurston v. Marsh*, 5 App. Prac. (N. Y.) 389. See *Lynch v. Cunningham*, 6 Abb. Prac. (N. Y.) 94.

72. *Price's Executors v. Lawton*, 27 N. J. Eq. 325, holding, also, that where the aid of the court is sought on the ground of the pendency of such an action, the record must be

produced or proof of its contents given, that the court may be advised that such is the nature of the action.

73. *Price's Executors v. Lawton*, 27 N. J. Eq. 325.

74. *Noyes v. Clark*, 7 Paige (N. Y.), 179, 32 Am. Dec. 620.

75. *Penouilh v. Abraham*, 42 La. Ann. 326, 7 So. 533.

authority in defendant to sell, as, if he has no power to sell, the sale will be a nullity, and plaintiff will be in no danger of having his possession disturbed.⁷⁶ And where a co-tenant redeems from a foreclosure by payment of the entire debt, and the title of such redemptioner, and his certificate of redemption of record, clearly show his rights and superior equity, an injunction restraining the foreclosure of a second mortgage, made by his co-tenant after such redemption, is unnecessary for his protection and should not be granted.⁷⁷

§ 1269. **Bond; violation; sureties.**—Where complainant files a bill to redeem from foreclosure and for an injunction, and gives a bond to pay all damages in case the “proceeding shall be determined against her,” and obtains leave to redeem, but does not do so, there is no breach of the bond.⁷⁸ And it is error, in dissolving an injunction restraining a mortgagee from executing a power of sale, to enter judgment *in personam* against plaintiff and his surety on the injunction bond for the value of the property mortgaged which the mortgagee had been prevented from seizing.⁷⁹ Again, where personal property, upon which there were three chattel mortgages, was seized on execution under a judgment in favor of a fourth creditor, and a forthcoming bond was given therefor, and one of the mortgagees, upon default, brought a bill for foreclosure, and the appointment of a receiver to preserve the property from sale under the execution, it was held that, after the property, or a part thereof, had been seized by the receiver, the debtor and his sureties on the forthcoming bond might maintain a cross-bill against the execution creditor, to enjoin the enforcement of their liability on such bond, and to be discharged therefrom, although they might have a remedy at law.⁸⁰ A mortgage, executed by a

76. Chapman v. Younger, 32 S. C. 295, 10 S. E. 1077; Wilson v. Hyatt, 4 S. C. 369.

77. Buettel v. Harmount, 46 Minn. 481, 49 N. W. 250.

78. Gage v. Porter, 64 N. H. 619, 15 Atl. 147.

79. Lawson v. Barton (Ark.), 7

S. W. 387. And see Greer v. Stewart, 48 Ark. 21.

80. Bolling v. Vandiver, 91 Ala. 375, 8 So. 290. And see Cole v. Canolly, 15 Ala. 271; Glover v. Taylor, 41 Ala. 124; Cordaman v. Malone, 63 Ala. 556.

debtor corporation to certain creditors in violation of a temporary injunction granted in a suit by those creditors for the appointment of a receiver, is an absolute nullity, and acquires no validity from the subsequent dismissal of the suit with the consent of such creditors.⁸¹

§ 1270. **Parties; defect of.**—A preliminary injunction will not be granted to restrain foreclosure of a chattel mortgage on property purchased by plaintiff, after the execution of the mortgage, at execution sale, on the ground that the mortgage is contrary to the statutes against fraudulent conveyances, where plaintiff was not a creditor, and the execution creditors are not made parties to the suit.⁸² But a mortgagor who has obtained a release of the mortgage and has sold and conveyed the premises with a covenant of warranty to a third person may, where a bill is filed against the latter by the mortgagee to foreclose the premises, maintain a bill in equity to enjoin the foreclosure suit, settle the question of payment of the mortgage, and have it cancelled upon the record, and need not postpone the assertion of his rights in that regard until he has been sued upon his covenant of warranty by his grantee when he might set up his payment of the mortgage in the suit at law.⁸³ In an action to restrain the sale of property under chattel mortgages executed under circumstances constituting an assignment with preferences, an objection that others, to whom the debtor had transferred property at about the

81. *Bissell v. Besson*, 47 N. J. Eq. 580, 22 Atl. 1077.

82. *Baird v. Warwick Machine Co.*, 40 Fed. 386, per Wheeler, J.: "The plaintiff was not a creditor and not one sought to be defrauded and had no right to defeat the mortgage until after he bought the property. His right is vested in the particular property which he bought and he has no right to have the mortgage set aside wholly. The execution creditors who may have that right are not parties to the suit either personally or by

representation. The case is not like *Clark v. Smith*, 13 Pet. (U. S.) 203, 10 L. Ed. 123, or *Chapman v. Brewer*, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83. In those cases the instruments creating the incumbrance could be set aside. Here the plaintiff is seeking to settle a disputed right to specific personal property in this mode in advance of a trial at law. The propriety of this is too doubtful to warrant a preliminary injunction."

83. *Hubbard v. Josinski*, 46 Ill. 160.

same time the mortgages were given, were not made parties defendant, cannot be sustained, where the decree granting the injunction provided for joining them as defendants.⁸⁴

§ 1271. **Protecting lien and security of mortgagee.** — Where the security of the mortgagee is being seriously impaired or diminished by any act of the mortgagor, the latter may upon a proper showing be restrained from so doing.⁸⁵ So a mortgagor may be enjoined from cutting wood and timber from the mortgaged premises to such an extent as to render the premises an insufficient security for the mortgage debt.⁸⁶ And where a mortgagor of personal property, such as hay and potatoes, has disposed of a part of the same an injunction may be granted at the suit of the mortgagee to restrain him from further disposing of such property where it appears that if he continues so to do irreparable injury will be sustained.⁸⁷ And one holding a mortgage on a street railroad may enjoin the city from so constructing a sewer as to cause unnecessary damage to the road where the company is insolvent and will not be able to repair the damage and its property after the construction of the sewer will not be adequate security for the mortgage debt; and where also the city, by reason of constitutional restrictions, is in such a condition that a judgment against it would not be collectible.⁸⁸ But where a mortgagor removed a building from the mortgaged lot to another lot and sold the latter lot with the building affixed to a *bona fide* purchaser, it was held

84. *Meinhard v. Strickland*, 29 S. C. 491, 7 S. E. 838; *Magovern v. Richard*, 27 S. C. 272; *Wilks v. Walker*, 22 S. C. 108. And see *Buffalo Chem. Works v. Bank of Commerce*, 29 N. Y. Supp. 663.

85. *Middlesex Bkg. Co. v. Niemeyer*, 50 La. Ann. 755, 23 So. 893. See *Lawrence v. Times Printing Co.*, 90 Fed. 24.

86. *Emmons v. Hinderer*, 24 N. J. Eq. 39; *Ensign v. Colburn*, 11 Paige

(N. Y.), 503; *Brady v. Waldron*, 2 Johns. Ch. (N. Y.) 148.

87. *Schoonover v. Condon*, 12 Wash. 475, 41 Pac. 190.

In Colorado, in an action in the county court to foreclose a chattel mortgage, the court has jurisdiction to grant an injunction to restrain defendant from disposing of the mortgaged property. *Bennett v. Reef*, 16 Colo. 431, 27 Pac. 252.

88. *Clapp v. Spokane City*, 53 Fed. 515.

that a court of equity would not compel him to return the building to the mortgaged lot but would leave the mortgagee to his remedy at law.⁸⁹ And if a mortgage is recorded its lien is not affected by sales of the mortgaged property made by the mortgagee pending foreclosure proceedings, and therefore the mortgagor should not be enjoined from making such sales pending the foreclosure.⁹⁰ In Minnesota it has been decided that where there is a mistake of fact, or a mistake of law and fact combined, equitable relief can be granted, especially if such relief does not result in injury to the opposite party. Thus where, by reason of a mistake in the computation of interest on a note secured by a mortgage, there is claimed to be due in the notice of foreclosure sale a larger sum than is legally due, and the premises are bid in by the mortgagee for the sum so claimed, but in good faith, believing that he is only bidding for the sum actually due, and the mortgagor is attempting to recover by action against the mortgagee, as surplus, the excessive interest so computed and included in the sum bid, and the premises are of less value than the sum actually and legally due, the mortgagee may be afforded equitable relief, and a resale ordered.⁹¹

§ 1272. **As between conflicting liens.**—A mortgagee has no interest in common with a judgment creditor or with the general creditors, and therefore an action in the nature of a bill of peace cannot be maintained against such mortgagee to enjoin him from foreclosing his mortgage, though the sale of the property in the manner authorized by the mortgage would be prejudicial to the other creditors.⁹² And one who is a mere mortgagee in possession

89. *Verner v. Betz*, 46 N. J. Eq. 256, 19 Atl. 206. And see *Harris v. Bannon*, 78 Ky. 568; *Peirce v. Goddard*, 22 Pick. (Mass.) 559; *Cooper v. Davis*, 15 Conn. 556. In *Learned v. Walton*, 42 La. Ann. 456, 7 So. 723, the court said: "We held in *Weil v. Lepeyre*, 38 La. Ann. 303, that a sale in good faith by the owner of such 'immovables by destination' followed by actual delivery to the purchaser does liberate the things thus

sold from the effect of the mortgage to which they had been subjected."

90. *Breon v. Strelitz*, 48 Cal. 645.

91. *Lane v. Holmes*, 55 Minn. 379, 57 N. W. 132. And see *Benson v. Markoe*, 37 Minn. 30, 33 N. W. 38; *Pace v. Chadderdon*, 4 Minn. 499.

92. *Buffalo Chem. Works v. Bank of Commerce*, 29 N. Y. Supp. 663. A deed of trust duly recorded supersedes a judgment previously rendered, but on which no execution had issued at

under a duly recorded mortgage is held not entitled to an injunction against a sale of the property under an execution which has been issued on a junior judgment rendered against the mortgagor.⁹³ So a mortgagee is not entitled to an injunction to restrain a sale of the land for the satisfaction of a junior judgment, even where the mortgage has been canceled of record by a mistake to which the judgment lienor was not party or privy.⁹⁴ And an injunction will not be granted restraining the sale of land under a judgment, on the ground that the plaintiff is a holder of a mortgage which is a prior lien, if it is not shown that the sale will not be made subject to the lien of the mortgage.⁹⁵ Nor can a mortgagee enjoin an execution sale of the mortgaged property on the ground of irregularities by the sheriff, for if the sale be void for irregularity his rights will not be affected, and if it be valid he is entitled to claim the proceeds.⁹⁶ And a third mortgagee cannot enjoin a sale under the judgment obtained on the prior mortgages, for if he had any ground for equitable relief he should have set it up in the action to foreclose. And a second mortgagee cannot enjoin a sale in foreclosure on the first mortgage, without clearly showing that such sale will work him injustice.⁹⁷ But a second mortgagee who offers to pay the judgment on the prior mortgage, may enjoin a sale under such judgment.⁹⁸ And where a judgment creditor is proceeding to sell mortgaged land, and the records do not disclose the priority of the mortgage, or even its existence, the mortgagee may

the date of the deed, and a sale of the mortgaged land under the judgment will be enjoined at the suit of the mortgagee or trustee in the deed. *Whitfield v. Clark*, 48 Ala. 555. And see *Martin v. Hewitt*, 44 Ala. 418.

93. *American Freehold L. & M. Co. v. Maxwell*, 39 Fla. 489, 22 So. 751.

94. *Wiedner v. Thompson*, 66 Iowa, 283, 23 N. W. 670. And see *Key City Gas Co. v. Munsell*, 19 Iowa, 305.

95. *Ruthven v. Mast*, 55 Iowa, 715, 8 N. W. 659.

96. *James v. Breaux*, 26 La. Ann. 245.

97. *Bloomington v. Barnard*, 7 Hun (N. Y.) 459.

98. *Dings v. Parshall*, 7 Hun (N. Y.), 522. The prayer of a petitioner was for an injunction restraining defendants from seizing the mortgaged chattels under a writ of attachment, without first paying or depositing the amount of the mortgage debt, and for general relief. The mortgagee had the right, under the mortgage, to take possession whenever she deemed it

enjoin the sale.⁹⁹ And a mortgagee is entitled to an injunction restraining a sale of the mortgaged property under a senior judgment, which he alleges in his petition has been paid, even though his mortgage has not been reduced to a judgment.¹ Where an action to set aside a mortgage as in fraud of the mortgagor's creditors is commenced after sale under foreclosure, the mortgagor cannot appeal from a judgment in favor of plaintiff which awards costs against the mortgagee.²

§ 1273. **Protecting junior chattel mortgages, etc.**—Junior chattel mortgagees, whose debt is not yet due, may restrain the mortgagor and his assignee for the benefit of creditors from selling the mortgaged property, as they have advertised, for one-third of its value, where the proceeds of such a sale would not pay the senior mortgages. And as an assignment for the benefit of creditors cannot prejudice the rights of the assignor's mortgagees, the latter may sue in the county in which the mortgage was given to enjoin a sale under the assignment, though the proceedings under the assignment are pending in the court of the county in which the assignee resides and the assignment was made.³ And a mortgagee of personal property, though his mortgage be not due, and without regard to the mortgagor's solvency or insolvency, may maintain a suit to enjoin the enforcement of a judgment of foreclosure, ren-

necessary, and the mortgage was alleged to have been given to secure a valid debt, and to have been recorded before the levy. It was held that the petition was not demurrable, as, whether or not the mortgagee was entitled to the particular relief demanded, her right to possession might have been determined under the general prayer. That questions as to the right of personal property are within the jurisdiction of courts of law makes no difference, as an error in the kind of proceedings adopted is not ground of demurrer; but by Code, Iowa, § 2514, the remedy is by

motion to change to the proper proceedings. *Thomas v. Farley M'fg Co.*, 76 Iowa, 735, 39 N. W. 874.

99. *Plumb v. Bay*, 18 Kan. 415.

1. *Brigham v. White*, 44 Iowa, 677.

2. *Bullard v. Harris*, 29 N. Y. Supp. 772.

3. *Ades v. Levi*, 137 Ind. 506, 37 N. E. 388, per Dailey, J.: "Equity will enjoin a threatened injury to the rights of the mortgagee. *Jones, Chat. Mortg.*, § 450. The assignee has no greater rights than his assignors, and mortgagees have a right to enforce their claims in the courts of the county where the property is located,

dered upon a mortgage executed to defraud him.⁴ And a recital in a duly-recorded chattel mortgage, of the existence of a prior mortgage on the same property, which prior mortgage fully de-

and where the mortgage is recorded. When mortgagors make an assignment, they can transfer no other or greater interest than they possessed at the time of the assignment, and had the right to enforce. If there had been no assignment of the goods by the Ades Bros., and they had advertised to sell them at one-third their cash value, there can be little doubt the appellees could enjoin the sale. The fact that the goods have passed into the hands of a trustee does not change the principle. It is the contention of appellants' counsel that the Lawrence Circuit Court had no jurisdiction in the matter for the reason that the assignment had been made in Vigo county, the assignee residing therein, and the proceedings were pending in the Vigo Circuit Court. This is upon the theory that one court cannot control the execution, orders, and process of another court. In *Gilbert v. McCorkle*, 110 Ind. 215, 11 N. E. 296, it is shown that Conrad Miller and Jacob Miller were partners doing business under the firm name of Miller Bros., in the city of Evansville, Ind., and, being in a failing condition, executed a mortgage on March 29, 1886, upon all the property, real and personal, to secure certain of their creditors. On March 30, 1886, the Millers made an assignment in the Circuit Court of Vanderburgh county for the benefit of their creditors. Gilbert was named and qualified as assignee. An action was commenced on April 12, 1886, in the Superior Court of said county to foreclose said mortgage. The assignee was made a defendant to the pro-

ceeding, and the other creditors, whose claims were not secured by the mortgage, became parties on their own application. It was contended that the Circuit Court had exclusive jurisdiction of the assignee and the property, and for that reason the Superior Court of Vanderburgh county had no jurisdiction of the subject matter. The court said: 'It has been settled by the decisions of this court that, where property which has been subject to the lien of an execution is afterwards assigned, such property may nevertheless be seized and taken out of the possession of the assignee, by virtue of such prior lien. *Griffin v. Wallace*, 66 Ind. 410; *Marsh v. Vawter*, 71 Ind. 22; *Woolson v. Pipher*, 100 Ind. 306. The assignment carries only the assignor's interest in the property assigned, and does not affect the prior vested rights and remedies which a good-faith lienholder may have therein. The assignee takes the property assigned subject to the incumbrance of the mortgage, and subject to all the rights and remedies of the mortgagees.' Citing *Recker v. Kilgore*, 62 Ind. 10."

4. *McCormick v. Hartley*, 107 Ind. 248, 6 N. E. 357, per Niblack, C. J.: "A mortgagee of person property acquires an interest in the property mortgaged, for the protection of which he may appeal to the courts without waiting until the mortgage debt becomes due. *Woodruff v. Halsey*, 8 Pick. (Mass.) 333; *Welch v. Whittemore*, 25 Me. 86; *Walker v. Radford*, 67 Ala. 446.

scribes the mortgaged property, is sufficient to put a subsequent judgment creditor of the mortgagor on inquiry; and where such inquiry would have led to a complete identification of the mortgaged property, its sale on execution will be enjoined at the suit of the second mortgagee, though the description of the property in the second mortgage, standing alone, may not have been technically sufficient.⁵ But an encumbrancer may not enjoin the sale of the property under a prior encumbrance, unless he offers to pay it off in full, and especially when the property is depreciating in value.⁶

§ 1274. **Growing crops.**—In England the mortgagee may enjoin the mortgagor's trustee in liquidation from cutting and removing crops from the mortgaged property after the mortgagee's demand upon the trustee to give up possession of the premises.⁷ A mortgagee takes possession of the land mortgaged subject to a prior disposition by the mortgagor of the growing crops and the purchaser has the right of ingress to gather and carry them away; for though the crop is in a sense a part of the real estate it is salable and transferable as personal property.⁸ But the purchaser of mortgaged premises at a foreclosure sale is entitled to the crops growing on the land at the time of the sale in preference to the purchaser at an execution sale against the mortgagor.⁹

§ 1275. **At suit of purchasers, etc.; cloud on title.**—A court of equity has jurisdiction, at the instance of a purchaser at a mortgage foreclosure sale of land on which a canning factory is situated, to restrain a party to whom the mortgagor of the land has executed a subsequent chattel mortgage, from selling the machinery on the premises covered by the mortgage, during the canning season, when the sale would destroy the business conducted therein, as the

5. *Kneller v. Kneller*, 86 Iowa, 417, 53 N. W. 271.

6. *Meysenburg v. Schlieper*, 46 Mo. 209.

7. *Bagnall v. Villar*, L. R. 12 Ch. D. 812.

8. *Sexton v. Breese*, 135 N. Y. 387,

32 N. E. 133; *Stall v. Wilbur*, 77 N. Y. 158; *Whipple v. Foot*, 2 Johns. (N. Y.) 422.

9. *Shepard v. Philbrick*, 2 Den. (N. Y.) 174; *Lane v. King*, 8 Wend. (N. Y.) 584.

owner would have no adequate remedy at law.¹⁰ And where the assignees of a satisfied mortgage have it foreclosed, a grantee of the mortgagor who is not made a party and has no notice of the foreclosure until after a sale under the decree may maintain a suit to enjoin the parties from conveying or asserting claim to the property and to annul the decree and deed as a cloud upon his title.¹¹ And where a wife living with her husband makes a mortgage of her realty in which the husband does not join and which is not given to secure the purchase money of the mortgaged land, it is void, and one to whom she conveys the mortgaged land, her husband joining, may maintain an action to enjoin a foreclosure of the mortgage and to have it declared void as a cloud upon his title.¹² Again, where one of a firm requested the other partners to pay off a mortgage on his property out of partnership funds and charge the amount to him on the firm books, and they paid it and charged it to him but instead of having it discharged had it assigned to themselves, it was held that this would be a fraud on him, and that he could enjoin them from foreclosing it, as a foreclosure sale would be a cloud on his title.¹³ But a party in possession of mortgaged land under an agreement with the mortgagor to pay off such as it may be necessary to pay to protect the title in consideration that he is to receive the profits of the land for a certain time does not occupy the position of a surety nor is he entitled to an injunction to stay sales on the foreclosure of mortgages to which actions both he and the mortgagor were parties.¹⁴

§ 1276. **Protecting sureties.**—An indorser of a note, the time of which had been extended without his knowledge, who suffered

10. *Dudley v. Hurst*, 67 Md. 44, 8 Atl. 901. And see *Scully v. Rose*, 61 Md. 408.

11. *Matheson v. Thompson*, 20 Fla. 790. And see *Buckmaster v. Kelley*, 15 Fla. 180.

12. *Yager v. Merkle*, 26 Minn. 429.

13. *Conkey v. Dike*, 17 Minn. 457, per *Ripley, C. J.*: "A clearer case of a cloud upon title cannot be stated and the injury which will be cre-

ated by such cloud is one which equity will interfere by injunction to prevent *pendente lite*. *Scribner v. Allen*, 12 Minn. 148; *Weller v. St. Paul*, 5 Minn. 95; *Scott v. Onderdonk*, 14 N. Y. 9. The decision in *Montgomery v. McEwen*, 9 Minn. 103, was disapproved.

14. *Bloomingtondale v. Barnard*, 7 Hun (N. Y.), 459.

judgment thereon, and executed a trust deed to secure payment of said judgment, is entitled to have a sale under said deed enjoined.¹⁵ But the sale of land under a trust deed given to indemnify a surety will not be enjoined where the debt is past due, and the parties have agreed that the trustee may advertise in time to sell by a certain day, though the surety has not yet paid the debt.¹⁶ And where a mortgage on a stock of goods provided that the mortgagor should keep the stock replenished for the benefit of the mortgagee, and on default, the mortgagee brought an action at law to recover the stock as replenished, it was held that he could not have the mortgagor enjoined from defending on the ground that he did not have a legal title to the goods added to the stock; nor is the equity of the bill aided by an averment that the only evidence by which the new and the old stock can be distinguished and separated is in the possession of the mortgagor, and that he is insolvent.¹⁷

15. Dey v. Martin, 78 Va. 1.

17. Tyson v. Weber, 81 Ala. 470.

16. Brower v. Buxton, 101 N. C. 2 So. 901.
419, 8 S. E. 116.

RELATING TO MUNICIPAL CORPORATIONS.

CHAPTER XLIV.

RELATING TO MUNICIPAL CORPORATIONS.

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Section 1277. **City council's discretion; if no jurisdiction.**—When a municipality through its common council or other officials is in the exercise of authority delegated to it by the Legislature of the State, it is vested with the right and duty to exercise the discretion and judgment incidental to the proper performance of what is delegated and with that discretion a court of equity will not ordinarily interfere.¹ This rule applies to those cases where the action of the municipal officers or council is legislative in its character, as where an ordinance is about to be passed.² So the

1. *United States*.—*Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453, 26 S. Ct. 600, 50 L. Ed. 1102.

Connecticut.—*Fellows v. City of New Haven*, 44 Conn. 240, 26 Am. Rep. 447.

Georgia.—*Regenstein v. Atlanta*, 98 Ga. 167, 25 S. E. 428; *Hanbury v. Woodward Lumber Co.*, 98 Ga. 54, 26 S. E. 477.

Illinois.—*Canal Comm'rs v. East Peoria*, 179 Ill. 214, 53 N. E. 633, *aff'd* 75 Ill. App. 450; *Johnson v. Chicago Sanitary Dist.*, 163 Ill. 285, 45 N. E. 213.

Kansas.—*Board of Education v. State*, 7 Kan. App. 620, 52 Pac. 466.

Louisiana.—*Municipality No. 1 v. Municipality No. 2*, 12 La. 49.

New York.—*Milhau v. Sharp*, 15 Barb. 193; *Parsons v. Travis*, 8 N. Y. Super. Ct. 439. See *Egan v. New York Health Dept.*, 9 App. Div. 431, 41 N. Y. Supp. 352; *Rogers v. O'Brien*, 1 App. Div. 397, 37 N. Y. Supp. 358.

Pennsylvania.—*Newell v. Bradford*, 18 Pa. Co. Ct. R. 465.

It is said in a recent case in Indiana that while the courts will arrest an arbitrary or plainly unreasonable exercise of the police power, where there has been an attempt thereby to lay a burden upon a subject in the use or enjoyment of his property, yet not-

withstanding this, the courts recognize that, as respects the police power, there is a broad authority within the field of legislative discretion, wherein, as respects what is good and expedient, the lawmaking power is absolutely the master of its own discretion. *Pittsburg C. C. & St. L. R. Co. v. Hartford City (Ind.)*, 1907, 82 N. E. 787. Per Gillett, J.

2. *United States*.—*New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518.

Alabama.—*Montgomery Gaslight Co. v. City Council*, 87 Ala. 245, 6 So. 113.

Colorado.—*Lewis v. Denver Water Works Co.*, 19 Colo. 236, 34 Pac. 993, 41 Am. St. Rep. 248.

Illinois.—*Stevens v. St. Mary's Training School*, 144 Ill. 336, 32 N. E. 962, 18 L. R. A. 832.

Iowa.—*Des Moines Gas Co. v. City of Des Moines*, 44 Iowa, 505, 24 Am. Rep. 756.

Kentucky.—*Roberts v. City of Louisville*, 92 Ky. 95, 17 S. W. 216, 13 L. R. A. 844.

Louisiana.—*Harrison v. City of New Orleans*, 33 La. Ann. 222, 39 Am. Rep. 272.

New Jersey.—*Bond v. City of Newark*, 19 N. J. Eq. 376.

New York.—*Negus v. City of*

rule was applied where the common council of a city passed an order for the demolition of a building on a public green which had been used as a State house, in which case the court refused to grant an injunction to restrain the demolition, as the council was acting within its powers and discretion, and there was nothing to show an intentional violation of duty on its part.³ And even though a city has a right to accept a charitable trust its refusal to do so would be an exercise by its council of judgment and discretion which could not be enjoined by a court of equity.⁴ And a judgment, in an action by the owners of property assessed for street improvements, restraining the city officers from paying out any money in pursuance of the contract for the improvements, which provided that the contractor should be paid semi-monthly as the work progressed, at the discretion of the city council, on the estimate of the city engineer, cannot be sustained where the only finding as to wrong-doing by the city officers is that the engineer improperly recommended payment, but there is no finding that the council had adopted the recommendation, or were about to do so, or that the officers charged with drawing the warrants had

Brooklyn, 62 How. Prac. 291, 10 Abb. N. C. 180; *People v. City of New York*, 32 Barb. 35, 19 How. Prac. 155; *New York & N. H. Ry. Co. v. City of New York*, 1 Hilt. 562; *Milhau v. Sharp*, 15 Barb. 193.

Pennsylvania.—*Parrish v. Wilkes-Barre*, 9 Kulp. 201.

3. *Whitney v. New Haven*, 58 Conn. 450, 20 Atl. 666. And see *Fellowes v. New Haven*, 44 Conn. 240; *Dibble v. New Haven*, 56 Conn. 199, 14 Atl. 210; *Hewison v. New Haven*, 34 Conn. 138.

4. *Dailey v. New Haven*, 60 Conn. 314, 22 Atl. 945, per Seymour, J.: "In the very recent case of *Whitney v. New Haven*, 58 Conn. 450, 20 Atl. 666, this court held that whenever bodies like courts of common council are acting within

the limits of powers conferred on them and in due form of law the right of courts to supervise, review or restrain is exceedingly limited. With the exercise of discretionary powers courts rarely and only for grave reasons interfere. Those grave reasons are found only where fraud, corruption, improper motives, or influences plain disregard of duty, gross abuse of power or violation of law enter into or characterize the result. Difference of opinion or judgment is never a sufficient ground for interference." The legislative department of a municipal corporation may be enjoined from any unlawful act, but not from any act within its legal discretion. *City of Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622.

done or were threatening to do any improper act.⁵ The rule, however, that a court of equity will not interfere with a municipal corporation in the exercise of the discretion conferred upon it is subject to the qualification that an abuse by a municipal corporation of its powers may be restrained by injunction,⁶ as may the passage of an ordinance where irreparable injury will result from its enforcement.^{6a} So where a city council attempts to annex territory not contiguous, which, under the statute, can be done only by the county commissioners, an injunction affords the appropriate remedy,⁷ because in such a case the city common council is excluded from jurisdiction by the statute.⁸

5. *Union Cemetery Ass'n v. McConnell*, 124 N. Y. 88, 26 N. E. 330.

6. *United States*.—*Coulson v. Portland*, Fed. Cas. No. 3,275, Deady, 481.

Colorado.—*City of Denver v. Mulen*, 7 Colo. 345, 3 Pac. 693.

Georgia.—*Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. 509.

Illinois.—*Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907; *Hyde Park v. City of Chicago*, 124 Ill. 156, 16 N. E. 222.

Kansas.—*State v. City of Neodesha*, 3 Kan. App. 319, 45 Pac. 122.

Louisiana.—*Layton v. Monroe*, 50 La. Ann. 137, 23 So. 99.

Maryland.—*Baltimore v. Broumel*, 86 Md. 153, 37 Atl. 648.

Missouri.—*Springfield Ry. Co. v. Springfield*, 85 Mo. 674.

New Jersey.—*McDonald v. City of Newark*, 42 N. J. Eq. 136, 7 Atl. 855.

New York.—*People v. Dwyer*, 90 N. Y. 402; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Oakley v. Trustees of Williamsburgh*, 6 Paige, 262; *Ambrose v. City of Buffalo*, 29 Abb. N. C. 140, 20 N. Y. Supp. 129.

Rhode Island.—*Place v. City of Providence*, 12 R. I. 1

Tennessee.—*International Trading*

S. Co. v. Memphis, 101 Tenn. 181, 47 S. W. 136.

Wisconsin.—*Lumsden v. City of Milwaukee*, 8 Wis. 485.

6a. *Spring Valley Waterworks Co. v. Bartlett*, 16 Fed. 615.

A mayor may be restrained from approving an ordinance which is illegal. *Norris v. Wurster*, 23 App. Div. (N. Y.) 124, 48 N. Y. Supp. 656.

7. *Delphi City v. Startzman*, 104 Ind. 343, 3 N. E. 937; *Erwin v. Fulk*, 94 Ind. 235; *Kyle v. Board*, 94 Ind. 115; *New Albany v. White*, 100 Ind. 206.

8. *Delphi City v. Startzman*, 104 Ind. 343, 3 N. E. 937, per Elliott, J.: "We have a positive statute prescribing what method shall be pursued and that prescribed must be adopted and no other. *Strosser v. Fort Wayne*, 100 Ind. 443. Our decisions have uniformly declared that in such a case as this the city must petition the county commissioners and secure an order from that body. *Taylor v. Fort Wayne*, 47 Ind. 274; *Peru v. Bearss*, 55 Ind. 576; *Town of Cicero v. Williamson*, 91 Ind. 541; *Logansport v. LaRose*, 99 Ind. 117. The court distinguished *Wise v. East-*

§ 1278. **Staying municipal government.**—Equity will not enjoin a municipal corporation in the exercise of its legislative function, unless the proposed act is *ultra vires*, and would work irreparable injury.⁹ And pending appeal from a judgment declaring territory annexed to a city, the Supreme Court will not stay the exercise by the city of governmental functions over the annexed territory, and restrain consideration of the judgment of annexation in the elections, taxation, and internal improvements of the city; the exercise of none of such acts being alleged to be inconvenient, except that of the voting by the residents of the annexed territory at an approaching election, and there being no immediate and imperious necessity for interference as to the other acts.¹⁰ But a court of equity may in its discretion in a proper case, by its injunc-

ham, 30 Ind. 133; *Anthony v. Sturgis*, 86 Ind. 479, and *Pugh v. Irish*, 43 Ind. 415, as cases in which it was merely sought to enjoin the city treasurer from levying taxes."

9. *Murphy v. East Portland*, 42 Fed. 308; *Alpers v. San Francisco*, 32 Fed. 503; *Water Works v. Bartlett*, 16 Fed. 615.

10. *Forsythe v. Hammond City*, 137 Ind. 426, 37 N. E. 537, per Hackney, J.: "The appellants have filed, and presented for our consideration, their verified petition to stay the exercise by the appellee of any of the functions of government over the lands of the appellants adjudged by the Circuit Court in this case to have been annexed to said city, and to constrain the consideration of said judgment of annexation in the elections, taxation, and internal improvements of said city. The threatened exercise of none of the acts so sought to be restrained is alleged to be inconvenient, excepting that of the voting by residents upon the annexed territory at an approaching election in said city. The act of voting will not ren-

der any judgment of this court less effectual, and it is a question with the voters whether they will take the chances of illegal voting, or of waiving their right to insist that their property has not been legally annexed to said city. With these questions we are not concerned, since the action of voters within the alleged annexed territory could only have the effect to confirm an affirmance of the judgment below, and would not obstruct the fullest operation of judgment of reversal. With respect to the allegations of threatened taxation, street improvements, etc., as affecting the lands annexed, there is not, as we have said, any showing of immediate and imperious necessity for interference, and the extraordinary power of injunction will not be exerted unless such necessity appears. This much we may say without committing ourselves to the question of the existence of power in the court to restrain any such acts, if they were imminent. But, when not essential to enable the fullest effect to be given to any decision we may make upon the merits

tive powers, prevent any attempt on the part of a municipal corporation to violate its contract.¹¹

§ 1278a. **Franchise not sold to highest bidder.**—Where a franchise to operate a street railway is offered for sale in pursuance of an ordinance providing for its sale at public auction to the highest bidder, it must be sold to the highest bidder, and the acceptance of any other bid is illegal and will be enjoined.¹² And in New York it is decided that even though a municipal corporation, in violation of a charter provision requiring municipal contracts to be let to the lowest responsible bidder, has awarded a contract to a higher bidder, the lower bidder cannot maintain an action against the municipality to recover loss of profits, but his remedy under such circumstances is to enjoin the common council from making an award to higher bidders.¹³ In another case in this State it is, however, held that a taxpayer's action to restrain the awarding of a contract to a bidder for a municipal contract is brought to allow the illegal acts of public officials to be controlled by courts and to protect the corporation and is not allowed for the purpose of enabling corporations or individuals to require the award of a public contract on bids in excess of those made by other competent and responsible bidders. Thus where there was a provision in proposals for a municipal contract that the bidders should give satisfactory evidence that they were able to complete the work as specified it was held that the provision was for the benefit of the city and intended to exclude irresponsible bidders unable to complete the contract, and was not for the benefit of other or higher bidders. And in this case it was decided that when it appears that an action by a higher bidder to restrain the awarding of the contract was not brought for the interest of the municipality, but for the ulterior purpose of imposing an additional burden on the municipality by

of the main case, we seriously doubt the existence of that power. The petition, therefore, is overruled."

11. *Asbury Park & S. G. Ry. Co. v. Township Committee* (N. J. Ch., 1907), 67 Atl. 790. See, also, *Turner's Falls Fire Dist. v. Millers Falls*

Water Supply Dist., 189 Mass. 263, 75 N. E. 630.

12. *Trojan Ry. Co. v. Troy*, 125 App. Div. (N. Y.) 362.

13. *Molloy v. New Rochelle*, 123 App. Div. (N. Y.) 642.

an interested taxpayer, a court of equity would not enjoin the letting of a contract to a bidder who was responsible.¹⁴ And in several cases it has been held that the bidder himself is not to maintain an action for an injunction in such a case.¹⁵

§ 1278b. **Ordinance violating contract rights.**—Where a city seeks to declare a forfeiture of the rights of another under a contract with it, such action is subject to the control of a court of equity and may be enjoined where it appears that such declaration of forfeiture pending litigation would render futile in a measurable degree the relief sought by the plaintiffs, or cause them serious and irreparable injury. And where this appears to be the case a preliminary injunction should be continued in force until the final hearing.¹⁶

§ 1279. **Protecting franchise granted by ordinance.**—As equity will interfere to protect and secure the enjoyment of a franchise secured by statute because it affords the only plain and adequate remedy,¹⁷ so it will protect rights of a like character acquired under a lawful and valid municipal ordinance.¹⁸ Thus equity will enjoin a city from destroying rights granted by ordinance to a street railroad company after it has accepted and acted upon the ordinance.¹⁹ But in Louisiana it was decided that the

14. *Nathan v. O'Brien*, 117 App. Div. (N. Y.) 664.

15. *Kelley v. City of Baltimore*, 53 Md. 134; *Adams v. Ives*, 1 Hun (N. Y.), 457; *Fidley v. City of Pittsburg*, 82 Pa. St. 351.

16. *Eau Claire Dells Imp. Co. v. Eau Claire* (Wis., 1908), 115 N. W. 155. See, also, *Defiance Water Co. v. Defiance*, 90 Fed. 753.

17. *Boston Water Co. v. Boston*, etc., R. Co., 16 Pick. (Mass.) 525; *St. Louis R. Co. v. Northwest*, etc., R. Co., 69 Mo. 66; *Newburgh Turnpike Co. v. Miller*, 5 Joans. Ch. (N. Y.) 101.

18. *Quincy City v. Bull*, 106 Ill. 337; *North Jersey St. R. Co. v. South Orange Twp.*, 58 N. J. Eq. 83, 43 Atl. 53. See *Newton v. Lewis*, 79 Fed. 715, 25 C. C. A. 161, 49 U. S. App. 266.

19. *Springfield R. Co. v. Springfield*, 85 Mo. 674; *North Jersey St. R. Co. v. South Orange Twp.*, 58 N. J. Eq. 83, 43 Atl. 53.

Defendant, by ordinance, granted plaintiff the right of constructing a railway over certain of defendant's streets, which right it afterwards revoked, and instructed its chief of police to prevent plaintiff from inter-

original grantee from the city of New Orleans of a franchise of a right of way over certain streets for railroads for a term of twenty years cannot, after its expiration, enjoin the city from selling the same franchise on the ground that the city has failed to comply with its alleged contract obligation to take and pay for the railroads as such failure, even if the obligation existed could not operate to prolong the franchise or restrain the city in the exercise of its sovereign authority over the streets for the public benefit.²⁰

§ 1279a. **Franchise fixing rates; ultra vires; right to change by ordinance.**—The right of a municipality to surrender by contract the power of government does not exist by virtue of its general powers as a municipality. Authority to make such surrender only exists in the supreme legislative body of the State or in such body as the Legislature has delegated the power to. This rule is announced in a recent decision in the United States Supreme

fering with the streets in any manner. Plaintiff brought suit, and moved for an injunction during the pendency thereof restraining defendant from interfering with its work of constructing the railway. It was held, that such motion was properly allowed, as a city cannot at pleasure rid itself of contract obligations. *Asheville St. Ry. Co. v. City of Asheville*, 109 N. C. 688, 14 S. E. 316.

In 1840, the city of Mobile granted to plaintiff's testator the exclusive right to supply the city with water for twenty years, or until the city should redeem its works built for that purpose. In 1883, defendant company was chartered, and began supplying the city with water. Plaintiff filed a bill to enforce the monopoly granted his testator, and applied for an injunction *pendente lite* restrain-

ing defendant from supplying water. It was held, that the injunction must be refused, as liable to cause harm of serious character to the people of the city, and the plaintiff will have leave to renew the application on final hearing of the bill. *Stein v. Bienville Water Supply Co.*, 32 Fed. 876. In such case, however, the court will grant an injunction restraining the defendant from injuring, or in any way interfering with, any pipes, conduits, or mains constructed pursuant to the agreement between the city and the plaintiff's testator.

20. *Canal, etc., R. Co. v. New Orleans*, 39 La. Ann. 709, 2 So. 388. Injunction will not lie in favor of one claiming the exclusive privilege of laying gas mains and pipes in the streets of a city to prevent the passage of an ordinance by the city

Court,²¹ wherein it is also declared that it has been settled by that court that the State may authorize one of its municipal corporations to establish by an inviolable contract the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend during the life of the contract the governmental power of fixing and regulating the rates.²² For the very reason, however, that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, it is said that both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power.²³ The case in which these rules are announced was where a suit in equity had been brought by a telephone company to restrain the enforcement of an ordinance fixing the rates to be charged for telephone service. The company contended that the city, having the authority to do so, had contracted with it that it might maintain the charges for service at a specified standard, and that as the rates prescribed in the ordinance complained of were less than the standard the ordinances therefore impaired the obligation of the contract in violation of the Constitution of the United States. The contract rights asserted were alleged to exist by virtue of an ordinance which granted a franchise for a period of fifty years. The city was authorized by the Legislature to "fix and determine the charges for telephones and telephone service and connections," and it was determined that under the power so conferred the city council had no authority to enter into a contract fixing unalterably during the term of

granting the privileges to others. *Montgomery Gas-Light Co. v. City Council*, 87 Ala. 245, 6 So. 113.

21. *Home Telephone Co. v. Los Angeles*, 211 U. S. 265.

22. Per Mr. Justice Moody, citing *Detroit v. Detroit Citizens' Street Ry. Co.*, 184 U. S. 368, 382, 46 L. Ed. 592, 22 Sup. Ct. 410; *Vicksburg v. Vicksburg Water W. Co.*, 206 U. S. 496, 508, 51 L. Ed. 1155, 22 Sup. Ct. 410.

23. Per Mr. Justice Moody, citing *Providence Bank v. Billings*, 4 Pet. (U. S.) 514, 7 L. Ed. 939; *Railroad Commission Cases*, 116 U. S. 307, 325, 29 L. Ed. 636, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191; *Vicksburg, etc., R. R. Co. v. Dennis*, 116 U. S. 665, 29 L. Ed. 770, 6 Sup. Ct. 625; *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 599, 611, 44 L. Ed. 679, 21 Sup. Ct. 493; *Stanislaus County v. San Joaquin, C. & I. Co.*,

the franchise, charges for telephone service, and disabling itself from future power of regulation; the power to "fix and determine the charges" being declared to authorize the exercise of governmental power and nothing else. Legislative authority to a city to make such a contract must clearly and unmistakably appear.

§ 1280. **Other adequate remedy.**—The general rule that equity will not grant relief by injunction where there is an adequate remedy at law applies where it is sought to enjoin proceedings under an ordinance.²⁴ So where there is a complete remedy by certiorari a court of equity will not grant an injunction.²⁵ And in accordance with the rule that courts of equity seldom interfere to stay proceedings of a criminal character, equity will not interfere to stay proceedings under city ordinances enforceable by fine with subsequent liability to imprisonment.²⁶ And where proceedings by a city to open a boulevard across a railway company's tracks are pending on appeal, and the company files a bill to enjoin the city from prosecuting such proceedings, on the ground that irreparable injury will be done to the company, the bill must be dismissed, as the question is a legal one, which will be disposed of in the condemnation proceedings.²⁷ Again, an injunction will not lie to restrain the act of the officers of an illegally organized

192 U. S. 210, 211, 48 L. Ed. 406, 24 Sup. Ct. 241; *Metropolitan Street Ry. Co. v. New York*, 199 U. S. 1, 50 L. Ed. 65; *Water, Light & Gas Co. v. Hutchinson*, 207 U. S. 385.

24. *Kroeger v. Walcott* (Iowa), 76 N. W. 841; *Bloomfield Twp. v. Glen Ridge*, 54 N. J. Eq. 276, 284, 33 Atl. 925, 928; *Forty Fort v. Forty Fort W. Co.*, 9 Kulp. (Pa.) 41. See *Cleveland v. Calvert*, 54 S. C. 83, 31 S. E. 871.

25. *Kroeger v. Walcott* (Iowa), 76 N. W. 841; *Bloomfield Twp. v. Glen Ridge*, 54 N. J. Eq. 276, 284, 33 Atl. 925, 928.

26. *Alabama*.—*Mayor v. Moses*, 52 Ala. 209.

Arkansas.—*Oil Co. v. Little Rock*, 39 Ark. 412.

Missouri.—*Kansas City Cable R. Co. v. Kansas City*, 29 Mo. App. 89.

Pennsylvania.—*Forty Fort v. Forty Fort W. Co.*, 9 Kulp. 241.

England.—*Kerr v. Preston*, L. R. 6 Ch. D. 463.

Holt, C. J., declared that he would disregard an order of a court of equity to stay a criminal proceeding in his court. *Holderstaffe v. Saunders*, 6 Mod. 16; *Attorney-General v. Cleaver*, 18 Ves. 219; *Lord Montague v. Dudman*, 2 Ves. Sen. 396.

27. *Detroit R. Co. v. Detroit*, 91 Mich. 444, 52 N. W. 52.

municipal corporation, but the remedy is by *quo warranto*.²⁸ And the basis of a complaint for an injunction against a town by a gas company being that the village is using more gas than it is entitled to under the contract, the plaintiff has an adequate remedy at law, and equity has no jurisdiction to enjoin the use of open lights.²⁹ But equity will enjoin the erection of a privy about to be built near plaintiff's house in violation of a city ordinance.³⁰

§ 1281. **Injury essential; adequate remedy.**—One cannot have a municipal corporation enjoined from changing the grade of a street, where he shows no substantial damages.³¹ And it is a settled rule that the mere change of grade of a street is not the seizure of private property for a public purpose.³² And the designation of piers as dumping grounds for the use of the street-cleaning department of New York city being necessary for the preservation of the health of the citizens, such use will not be enjoined as a nuisance on the ground that one individual is inconvenienced thereby, unless it appears that such individual would suffer irreparable injury as well as special injury.³³ Nor will an injunction lie to prevent the enforcement of an alleged unlawful ordinance, even to prevent an apprehended breach of the peace and arrest, in case of a violation of the ordinance, there being adequate

28. MacDonald v. Rehner, 22 Fla. 198.

29. Saltsburg Gas Co. v. Borough of Saltsburg, 138 Pa. St. 250, 20 Atl. 844.

30. Rand v. Wilber, 19 Ill. App. 395; Wahle v. Reinbach, 76 Ill. 322.

31. Kokomo v. Mahan, 100 Ind. 242.

32. Macy v. Indianapolis, 17 Ind. 267; Lafayette City v. Spencer, 14 Ind. 399; Delphi City v. Evans, 36 Ind. 90; Lafayette City v. Bush, 19 Ind. 326; Weis v. Madison City, 75 Ind. 241.

33. Hill v. City of New York, 15 N. Y. Supp. 393, *aff'd* 18 N. Y. Supp. 399. One indebted to plaintiff con-

veyed land to him as security. The land was sold for taxes assessed against plaintiff, execution issued for \$450, and the city became the purchaser. Afterwards an assessment against plaintiff's grantor for street improvements was levied on the land, and it was sold, the plaintiff becoming the purchaser for \$37. Plaintiff sought an injunction restraining the city from selling the land after expiration of the period of redemption under the first sale. It was held, that it was properly refused, as plaintiff would suffer no irreparable loss or injury. Empire Loan Assn. v. City of Atlanta, 77 Ga. 496.

remedy at law.³⁴ And where a city has filled in a cellar built underneath a sidewalk by an adjoining landowner, a bill by the latter, alleging that the city contracted to allow him to build and use such cellar, and praying an injunction and damages, cannot be maintained, where it fails to show any irreparable injury, or that there is no adequate remedy at law.³⁵ Again, a lot-owner is not entitled to an injunction against the narrowing by the authorities of the town of a sidewalk laid in front of his lot, unless he shows that irreparable injury will result to him therefrom.³⁶

§ 1282. **City improvements.**—Equity will not interfere by injunction with a plan of improvement, for instance a sewerage system, adopted in good faith by municipal authorities, and within the scope of their authority, where injury therefrom is doubtful, eventual, or contingent. To justify such an interference it must be shown that injury material and actual is the necessary or probable result.³⁷ And where the action of a city in executing a public work is within the scope of its authority, and free from fraud and corruption, it will not be enjoined, though the methods adopted result in special damage to complainant.³⁸ And a city cannot be enjoined from improving a street, on the ground that the work will necessitate a special tax on the abutting property, where no such tax has been levied, and no act done showing an intention to levy it, and where the ordinance under which the work is being done makes no provision for any assessment against the abutting property.³⁹ Nor will a perpetual injunction be granted to restrain the officers of a city from issuing, selling, and delivering its bonds in aid of local improvements, when there is an express finding by the trial court that said bonds had been issued, sold, and delivered

34. *St. Peter's Episcopal Church v. Town of Washington*, 109 N. C. 21, 13 S. E. 700. And see *Busbee v. Lewis*, 85 N. C. 332; *Pearson v. Boyden*, 86 N. C. 585.

35. *Winter v. Montgomery*, 93 Ala. 539, 9 So. 366. And see *Cross v. Mayor*, 18 N. J. Eq. 305; *Holmes v. Jersey City*, 12 N. J. Eq. 310.

36. *Town of Marion v. Skillman*, 127 Ind. 130, 26 N. E. 676.

37. *Morgan v. Binghamton*, 102 N. Y. 500, 7 N. E. 424. And see *Swett v. Troy*, 62 Barb. (N. Y.) 630.

38. *Union Steam-Boat Co. v. City of Chicago*, 39 Fed. 723.

39. *Dever v. Junction City*, 45 Kan. 417, 25 Pac. 861.

before service of a temporary restraining order issued at the commencement of the action.⁴⁰ But a city in the issuance of bonds must comply with the terms and conditions of the subscription thereto as approved by a popular vote and may be restrained from issuing them otherwise.⁴¹ The Indiana statute of 1891, relating to streets and sewers, while it permits injunctions on the proceedings before the making of the improvements, provides that when the work is done, and the final estimate of assessments reported to the city council, notice shall be given of a time and place for objections to the confirmation; and if, thereafter, a property owner still refuse to pay his assessment, and a precept to collect be issued, he may appeal, and have reviewed all matters from the making of the contract to the report on the final estimate. But it is held that a property owner cannot enjoin the council from confirming such report, on the ground that the work is ill done and not according to the contract, nor on the ground that, as constructed, the sewer must become a nuisance, and for the reason also that he had an adequate remedy at law.⁴²

40. *City of Alma v. Loehr*, 42 Kan. 368, 22 Pac. 424, per Simpson, C.: "Equity will not entertain a bill for an injunction to restrain the issuing of municipal bonds in aid of a subscription to a railway where the bonds have been actually issued and delivered to the company. *Menard v. Hood*, 68 Ill. 121."

41. *Neale v. Wood*, 43 W. Va. 90, 27 S. E. 370.

42. *Robinson v. Valparaiso City*, 136 Ind. 616, 36 N. E. 644, per Howard, C. J.: "When the work is done, and the final estimate of assessments on the property is reported to the council, it is provided' (Acts 1891, p. 324) that two weeks' notice shall be given of the time and place when and where objections may be made to the confirmation of such estimate; and, finally, if the property owner is still

dissatisfied and refuses to pay his assessment, and a precept is issued for its collection, he is given the right of appeal to the courts. On this appeal all questions, from the making of the contract to the report of the engineer on the final estimate, are brought in review. Acts 1891, p. 327. Not until the court shall find that the proceedings subsequent to the order directing the work to be done are regular, that a contract has been made, that the work has been done according to the contract, and that the estimate has been properly made thereon, will the property owner be finally compelled to pay his assessment. Thus, the law affords to the property owner a full and complete remedy, and injunction will not lie. *Board, etc., v. Hall*, 70 Ind. 469; *Ricketts v. Spraker*, 77 Ind. 371; *Sims v. City of Frankfort*, 79 Ind.

§ 1283. **Same subject.**—The action of the city council and commissioners in making an assessment district for street improvements, and an assessment, will not be reviewed by the courts, in the absence of mistake or abuse of discretion, and a sale be set aside to remove a cloud from plaintiff's title.⁴⁴ And where a municipal corporation, for the purpose of maintaining a system of water-works, proposes to take the water collected in a mill-pond in order to secure the necessary head of water, the owner of the dam and mill with the right to use the water, who is not the owner of the

446; *Smith v. Hess*, 91 Ind. 424; *Young v. Sellers*, 106 Ind. 101, 5 N. E. 686; *Paving Co. v. Edgerton*, 125 Ind. 455, 25 N. E. 436. Appellants try to strengthen their contention by saying that they sue, not only as property owners liable to assessment for the construction of the sewer, but also as taxpayers, inasmuch as the city is liable to have to pay for the sewer, under the terms of the contract, out of the general city treasury. In answer to this, it is sufficient to say that all the proceedings are under the statute; that the sewer is to be paid for out of assessments on the property benefited. The city, in her corporate capacity, assumes no obligation by reason of the work. *Quill v. City of Indianapolis*, 124 Ind. 292, 23 N. E. 788; *City of New Albany v. McCulloch*, 127 Ind. 500, 26 N. E. 1074. It is further contended that the action will lie as a suit to enjoin a nuisance. The complaint shows that the sewer is not now a nuisance, but avers that, as constructed, it must become a nuisance. The question to be decided in this proceeding is whether the work has been done according to contract, and this cannot be answered by an investigation into the probable future working of the sewer. If the sewer should become a nuisance in the future, notwithstand-

ing its construction according to contract, and the plans and specifications, that will be a question of another kind. . . . In any event, the appellants, who have stood by until the work is done, and now seek to enjoin payment, are in no position to complain of the act of 1891, which, without adding any burden, enlarges their remedy, both as to injunction before the work is begun, and as to appeal after it is completed. The judgment is affirmed."

43. *Powers v. City of Grand Rapids*, 98 Mich. 393, 57 N. W. 250, per McGrath, C. J.: "It cannot be said that the improvement does not benefit plaintiff's property, and the measure of that benefit is for the council and commissioners. These officers acted within the scope of their powers, and the record contains no evidence of fraud, corrupt motive, or intentional favoritism. The presumption is that, in making the district and the assessment, the officers of the municipality acted in good faith, and have correctly and faithfully exercised the discretion reposed in them. In such case, where mistake or abuse of discretion is not manifest or demonstrable, the determination of the municipal officers in whom such discretion is vested is conclusive, and it is not reviewable

land, cannot enjoin the city from taking the water from such pond.⁴⁴

§ 1284. **Control of streets.**—Under the charter of the city of Trenton giving the city council authority to prescribe the manner in which corporations shall exercise any privilege granted them in the use of any street, or in the digging up of the same, a street railway company will be enjoined from rebuilding its road without the consent of the board of public works of the city which has succeeded to the powers of the council.⁴⁵ A village, whether organized under a special charter or under the general village law, may maintain an action to enjoin the erection of buildings for private use in its streets.⁴⁶ But after a bridge is completed it is too late to enjoin its completion; and a chancellor at chambers is without power to order, by mandatory injunction, a city to remove or remodel any part of a bridge forming a part of one of its streets.⁴⁷ And although under its charter the authority of the common council of a city over alleys is not absolute, a change in the location of an alley for the benefit of a land owner will not be enjoined where as a means of ingress and egress the alley as changed will furnish the same service as before, and the change will be more likely to enhance than impair the market-value of the lot of the principal objector.⁴⁸ And where a municipal cor-

by the courts. 1 Dill. Mun. Corp. 94.”

44. *Bass v. Fort Wayne*, 121 Ind. 389, 23 N. E. 259. In *Patoka Township v. Hopkins*, 131 Ind. 142, Elliott, C. J., said: “We regard it as quite clear that the court cannot direct how or when drains shall be constructed by highway officers, inasmuch as the control of that matter is committed to those officers and not to the courts. *Weaver v. Templin*, 113 Ind. 298; *Fort Wayne v. Cody*, 43 Ind. 197.”

45. *Trenton City v. Trenton R. Co.* (N. J.), 27 Atl. 483.

46. *Village of Buffalo v. Harling*, 50 Minn. 551, 52 N. W. 931, per Dickinson, J.: “If it had no authority save such as is to be implied from

the fact of its incorporation as a village, it is probable that it would have no right to maintain an action of this kind. But if the village was organized under the general village law or under a special charter, which as does the law of 1855, places the streets and public grounds under the control of the village authorities, and authorizes them to prevent the encumbering or obstruction of the same, such an action is maintainable to prevent the public nuisance. *Pine City v. Munch*, 42 Minn. 342.”

47. *Georgia Pacific R. Co. v. Douglasville*, 75 Ga. 828.

48. *Schmolt v. Nagel*, 151 Mich. 502, 115 N. W. 411.

poration is given the control of its streets with the right to permit the laying of railway tracks therein a court of equity will not control the exercise of such right by injunction.⁴⁹ And the decision of the body, to which is committed the determination whether streets or alleys shall be opened, laid out, straightened, widened, or extended, is conclusive as to the necessity of the improvements and of taking private real estate for the purpose, and will not be controlled by injunction.⁵⁰ The fact, however, that a municipality has been enjoined from proceeding to relay a sidewalk because it has failed to comply with certain prerequisites to its right to act does not prevent it from subsequently proceeding in a legal way to exercise the power conferred on it by statute.⁵⁷

§ 1285. **Mandatory injunction in favor of city.**—Injunction will lie in favor of a city, against a lot owner, to compel removal of a building encroaching on and obstructing a street.⁵² And

49. *South Chicago City R. Co. v. Calumet Elec. St. R. Co.*, 70 Ill. App. 254, *aff'd* 171 Ill. 391, 49 N. E. 576.

See § 1277 herein as to power to control exercise of discretion by municipal corporation.

50. *Knoblauch v. Minneapolis*, 56 Minn. 321, 57 N. W. 928. And see *Lyle v. Chicago, etc., R. Co.*, 55 Minn. 223, 56 N. W. 820.

51. *Converse v. Incorporated Town of Deep River (Iowa, 1908)*, 117 N. W. 1078.

52. *Eau Claire City v. Matzke (Wis.)*, 56 N. W. 874, per Winslow, J.: "This is an action in equity, brought by the city, to obtain a mandatory injunction compelling the defendant to remove certain buildings owned and maintained by defendant, and which are alleged to encroach upon a public street in the city, and obstruct a public alley, and which defendant refuses to remove. A general demurrer to the complaint was sustained, on the ground that the

remedy at law was adequate. It must now be considered as well settled in this State that a city or village, in its corporate capacity, may maintain an action in equity to prevent threatened obstructions or serious unlawful injuries to public streets. *Waukesha Hygeia Mineral Spring Co. v. Village of Waukesha*, 83 Wis. 475, 53 N. W. 675; *Town of Neshkoro v. Nest*, 85 Wis. 126, 55 N. W. 176. No good reason is perceived why the equity powers of the court may not also be invoked to compel a restoration of a street unlawfully obstructed or encroached upon. In fact, such actions have been approved by this court in cases of obstructions unlawfully placed in streets by railway companies in building their tracks. *Town of Jamestown v. Chicago, etc., R. Co.*, 69 Wis. 648, 34 N. W. 728; *City of Oshkosh v. Milwaukee, etc., R. Co.*, 74 Wis. 534, 43 N. W. 489. The principle on which these cases rest applies to an obstruc-

where a water company which is under a contract to furnish water to a city for public purposes threatens to shut off the supply an injunction against the doing of such act by the company will be granted.⁵³ But a city cannot maintain a bill to enjoin the erection of a permanent building on a wharf projecting into a navigable river upon the ground that at some future time the city may condemn the premises for a bridge.⁵⁴

§ 1286. **Restraining indebtedness.**—A city may be enjoined, at the instance of a tax-payer, from increasing the city debt beyond the constitutional limit.⁵⁵ In such a case the complainant is not bound to show that he is injured otherwise than in common with other taxpayers.⁵⁶ And the bill in such a case should not be dismissed because the creditor of the city is not made a party, but should be retained in order that the proper parties be brought in.⁵⁷ And any tax-paying resident and voter of a city may sue on behalf of himself and all other taxpayers to enjoin the creation of any indebtedness by the city in excess of the constitutional limit.⁵⁸ And where there has been a public subscription to works of public improvement a court of equity will restrain the issuance and sale

tion or an encroachment maintained by a lot owner. In both cases, there is an invasion of the public right, and a duty resting on the defendant to remove the unlawful structure. We think the action is properly brought."

53. *Bienville Water S. Co. v. Mobile*, 112 Ala. 260, 20 So. 742, 33 L. R. A. 59.

54. *City of Chicago v. Reed*, 27 Ill. App. 482.

55. *Grayville v. Gray*, 19 Ill. App. 120, per Pillsbury, P. J.: "That such a bill will lie at the suit of a taxpayer is settled by the cases of *Springfield v. Edwards*, 84 Ill. 626; *Howell v. Peoria*, 90 Ill. 104." And see *Law v. People*, 87 Ill. 395.

56. *Colton v. Hanchett*, 13 Ill. 615; *Perry v. Kinnear*, 42 Ill. 160;

Beauchamp v. Supervisors, 45 Ill. 274.

57. *Howell v. Peoria*, 90 Ill. 104; *Knapp v. Marshall*, 26 Ill. 63; *Thomas v. Adams*, 30 Ill. 37.

58. *Spilman v. City of Parkersburg*, 35 W. Va. 605, 14 S. E. 279; *List v. Wheeling*, 7 W. Va. 501. And see *Brannon v. County Court*, 33 W. Va. 789; *County Court v. Boreman*, 34 W. Va. 362, 12 S. E. 490. In *Prince v. Quincy*, 128 Ill. 443, the court said: "The effect of this constitutional inhibition is to require cities indebted to the limit fixed by the Constitution to carry on their corporate operations while so indebted upon the cash system and not upon credit to any extent or for any purpose."

of bonds in payment of such subscription before the time called for by the terms thereof.⁵⁹

§ 1287. **Same subject.**—Where a city has reached the limit of the indebtedness permitted to it, and its council has passed an ordinance confirming a contract which may render it liable for a further sum, and directing that warrants shall issue when the terms of the contract shall have been fulfilled, an application for an injunction to restrain the municipal officers from carrying out the contract is not premature.⁶⁰ And when a school-district votes in May to issue bonds, and the indebtedness thus authorized would exceed the constitutional limit according to the tax-lists of the previous year, an injunction will be granted to prevent the issue of bonds until the next tax-list is made, as it cannot until then be determined whether the debt will exceed the constitutional limit for the current year.⁶¹

§ 1288. **Interest on bonds; parties.**—The payment of interest on school-district bonds, thirteen years after they were issued, will not be enjoined simply because they were issued under a special act, where there is not sufficient either pleaded or proved to put in issue the constitutionality of the bonds.⁶² In a bill against a

59. *Neale v. Wood County Ct.*, 43 W. Va. 90, 27 S. E. 370.

60. *Davenport v. Kienschmidt*, 6 Mont. 502. In this case the court cited: *Crampton v. Zabriskie*, 101 U. S. 609, 25 L. Ed. 1071; *Williams v. Peinny*, 25 Iowa, 437; *Springfield v. Edwards*, 84 Ill. 626; *Harney v. Indianapolis*, 32 Ind. 244; *Terrett v. Sharon*, 34 Conn. 108; *Newmeyer v. Missouri R. Co.*, 52 Mo. 84; *Baltimore v. Gill*, 31 Md. 394; *Page v. Allen*, 58 Pa. St. 345.

61. *Wilkinson v. Van Orman*, 70 Iowa, 230, 34 N. W. 495.

62. *Burlington, etc., R. Co. v.*

Saunders County, 16 Neb. 123. The question whether or not Local Act Mich. 1889, which prescribes the location within which the city of Saginaw shall erect a city hall, is in violation of the right of local self-government, will not be determined in a suit by a tax-payer to restrain the common council from issuing bonds for such city hall, where the action of the common council appears to be voluntary and in the exercise of its own discretion, and not the result of coercion on the part of the Legislature. *Carlisle v. City of Saginaw*, 84 Mich. 134, 47 N. W. 444.

municipal corporation to enjoin the payment of interest on its bonds, the holders of the bonds are necessary parties.⁶³

§ 1289. **Invalid municipal ordinances.**—Where an ordinance is void a court of equity will as a general rule grant an injunction restraining its enforcement either on the ground of preventing a multiplicity of suits or that there is no adequate remedy at law.⁶⁴ In some cases, however, it is decided that a court of equity has no jurisdiction to enjoin prosecution of actions at law to enforce a city ordinance, on the alleged ground that the ordinance is invalid, since that defence can be interposed in a court of law.⁶⁵ And it

63. *Hope v. Gainesville*, 72 Ga. 246.

64. *United States*.—*Ozark Bell-Teleph. Co. v. Springfield*, 140 Fed. 666; *Glucose Ref. Co. v. Chicago*, 138 Fed. 209; *Barthet v. City of New Orleans*, 24 Fed. 563.

Georgia.—*Gould v. City of Atlanta*, 55 Ga. 678.

Illinois.—*Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696; *Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907.

Indiana.—*Spiegel v. Gainsburg*, 44 Ind. 418.

Louisiana.—*Layton v. Monroe*, 50 La. Ann. 137, 22 So. 99.

Maryland.—*Deems v. City of Baltimore*, 80 Md. 164, 30 Atl. 648, 26 L. R. A. 541.

Missouri.—*Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. 566.

New York.—*Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105; *Norris v. Wurster*, 23 App. Div. 124, 48 N. Y. Supp. 656; *People v. City of New York*, 32 Barb. 35, 19 How. Prac. 155, 10 Abb. Prac. 144.

Pennsylvania.—*Appeal of Harper*, 109 Pa. St. 9, 1 Atl. 791; *Angle v. Borough of Stroudsburg*, 29 Pa. Super. Ct. 601.

Texas.—*City of Austin v. Austin City Cemetery Assn.*, 87 Tex. 330, 28 S. W. 528.

The enforcement of an ordinance fixing telephone rates may be enjoined. *Ozark-Bell Teleph. Co. v. Springfield*, 140 Fed. 666.

Where an ordinance closes a street to certain class of vehicles its enforcement may be enjoined at suit of one who can use only one other street and that street is impassable. *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 51 N. E. 758, 42 L. R. A. 696.

Any one whose interests will be injuriously affected may bring a suit to enjoin the enforcement of a void ordinance. *Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907.

Where an ordinance violates contract rights its enforcement may be restrained. *Defiance Water Co. v. Defiance*, 90 Fed. 753. See in this connection, §§ 1278b, 1279, 1279a, herein.

65. *Chicago, etc., R. Co. v. Ottawa*, 148 Ill. 397, 36 N. E. 85, per *Curiam*: "It is claimed in the argument of appellant that the ordinance under which the prosecutions were instituted is void and that a court of equity is

has also been decided that an injunction will not be granted to prevent the enforcement of a municipal ordinance on the ground of its alleged illegality, for if a criminal prosecution should ensue upon its violation its validity would then come directly before the courts.⁶⁶ And injunctive relief will not be afforded to one who has an adequate remedy at law.⁶⁷

§ 1290. **Same subject.**—Unless the invalidity of a city ordinance has been established at law, or unless numerous actions are pending, one aggrieved by it will not be aided by a restraining

clothed with jurisdiction to enjoin the prosecution of the various suits brought by the city of Ottawa to enforce a penalty for a violation of the ordinance. The Circuit Court and the Appellate Court both held that a court of equity, under the facts presented by the bill, had no jurisdiction to enjoin the prosecution of the writs instituted by the city; and, if that ruling is correct, the judgment of the Appellate Court will have to be affirmed, regardless of the validity or invalidity of the ordinance. In *Yates v. Village of Batavia*, 79 Ill. 500, where a bill had been filed to enjoin the prosecution of suits commenced against the complainants for the violation of a village ordinance 'to provide against the evils resulting from the sale or giving away of intoxicating liquors,' it was held that a court of chancery had no jurisdiction of the subject-matter of the litigation; that the defense to the several actions, if any existed, was complete in an action at law. In *Poyer v. Village of Des Plaines*, 123 Ill. 112, 13 N. E. 819, where a bill in equity was filed to enjoin the prosecution of seven suits instituted by the village, and to restrain others threatened, for the violation of an ordinance passed by the village providing that public picnics

and open-air dances within the limits of the village are nuisances, it was held that a court of equity will not interfere by injunction to restrain the enforcement of the ordinances in the appropriate courts on the ground that such ordinances are alleged innocence of the party charged; nor will the court enjoin such proceedings for the purpose of determining the validity of the ordinance in a court of law when the defendant has an adequate remedy at law for any injury he may sustain. The law as established in these cases is fully sustained by the decisions in other courts, as will be found by reference to the cases cited in *Poyer v. Village of Des Plaines*; *Davis v. American Society*, 75 N. Y. 362; *West v. Mayor*, 10 Paige (N. Y.), 539; *Cohen v. Goldsboro*, 77 N. C. 2; *Devron v. First Municipality*, 4 La Ann. 11; *Moses v. Mayor*, 52 Ala. 198; *Burnett v. Craig*, 30 Ala. 135."

See, also, *Thompson v. Tucker* (Okla., 1905), 83 Pac. 413.

66. *Wardens v. Washington*, 109 N. C. 21; *Cohen v. Goldsboro*, 77 N. C. 2.

67. *Busbee v. Lewis*, 85 N. C. 332; *Busbee v. Macy*, 85 N. C. 329; *Pearson v. Boyden*, 86 N. C. 585.

order in equity.⁶⁸ But an injunction lies in favor of the taxpayers to prevent a city from passing an ordinance authorizing an illegal disposition of its property, the general rule that the passage of a municipal ordinance will not be enjoined being confined to subjects over which the municipality, in its governmental character has discretionary authority.⁶⁹ And where an injunction is brought against a city council to restrain the passage of a city ordinance authorizing the illegal disposal of wharfage property, a withdrawal of the ordinance will not defeat the injunction.⁷⁰ The enforcement of a void city ordinance may be enjoined in order to prevent a multiplicity of actions at the instance of any person whose interests are injured by it, but if it is not void a court of equity cannot determine whether or not the plaintiff has violated it.⁷¹ And where all the provisions of an ordinance are not void, its enforcement cannot be enjoined.⁷²

68. *Marvin Safe Co. v. New York* (N. Y.), 38 Hun, 146, per Daniels, J.: "If no authority existed to enact the ordinance in the broad terms contained in it the want of such authority would constitute a legal defense to any action brought for the recovery of the prescribed penalty. Complete relief to that extent would be secured by making a defense to an action of that description, and if the plaintiff should succeed in maintaining the defense, then further prosecutions under the ordinance might be presented by means of an action of this description. But until such a defense has been successfully made to an action brought for the recovery of the penalty. No such suit as this can be maintained. *Elridge v. Hill*, 2 Johns. Ch. (N. Y.) 281; *West v. Mayor*, 10 Paige (N. Y.), 539; *Wallack v. Society, etc.*, 67 N. Y. 23. . . . The regular course to be followed in a case of this nature where an ordinance of the city is to be resisted on account of the want of

power to enact it was indicated and defined in the *Third Ave. R. Co. v. Mayor*, 54 N. Y. 159, and that is where a multiplicity of suits may be prosecuted or threatened and the right to maintain them is plausibly denied to restrain the prosecution by injunction of every suit but one and to allow that one to proceed to trial and final determination for the purpose of testing the authority upon which the actions are legally dependent."

69. *Roberts v. Louisville*, 92 Ky. 95; *Oliver v. Worcester*, 102 Mass. 489; *Louisville v. Commonwealth*, 1 Duv. 295; *Des Moines Gas Co. v. Des Moines*, 44 Iowa, 505; *People v. Dwyer*, 90 N. Y. 402.

70. *Roberts v. City of Louisville*, 92 Ky. 95, 17 S. W. 216.

71. *Mayor, etc., v. Radecke*, 49 Md. 217; *Davis v. American Society*, 75 N. Y. 362; *Des Plaines Village v. Poyer*, 123 Ill. 348.

72. *Davis v. Fasig*, 128 Ind. 271, 27 N. E. 726. And see *Decker v.*

§ 1291. **Same subject; private bridge over public alley.**—A city ordinance granting to private parties the right to construct for their own use a bridge over a public alley is invalid since cities hold the fee of the streets in trust for public uses only and where the answer to a bill to enjoin the erection of a bridge across a public alley admits an intention to erect the bridge, and describes it specifically, and it appears that defendants have no right to erect any bridge in such alley, it is proper to enjoin them from erecting any bridge across the alley, without limiting the injunction to the particular kind of bridge proposed to be erected.⁷³

§ 1292. **Ordinance passed by officers de facto.**—A private person cannot collaterally attack by injunction a city ordinance on the ground that the legislative body which passed it was not legally constituted, as acts of officers *de facto*, done under color of right, are valid as to the public and third persons.⁷⁴

Sargeant, 125 Ind. 404, 25 N. E. 458.

73. Field v. Barling, 149 Ill. 556, 37 N. E. 850. And see Earll v. Chicago, 136 Ill. 277, 26 N. E. 370; Lake View Town v. Le Bahn, 120 Ill. 92, 9 N. E. 269.

74. Perkins v. Fielding (Mo.), 24 S. W. 444, per Brace, J.: "This is a proceeding by injunction, to restrain the defendant Fielding from grading a strip of land in front of the plaintiff's premises, as a part of Thirty-Ninth street, under a contract with the city of Westport, upon the ground that said strip and street are not within the corporate limits of said street. A temporary injunction was granted. The defendants filed a joint answer, averring that the premises were within the corporate limits of the city of Westport, and a part of Thirty-Ninth street, and that defendant Fielding was duly performing such work under an ordinance and contract with said city; and also a

motion to dissolve the temporary injunction, which motion, upon the hearing, being sustained, the plaintiff appeals. . . . Chief Justice Butler, in the celebrated case of State v. Carroll, 38 Conn. 449; loc. cit. pp. 471, 472, upon an exhaustive review of all the English and American authorities of note, lays down the following rules, among others, upon the subject: 'An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interests of the public and third persons, where the duties of the office were exercised—First, without known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be; . . . third, under color of a known elec-

§ 1293. **Ordinance in favor of railroad bonds; parties.**—The power of a municipal corporation to issue bonds is limited by the authority conferred upon it and an issuance of bonds for the purpose of aiding a railroad may be enjoined where such act would be in violation of the constitution.⁷⁵ Where an ordinance authorizes the mayor to guarantee the payment of certain railroad bonds by and with the advice of the committee on the city debt, the committee are proper parties to a bill to enjoin such guarantee; but, if such a bill to enjoin a city from guaranteeing railroad bonds avers that the bonds have all been sold and negotiated, it need not make the railroad a party.⁷⁶

tion or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body.' The principles announced in the able and exhaustive opinion in this case have been variously applied and the case universally followed, in subsequent cases, and the language of the learned chief justice has become almost a text upon the subsequent law writers. Many of the cases are cited, and the application of the principles thereof pointed out, in 5 Amer. Eng. Enc. Law, note 1, pp. 96-103, inclusive, and in note 1, 1 Dill Mun. Corp. (4th Ed.), § 276. See, also, Adams v. Lindell, 5 Mo. App. 197, approved 72 Mo. 192. Judge Dillon, in the text to which the note is applied, says: 'In this country the doctrine is everywhere declared that the acts of *de facto* officers, as distinguished from the acts of mere usurpers, are valid, and the principle extends, not only to municipal officers generally, but also to those composing the council or legislature or governing body of a municipal corporation.' It would be difficult to imagine a case which could call more loudly, upon the score of justice and policy, for the applica-

tion of these principles, than does the case in hand. Judgment affirmed."

75. Dodge v. Van Buren Circuit Judge, 118 Mich. 189, 76 N. W. 315.

76. Goddard v. Providence, 18 R. I. 536, 28 Atl. 765, per *Curiham*: "By the terms of Ordinance No. 713 (an ordinance authorizing the indorsement of the bonds of the Providence & Springfield Railroad Company), the mayor is authorized to guarantee the payment of the bonds only by and with the advice of the committee on the city debt. Their advice is consequently necessary to the mayor's action. This being so, the committee on the city debt is a part of the instrumentality for the carrying out by the city of the action which it is the purpose of the bill to enjoin. We think, therefore, that, in accordance with well-settled principles, the committee of the city debt were properly made parties to the bill. Story, Eq. Pl. § 159; Sully v. Drennan, 113 U. S. 287, 5 Sup. Ct. Rep. 453, 28 L. Ed. 1007. Their demurrer to the bill is overruled. The bill avers that the bonds have all been sold and negotiated. If this be so, the Providence & Springfield Rail-

§ 1294. **Invalid city contracts.**—A municipality may be prevented by injunction from executing or entering upon the performance of a contract which is void as being in excess of the powers conferred upon it.⁷⁷ So in New York it has been decided that where a city charter only requires the original cost of a pavement to be borne by abutting owners and leaves to the city the expenses of keeping it in repair, a contract which requires the contractor for ten years to make necessary repairs not only of defects caused by material and workmanship and natural wear and tear, but also of those caused by the action of the elements, is void, and the execution thereof, will be enjoined for casting unauthorized burdens upon the abutting owners, in the absence of proof that the period of the guaranty was no longer than the ordinary durability of such pavement when laid with the best workmanship and material.⁷⁸ And a guaranty of bonds by a city, which act is unauthorized, may be restrained in a suit by the tax-

road Company has ceased to have any interest in the bonds, and, no relief being prayed against it, the complainants could not properly have made it a respondent. Had they done so, the bill would have been clearly demurrable. Pub. St., R. I., ch. 192, § 15, provides that any person, on making it appear that he is interested in the subject-matter of a suit, may be allowed to become a party. If the Providence & Springfield Railroad Company is still the holder of the bonds, as alleged, when that fact appears it may be permitted by the court to become a party to the suit, if the complainants do not voluntarily amend their bill by making it a party; but on the allegations of the bill, of which alone, on demurrer, we can take cognizance, we do not think that the Providence & Springfield Railroad Company is entitled to be made a party, and hence the demurrer of the city of Providence, incorporated in its answer, based on the ground that the

bill is defective for the nonjoinder of that company, must also be overruled."

77. Arkansas.—*Forrester v. Hardware Co. v. Erb*, 54 Ark. 645, 17 S. W. 7, 13 L. R. A. 353.

Illinois.—*Adams v. Brennan*, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 96 Am. St. R. 222.

Indiana.—*Alexander v. Johnson*, 144 Ind. 82, 41 N. E. 811.

Kansas.—*Shanks v. Pearson*, 66 Kan. 168, 71 Pac. 252.

Minnesota.—*Farmer v. St. Paul*, 65 Minn. 176, 67 N. W. 990, 33 L. R. A. 199.

New York.—*Birge v. Berlin Iron B. Co.*, 133 N. Y. 477, 31 N. E. 609; *Pullman v. Mayor of New York*, 49 Barb. 57.

Wisconsin.—*Webster v. Douglass County*, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451, 72 Am. St. Rep. 870.

78. Bradshaw v. Jamestown, 125 App. Div. (N. Y.) 86.

payers.⁷⁹ And it has also been decided that a payment by municipal authorities on a contract which is void may be restrained by injunction.⁸⁰ But where work under a contract for public improvements has been begun it is held that the making of such improvements will not be enjoined where the statute provides for an appeal upon the issuance of a precept for the collection of assessments.⁸¹ And in Massachusetts it has been held that a court of equity has not jurisdiction to entertain a suit by individual taxpayers to restrain a city from carrying out an invalid contract, though a different rule exists in some jurisdictions.⁸² And it has been decided that a city will not be enjoined, at the instance of a taxpayer, from entering into a contract awarded by it which will be void when executed because it was awarded without previous advertisement for bids, as required by law and a resolution of such city; for being void it could not be enforced and would not therefore be an irreparable injury to the taxpayer.⁸³ And it has

79. *Lynchburg & R. S. R. Co. v. Dameron*, 95 Va. 545, 28 S. E. 951.

80. *Flynn v. Little Falls E. & W. Co.*, 74 Minn. 180, 77 N. W. 38. See, also, *Collier v. Elliott*, 100 Ga. 363, 28 S. E. 117. Compare *Wayne County v. Dickinson*, 153 Ind. 682, 53 N. E. 929; *Eeroyd v. Coggeshall*, 21 R. I. 1, 41 Atl. 260.

81. *Everett v. Deal*, 148 Ind. 90, 47 N. E. 219.

82. *Steele v. Municipal Signal Co.*, 160 Mass. 36, 35 N. E. 105, per Allen, J.: "This suit is not brought under Pub. St., ch. 27, § 129, no such vote having been passed as is there contemplated, but the plaintiffs seek to maintain their bill under the general equity jurisdiction of the court. A difference of opinion has existed elsewhere whether it is within the general scope of the jurisdiction of a court of equity to entertain a suit by individual taxpayers to restrain cities and towns from carrying out invalid con-

tracts and performing other similar wrongful acts, 2 Dill. Mun. Corp (4th Ed.), § 914 *et seq.* In Massachusetts it can hardly be considered an open question, it having been involved in the decision of *Baldwin v. Wilbraham*, 140 Mass. 459, 4 N. E. 829. Assuming that the full general equity jurisdiction of the court is unlimited by the retention of the provision of Pub. St., ch. 27, § 129, still, according to the decision in *Baldwin v. Wilbraham*, the subject of this suit is outside of that jurisdiction. Decree affirmed."

83. *Public Ledger Co. v. Memphis* (Tenn.), 23 S. W. 51, per Snodgrass, J.: "Not denying the right of complainant, as a taxpayer, to enjoin defendant from the execution of an illegal contract if it would or might result in irreparable injury (*Lynn v. Polk*, 8 Lea, 121), no such case is presented here as calls for the intervention of a court of equity by the extraordinary process of injunction.

also been held that performance of a contract by a city will not be enjoined at the suit of a taxpayer merely because it is *ultra vires* where it does not appear that the taxes will be thereby increased or that performance will in any way injuriously effect the property or personal rights of the taxpayers or public.⁸⁴

§ 1295. **Frame buildings within fire limits, etc.**—Where an ordinance prohibiting the erection of wooden buildings within certain limits, known as fire limits, provides the remedy for its violation, generally by prosecution and the infliction of a penalty, a court of equity will not, it has generally been held, grant an injunction restraining the erection of a building in violation thereof.⁸⁵ But in a case in New York it was decided that the common council of the city of Brooklyn had no power to grant permits authorizing the erection or retention of frame buildings within the fire limits of the city, and any person receiving and acting under such a permit might be compelled by the court to

The contract, as alleged, could at most be void, and not enforceable against the city; and in no event could complainant, as a taxpayer, be therefore injured or affected. The remedy by injunction to prevent municipal corporate action is one not lightly to be applied, or in matters not immediately affecting or to affect the complaining taxpayer. If the matter complained of is not merely of simple contract of no serious moment, and which may be defeated by resistance to its enforcement, even by the body making it, there is no sufficient ground for use of the writ at the instance of the taxpayer." Where a city council has let a contract to do the public printing to the lowest bidder, as required by the city charter, the fact that such bidder is not a publisher of a newspaper does not authorize an injunction restraining him from proceeding to execute the con-

tract; and the court granting it has no power to punish the bidder for disobeying the order as for a contempt. *State v. Milligan* (Wash.), 28 Pac. 369.

84. *Wood v. Victoria*, 18 Tex. Civ. App. 573, 46 S. W. 284.

85. *Michigan*.—*St. Johns v. McFarlan*, 33 Mich. 72, 20 Am. Rep. 671.

Missouri.—*Rice v. Jefferson*, 50 Mo. App. 464.

New York.—*New Rochelle v. Lang*, 75 Hun, 608, 27 N. Y. Supp. 600; *Young v. Scheu*, 56 Hun, 307, 9 N. Y. Supp. 349.

Pennsylvania.—*Elwood City v. Main*, 16 Pa. Co. Ct. R. 474.

Wisconsin.—*Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. 128, 20 Am. St. R. 123, 8 L. R. A. 808; *Wau-pun v. Moore*, 34 Wis. 450, 17 Am. Rep. 446.

But see *Kaufman v. Stein*, 138 Ind. 49, 37 N. E. 333.

take down and remove such buildings within a reasonable time.⁸⁶ And in a recent case it is decided that an injunction should not be granted to restrain a city from removing a frame building situated within the fire limits, it not appearing that the injury is one for which adequate compensation may not be recovered in an action at law or that the city is insolvent.⁸⁷ In a case in Iowa, however, it is decided that injunction will lie to prevent an incorporated town from removing a building as an alleged violation of a fire

Maintenance of "sky sign."—

An action for an injunction lies to restrain the maintenance of a "sky sign" erected upon the roof of a building in New York city, in violation of the building code. *New York v. Wineburgh Adv. Co.*, 122 App. Div. (N. Y.) 748. See *Matter of City of New York*, 122 App. Div. (N. Y.) 741.

86. *Brooklyn v. Furey*, 9 N. Y. Misc. 193, per Clement, C. J.: "When the Legislature gave the common council power to enlarge the fire district I am of the opinion that it thereby prohibited that body from doing the opposite. The Legislature considered what powers should be given on the subject to the common council, and determined that it might enlarge, but not reduce, the fire district. The subsequent general clause as to their powers, by which that body might pass an ordinance for the general welfare, did not confer the right to interfere with the fire limits, because the subject had been considered in fixing their special powers. *Flanagan v. Hollingsworth*, 2 How. Pr. (N. S.) 391, 108 N. Y. 621, and cases there cited. The counsel for respondent claims that his client, by reason of the consents obtained and the lapse of time, has vested rights. The difficulty is that he never had any rights to vest. A similar case arose in New York city, where the dock de-

partment attempted to lease piers with sheds erected in violation of the fire laws. Judge Earl in that case said (*N. Y. Fire Dep't v. Atlas Steamship Co.*, 106 N. Y. 566, 577, 13 N. E. 329): 'The defendant, by its lease of the pier from the dock department, was not authorized to violate the building laws applicable to the city. No department or officer of the city government could enter into a valid stipulation with the defendant by which it would be authorized to violate any law enacted for the public safety.' I am also of opinion that the ordinances of the common council, giving consent to the respondent to erect frame buildings within the fire limits, are void as unjustly discriminating between one citizen and another. The resolutions do not purport to reduce the fire limits, but are simply permits. They allow one citizen in a block to do an act which is penal if done by any other citizen in the same block. Special discrimination by ordinance is no allowed. *Dillon* (4th Ed.), § 322, and cases cited. A decree will be entered requiring the respondent to take down and remove all the frame buildings on the lots in question. A reasonable time to comply with the decree will be allowed."

87. *Clark v. City of Deadwood* (S. D., 1908), 117 N. W. 131.

limit ordinance, there being no other adequate legal remedy for a wrongful removal thereof.⁸⁸

§ 1296. **Removing appointive city officer.**—A writ of prohibition will lie to prevent the common council of a city from proceeding with the investigation of charges preferred against the counsellor of such city with a view of his removal from office, where there is no charter provision giving the council the power of removal. It is no ground for the removal of an officer that he had been guilty of misconduct in an office which he held prior to his induction into the office from which he was sought to be removed; and there is no inherent power in the governing body of a city to remove, even for cause, an appointive officer of the city.⁸⁹

88. *Lemmon v. Town of Guthrie Center*, 113 Iowa, 36, 84 N. W. 986. 86 Am. St. Rep. 357.

89. *Speed v. Detroit Common Council*, 98 Mich. 360, 57 N. W. 406, per Grant, J.: "It is suggested, rather than seriously insisted, by the learned counsel for the respondents, that the writ of prohibition does not lie in the present case, for the reason that the common council was proceeding in a political or administrative way, rather than in any other. They cite *Mechem*, Pub. Off. 1019, 1020; *High*, Extr. Rem. 783, 769; *Burch v. Hardwicke*, 23 Gratt. (Va.) 51; *People v. District Court*, 6 Colo. 534; *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. Rep. 570, 29 L. Ed. 601. The rule laid down by these learned authors is that the writ lies only to prevent the unauthorized exercise by courts and officers of judicial powers, and does not lie to restrain executive or ministerial action; and the authorities above cited together with others, are

cited in support of the proposition. In *People v. District Court*, the power to remove for certain causes was expressly conferred upon the city council of Leadville. No doubt, therefore, existed of the jurisdiction of the council in the matter. In *Burch v. Hardwicke*, the power was also expressly conferred by the charter upon the mayor to suspend or remove officers for misconduct in office or neglect of duty. In *Smith v. Whitney* the writ was invoked to prohibit the secretary of the navy, and a general court martial of naval officers, to try the relator upon charges which had been preferred against him. In all these cases the respondents were proceeding under the express authority of law, and they are therefore clearly inapplicable to the present case. The writ lies 'to prohibit the exercise by an inferior tribunal or officer of judicial powers with which he is not legally vested,' and 'to prevent actions in excess of the jurisdiction conferred by law, and not to regulate or control the manner in which a lawful juris-

§ 1297. Diversion by city of public grounds.—A dedication of land by a county to public use as a public square will not fail because the city for whose benefit it was intended was not in existence at the time of the dedication, since the city, on springing into existence as a municipal corporation, is by operation of law invested with the control, for the use of the public, of all highways and public grounds within the corporate limits, subject to such reserved rights as may exist in favor of the county, and the city may be enjoined from diverting a public square from the public use to which it was dedicated.⁹⁰

diction shall be exercised.' Mechem, Pub. Off. 1013, 1014. Under the Constitution, the Legislature may provide for the removal of municipal officers. It certainly has never been regarded in this State that the officer or body upon whom this power is conferred acts in a purely political, administrative, or legislative capacity. Such officer or body acts, and must of necessity act, in a *quasi* judicial capacity, and the method of procedure must be of *quasi* judicial character. *Stockwell v. Township Board*, 22 Mich. 341; *Dullam v. Willson*, 53 Mich. 392, 19 N. W. 112; *People v. Stuart*, 74 Mich. 411, 41 N. W. 1091; *Fuller v. Ellis*, 98 Mich. 96, 57 N. W. 33. Such officer or body then becomes an inferior tribunal, amenable to the writ of prohibition, when acting in exercise of the jurisdiction conferred. In such cases it is of little consequence what name is given to the power conferred. The name cannot relieve it of its essential character. It would be a reproach to the law if it did not provide a speedy remedy by which such tribunals can be prohibited from the exercise of an excess of authority, or of an authority which they do not possess. We are of the opinion that

the writ lies in the present case. *State v. Common Council of City of Duluth*, 53 Minn. 238, 55 N. W. 118; *People v. Cooper*, 57 How. Pr. 416; 1 Dill. Mun. Corp. 253."

90. *Llano City v. Llano County* (Tex.), 23 S. W. 1008, per *Curiam*: "In *Campbell Co. v. Town of Newport*, 12 B. Mon. 539, it is held that a dedication of a square for public buildings can only be used by the county for such purpose, and it will not be permitted to use it for a different purpose. In *City of Dubuque v. Maloney*, 74 Amer. Dec. 365, the rule is stated that a dedication made for a designated public use does not authorize the city to use it for another purpose. In *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 541, the railway company, by virtue of its charter, was authorized to run its road over, across and along the streets, alleys, public grounds, squares, etc., of the town of Jacksonville.' In pursuance of this grant, it attempted to construct its road across a public square within said city. The square was dedicated to the public by the original proprietors of the land. The court, in perpetually enjoining the railway company in its encroachment upon the square, says: 'The

§ 1298. **Enjoining authorized contract.**—Where the city of Boston took certain land for the construction of a sewer under the authority of the statute of 1885 which empowered it to take in fee for such purposes, it was held that the former owner of the land could not enjoin the performance of a contract as authorized

square was intended for beauty and adornment, and for the health and recreation of the public, and the donors ever intended that it should be used as a street. . . . The donation was for a specific and defined purpose, . . . and was intended for the use of the public; and any attempted use, different from that to which it was originally intended, would be a diversion of the trust. No power lies in the city or any other to do that. In *McCullough v. Board*, 51 Cal. 418, the city, through its board of education, by the consent of the city and county, attempted to use a part of one of the public squares of the city upon which to erect a schoolhouse. The court held that such authority cannot be conferred by the city and county, as such a use would be inconsistent with the purpose for which said squares were created. In *Village of Princeville v. Auten*, 77 Ill. 327, the village board of trustees attempted to move the town hall from its present site, and to place it on the public square. It was held that the public square was devoted to the use and enjoyment of the public, and that neither the city nor the county could appropriate or use it for the purpose of erecting thereon public buildings. In *Lamar Co. v. Clements*, 49 Tex. 349, it is held that the county, having accepted the block or square in question from the donor for the purpose of erecting a courthouse thereon, was estopped from making use of the property so

dedicated for an altogether different use. The case before the court in *Harris Co. v. Taylor*, 58 Tex. 690, in some of its features is similar to this case. There the original proprietors dedicated a block or square in the city of Houston as a 'courthouse square.' The county undertook to erect upon it a jail. Some of the adjacent owners enjoined the erection upon the ground that the erection of the jail was a use and appropriation of the square to purposes foreign to its dedication, and its erection would constitute a public nuisance. The county contended that the use of the property for a jail was in keeping with the purpose of the dedication, and that such jail was a public use and public necessity. The court perpetuated the injunction restraining such use of the property, and, in effect, held that the construction of the jail was a use inconsistent with the dedication, and that the right to erect a courthouse thereon did not confer the right to erect a jail. A dedication of property to public uses by the government of a county is measured by the same law that governs a dedication for such purposes by an individual, and when the dedication is made by the county it has no more right to devote the property to uses foreign to the dedication than an individual would have. *City of Dubuque v. Maloney*, 74 Amer. Dec. 365; *Samuels v. Mayer*, etc., of Nashville, 3 Sneed, 299; *Village of Princeville v. Auten*, 77 Ill.

by statute between the city and the sewerage board whereby the city agreed to take into its sewers the sewage of certain other cities, on the ground of his supported possibility of reverter in such land; nor can he enjoin the performance of such contract on the ground that his remaining, and adjoining land will be seriously

326; 2 Dill. Mun. Corp. (4th Ed.), § 647; *McCullough v. Board*, 51 Cal. 418; *Lamar Co. v. Clements*, 49 Tex. 354; *Harris Co. v. Taylor*, 58 Tex. 693. The rule that exists in Pennsylvania, announced in the case of *Com. v. Bowman*, 3 Pa. St. 203, that the right of the counties to the use of the public squares upon which to erect courthouses and public buildings has in that State 'become so established by usage and custom as to have acquired the consistency of law,' cannot, we think, obtain in this State; but that, rather, that rule should prevail that is announced in the case of *Village of Princeville v. Auten*, 77 Ill. 326, to the effect that a square dedicated to the public cannot, by reason of a custom or usage be used for a purpose inconsistent with the purposes to which it was dedicated.' In *Smith v. McDowell ex rel Hall*, 148 Ill. 51, 35 N. E. 141, *Shops, J.*, said: 'By the platting of the village, the streets, in their entire width and length, were dedicated to the use of the public as streets. The village thereby became seized in fee of the streets and alleys for the use of the local and general public, holding them in trust for such uses and purposes, and none other. *Alton v. Illinois Transp. Co.*, 12 Ill. 38; *Carter v. Chicago*, 57 Ill. 285; *Chicago v. McGinn*, 61 Ill. 266; *Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540; *Quincy v. Jones*, 76 Ill. 231; *Kreigh v. Chicago*, 86 Ill. 410; *Stack v. East St. Louis*, 85 Ill. 377; *Lee v. Town of Mound*

Station, 118 Ill. 312; 8 N. E. 759. These municipal corporations are instrumentalities of the State, exercising such powers as are conferred upon them in the government of the municipality. Their power is measured by the legislative grant, and they can exercise such powers only as are expressly granted or are necessarily implied from the powers expressly conferred. The legislature, representing the great body of the people of the State, when no private right is invaded or trust violated (*Jacksonville v. Jacksonville Ry. Co.*, *supra*), may repeal the law creating them, or exercise such control in respect of the streets, alleys, and public grounds within the municipalities of the State as it shall deem for the interest of the people of State. Dill. Mun. Corp., § 541; *Chicago v. Rumsey*, 87 Ill. 355; *People v. Walsh*, 96 Ill. 253; *Chicago v. Union Bldg. Ass'n*, 102 Ill. 397; *Commissioners v. McMullen*, 134 Ill. 170, 25 N. E. 676. It does not follow, however, as seems to be supposed, that, by the use of the general words 'and vacate the same,' the absolute power of the legislature was intended to be conferred upon the municipal authorities. The grant of power in this particular is to be construed in view of the purposes for which the municipality is invested with the control of its streets, alleys, and public grounds. The municipality, in respect of its streets, is a trustee for the general public, and holds them for the use to which they

enjoined by such performance though no provision is made by statute for compensation for such damages.⁹¹

§ 1299. Waste and misapplication.—Though the purchase of water works be a matter within the discretion of the city council yet such a purchase at a grossly excessive price may be enjoined at the suit of taxpayers as involving a waste and misapplication of

are dedicated. The fundamental idea of a street is not only that it is public, but that it is public in all its parts, for free and unobstructed passage thereon by all persons desiring to use it. In *Alton v. Illinois Transp. Co.*, *supra*, we said, in treating the subject there under consideration: 'Whatever title to these public grounds may be vested in the city, she has not the unqualified control and disposition of them. They were dedicated to the public for particular purposes, and only for such purposes can they be rightfully used. For these purposes the city may improve and control them, and adopt all needful rules and regulations for their management and use, but she cannot alien or otherwise dispose of them. At most, she but holds them in trust for the benefit of the general public.' In *Quincy v. Jones*, *supra*, after quoting with approval the foregoing language, it is said: 'It is the unquestioned duty of the city, in controlling and improving the streets, to prepare them for public use as streets, . . . as the public necessity may require. Holding them in trust for the public, and having no authority to convey or divert them to other uses, it would seem inevitably to follow that they can have no power to grant to individuals rights or easements in the streets which might in any way interfere with the duty of preparing

them for public use.' And in *Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448, in considering the power of the municipality to grant rights in the public streets of the city, it was said: 'It is not claimed that the use of the streets can be permanently granted for private purposes, and we recognize as unquestionable law that the use of the streets . . . must be for the public, and that no corporation or individual can acquire an exclusive right to their use, or to the use of any part of them, for private purposes.' In *Glasgow v. St. Louis*, 87 Mo. 678, under power 'to establish, open, vacate, alter, widen, extend, pave, or otherwise improve all streets,' etc., it was held that an ordinance to vacate a portion of one of the streets of the city for the use of private parties was *ultra vires*. See, also, *Reimer's Appeal*, 100 Pa. St. 182; *St. Vincent Orphan Asylum v. Troy*, 76 N. Y. 108; *State v. Berdetta*, 73 Ind. 185; *Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co.*, 82 Mo. 127; *Dubach v. Railroad Co.*, 89 Mo. 486, 1 S. W. 86."

91. *Titus v. Boston*, 161 Mass. 209, 36 N. E. 793, per Holmes, J.: "The power given by St. 1885, ch. 249, § 1, to the board of aldermen to 'take in fee for the city of Boston any land that they may deem necessary for' 'the purposes of building and maintaining the system of sewers

the public funds.³² And it is decided that a bill for injunction, rather than certiorari, is the proper proceeding to arrest an unlawful attempt by a city to dispose of its property to the injury of its

of said city, and discharging sewage therefrom,' is a power to take the title in fee simple absolute to the land. Page v. O'Toole, 144 Mass. 303, 10 N. E. 851; Dingley v. City of Boston, 100 Mass. 544, 554. It follows that the plaintiff cannot maintain her bill on the ground of her supposed possibility of reverter in the lands taken by the city for a sewer. See, further, Chandler v. Jamaica Pond Aqueduct, 125 Mass. 544, 547. The plaintiff claims relief on the further ground that her remaining land will be seriously injured by the proposed use of the city's sewer. It is true that under the contract between the city and the commonwealth, more sewage naturally will be discharged than would be if the city should use its sewer for its own sewage alone. But while the contract is authorized by St. 1889, ch. 439, § 4, it is assumed by the plaintiff that no provision is made in that statute for compensation to her for damage which her remaining land may suffer from the increase in the discharge. We make the same assumption without deciding the point or expressing an opinion upon it. It might be possible to read the words of section 4, that the commonwealth 'shall pay . . . all damages that shall be sustained by any person by reason of such taking or entering as aforesaid,' as referring to any taking or entering authorized by the section, and also to say that the statute did not require a description to be filed of the plaintiff's remaining and affected by the entering. Taft v. Com., 158

Mass. 526, 547, 33 N. E. 1046. But, granting so much to the plaintiff, we still are of opinion that the bill shows no ground for relief. The act of 1885, when authorized land to be taken for a system of sewers, in the language quoted at the beginning of this decision, authorized the building and use of the sewers. It is true that the only damages provided for are those 'sustained by any person in property by the taking of any land as aforesaid,' and that this does not include damage to adjoining lands by the use of the sewers, except so far as that caused by increased proximity may be allowed in estimating the damages for taking land, on the principle of Walker v. Railway Co., 103 Mass. 10, and Taft v. Com., 158 Mass. 526, 548, 549, 33 N. E. 1046. But within bounds a statute may authorize what but for it would be a nuisance, and it does not appear that this statute goes beyond the bounds. Taft v. Com., *ubi supra*; Sawyer v. Davis, 136 Mass. 239."

92. Avery v. Job, 25 Oreg. 512, 36 Pac. 293, per Bean, J.: "No principle of equity jurisprudence is, perhaps, better established than that when the officers of a municipal corporation are clothed with a discretionary power, and are acting within the scope of such power, a court of equity will not sit in review of their proceedings, or interfere by injunction, at a suit of a private citizen unless fraud is shown, or the power or discretion is being manifestly abused, to the oppression of the citizen. The fact that the court would

taxpayers.⁹³ The action by a taxpayer of a municipality against a municipal officer to prevent waste or injury to its property, authorized by the New York Code of Procedure, was intended only to protect against the officer's fraud and to prevent his illegal action and a complaint in such an action is not sufficient which charges the officer with proposing to purchase property for the municipality at an extravagant price but does not also charge him with fraud.⁹⁴ Under the provision of a statute which author-

have exercised the discretion in a different manner will not warrant it in interfering. *Spring Valley Water-works v. City of San Francisco*, 82 Cal. 286, 22 Pac. 910, 1046. Although the acts of the council are not charged to have been fraudulent, and the term fraud is not used in the complaint, facts are stated and alleged which show such a gross and manifest abuse of discretion and disregard for the rights of the taxpayer as amount to the same thing. Fraud is not a fact, but a conclusion of law from facts; and the term may not be used at all in the pleadings if facts are averred which show fraud as a conclusion of law. *Bliss*, Code Pl. § 211; *Hess v. Young*, 59 Ind. 379. The officers of a municipality in many respects sustain the relation of trustees to the citizens and taxpayers, and, while they are necessarily invested with large discretionary powers in the conduct of the affairs of the corporation, which the courts will not interfere, it is too clear for argument that they cannot, in total disregard of the rights of the citizens and taxpayers, waste and misapply the public funds, as the complaint alleges is contemplated in this case. By their demurrer the defendants admit that they intend and contemplate, as the representatives and trustees of the city, to pay \$28,000 out of the public funds for property

worth not to exceed \$10,000, and wholly inadequate and insufficient for the purposes for which it is designed, and this admission shows such an unwarranted invasion of the rights of the taxpayer as will be prevented by an injunction at the instance of such taxpayer."

93. *Brockman v. City of Creston*, 79 Iowa, 587, 44 N. W. 822.

94. *Ziegler v. Chapin*, 126 N. Y. 342, 27 N. E. 471; *Talcott v. Buffalo*, 125 N. Y. 280, 26 N. E. 263. A proposed contract between the board of electrical control of New York city and the Standard Electric Subway Company omitted all reference to a resolution previously adopted by the board designating the streets and avenues on which, and limiting the time within which, subways for the accommodation of electric wires were to be constructed by the company. The proposed contract provides that all disputes as to the use of the subways shall be referred to the board of control, while Laws N. Y. 1887, ch. 716, from which the board derives its authority, provides for the settlement of such disputes by the justices of the supreme court or the judges of the court of common pleas or superior court. The proposed contract also gives the city the option to purchase the subways, subject to all incumbrances placed thereon by the company, without limitation as to the

ized certain officers of the city of Brooklyn to purchase certain property from a water works company and if they could not agree with the company as to price to take it by the right of eminent domain "within two years thereafter," it was held that a taxpayer might enjoin them from carrying out a contract with the company made after the expiration of two years as being illegal and void.⁹⁵

§ 1300. **Misappropriation.**—It is the prevailing rule that taxpayers may enjoin municipal corporations and their officers from transcending their lawful powers or violating their legal duties in any mode which will injure the taxpayers,—such as making an unauthorized appropriation of the corporate funds, or an illegal disposition of the corporate property. In such cases the equity jurisdiction usually rests upon fraud, breach of trust, multiplicity of suits, or the inadequacy of the ordinary remedies at law.⁹⁶ And the jurisdiction of equity to grant injunctive relief in such cases is uniformly recognized in the decisions.⁹⁷ The taxpayers are in equity the owners of municipal funds upon which

amount, while the act declares that the incumbrances at the time of the purchase of the subways by the city shall not exceed 50 per cent. of their cost. It was held that the execution of the proposed contract by the board should be enjoined at a taxpayer's suit, as it is illegal and wasteful within the meaning of Laws N. Y. 1887, ch. 673, which authorizes the prosecution of an action by a taxpayer against the officers or commissioners of any municipal corporation "to prevent any illegal official act on their part, or to prevent any waste or injury" to the property or funds of the corporation. *Armstrong v. Grant*, 56 Hun, 226, 9 N. Y. Supp. 288.

95. *Ziegler v. Chapin*, 126 N. Y. 342, 27 N. E. 471.

96. *Dillon, Mun. Corp.* 4th Ed. §

914, citing as to unauthorized assessments in cases of fraud, *First Nat. Bank v. Cook*, 77 Ill. 622; *Brandirff v. Harrison Co.*, 50 Iowa, 164; *Du Page Co. v. Jenks*, 65 Ill. 275; *Riley v. W. U. Tel. Co.*, 47 Ind. 511; *Lebanon v. Ohio, etc., R. Co.*, 77 Ill. 539. And see *Harrington v. Plainview*, 27 Minn. 224, 6 N. W. 777; *Willard v. Comstock*, 58 Wis. 565, 17 N. W. 401; *Lynch v. Eastern, etc., R. Co.*, 57 Wis. 430, 15 N. W. 743, 825; *Robertson v. Breedlove*, 61 Tex. 316; *Richmond v. Crenshaw*, 76 Va. 936.

97. *United States*.—*Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; *Fazendo v. Houston*, 34 Fed. 95.

California.—*Bradford v. San Francisco*, 112 Cal. 537, 44 Pac. 912; *Barry v. Goad*, 89 Cal. 215, 26 Pac. 785.

warrants are drawn and the municipal authorities are merely trustees and can only hold and apply the fund to the legitimate purposes of the trust, and will be restrained from a misuse or misappropriation of such funds in a suit by a taxpayer.⁹⁸ Thus, a city may be enjoined, at the suit of a citizen and taxpayer, from making an illegal appropriation to celebrate the fourth of July, as such a misappropriation of the corporate funds is an injury to the taxpayer for which no other remedy is so effectual as an injunction.⁹⁹ And where the New Orleans city council illegally appro-

Colorado.—Packard v. Board of Comm's, 2 Colo. 338.

Connecticut.—Perrett v. Town of Sharon, 34 Conn. 105.

Florida.—Chamberlain v. Tampa, 40 Fla. 74, 23 So. 572.

Illinois.—Chicago v. Nichols, 177 Ill. 97, 52 N. E. 359.

Indiana.—Alexander v. Johnson, 144 Ind. 82, 41 N. E. 811; Warren County Agricultural Joint Stock Co. v. Barr, 55 Ind. 30.

Iowa.—Cascaden v. Waterloo, 106 Iowa, 673, 77 N. W. 333; Rodgers v. Independent School Dist., 100 Iowa, 317, 69 N. W. 544.

Kansas.—Missouri River, Fort S. & G. R. Co. v. Miami County Comm's, 12 Kan. 230.

Kentucky.—Patton v. Stephens, 14 Bush. 324.

Louisiana.—State v. New Orleans, 49 La. Ann. 804, 21 So. 870, 37 L. R. A. 540.

Maryland.—Wiley v. School Commissioners, 51 Md. 401.

Massachusetts.—Allen v. Inhabitants of Marion, 11 Allen, 108.

Michigan.—Attorney-General v. Detroit, 26 Mich. 263.

New Hampshire.—Brown v. Marsh, 21 N. H. 81.

New Jersey.—Bond v. City of Newark, 19 N. J. Eq. 376.

New York.—Gerlach v. Brandreth, 34 App. Div. 197, 54 N. Y. Supp. 479.

Ohio.—State v. Cuyahoga County Comm's, 6 Ohio, N. P. 405; Fergus v. Columbus, 6 Ohio, N. P. 82.

Oregon.—State v. Metschan, 32 Oreg. 372, 46 Pac. 791, 41 L. R. A. 692.

Pennsylvania.—Sener v. Ephrata, 176 Pa. St. 80, 34 Atl. 954.

Rhode Island.—Fiske v. Hazard, 7 R. I. 438.

Washington.—Krieschel v. Snohomish County Comm's, 12 Wash. 428, 41 Pac. 186; Williams v. Shoudy, 12 Wash. 362, 41 Pac. 169.

West Virginia.—Armstrong v. Taylor County Court, 41 W. Va. 602, 24 S. E. 993.

Where the amount of indebtedness which a municipality may incur is limited by statute, equity will enjoin an increase which exceeds such limit. Sener v. Ephrata, 176 Pa. St. 80, 34 Atl. 954.

The removal of a county seat may be enjoined where an unlawful expenditure of the public funds is involved. Krieschel v. Snohomish County Comm's, 12 Wash. 428, 41 Pac. 186.

98. Litz v. Village of West Hammond, 230 Ill. 310, 82 N. E. 634.

99. New London v. Brainard, 22 Conn. 552. And see Hodges v. Bufalo, 2 Den. (N. Y.) 110; Stetson v. Kempton, 13 Mass. 272.

priated money to pay its expenses in escorting the Liberty Bell back to Philadelphia,—it was held that an injunction would issue, on petition of a taxpayer, against the city, its treasurer, and comptroller.¹ And a taxpayer may sue to enjoin the county auditor from drawing his warrant in payment for the purchase of land of which no notice has been published, for he has such an interest in the application of county funds that he may enjoin their withdrawal from the treasury in payment of demands which have no validity against the county.² And the allowance of an unfounded claim by a city council is not an adjudication estopping the taxpayer from maintaining an action to enjoin the alleged wrongful diversion of public funds for its payment.³ Again, where a municipal corporation, in the petition, resolution, and notice, specifically describes certain property which it proposes to appropriate for public uses, injunction will lie to restrain it from taking any other property.⁴ That one has paid a tax imposed for an illegal purpose does not estop him from seeking to enjoin other appropriations for the same purpose.⁵ And a taxpayer can sue to enjoin a municipal corporation from appropriating money for a purpose not authorized by its charter, although his tax would be increased thereby but a trifle; and his private purpose in bringing the suit is immaterial.⁶ Under the laws of Arkansas a town council

1. Liberty Bell, 23 Fed. 843, per Pardee, J.: "There is no doubt that the said ordinance makes an appropriation of the funds of the city derived from taxation for purposes wholly beyond the purview of municipal government; is a wrongful appropriation of the funds held in trust for the taxpayers and people of New Orleans to pay the alimony and legitimate expenses of the city; and is, in short, *ultra vires*, null and void. Hood v. Lynn, 1 Allen (Mass.), 103; Tash v. Adams, 10 Cush. (Mass.) 252; Claffin v. Hopkinton, 4 Gray (Mass.), 502; Murphy v. Jacksonville, 18 Fla. 318; Grant Co. v. Bradford, 72 Ind. 455; Henderson v. Cov-

ington, 14 Bush (Ky.), 312; Halstead v. Mayor, 3 N. Y. 433; New London v. Brainard, 22 Conn. 552."

2. Winn v. Shaw, 87 Cal. 631, 25 Pac. 968. And see Shakespear v. Smith, 77 Cal. 638, 20 Pac. 294; Foster v. Coleman, 10 Cal. 279. The cases, Linden v. Case, 46 Cal. 174; McCoy v. Briant, 53 Cal. 249; Merriam v. Board, 72 Cal. 519, 14 Pac. 137, are to be distinguished.

3. Fullerton v. City of Des Moines (Iowa, 1908), 115 N. W. 607.

4. Bass v. City of Fort Wayne, 121 Ind. 389, 23 N. E. 259.

5. Huesing v. Rock Island, 128 Ill. 465, 21 N. E. 558.

6. Huesing v. Rock Island, 25 Ill.

is without power to appropriate money to aid in the building of a county courthouse to be located in the town, and the taxpayers of the town may enjoin such a misapplication of town funds; and after the commencement of the suit the jurisdiction of the court cannot be ousted by the recalling of the warrant issued pursuant to such illegal appropriation.⁷

§ 1301. Nuisance caused by city, etc.; trespass.—The apprehended fouling or pollution of a stream of water in the future by the sewerage of a part of a city from sewers, which have been legally, scientifically, and properly constructed, but which has not yet taken place, and of which there is no immediate or imminent danger, and which depends upon a contingency that may not happen, does not present a case for an injunction.⁸ And the threatened violation of a city ordinance which attempts to regulate the erection of buildings, for the purpose of greater security against damage by fire, will not be restrained by injunction, unless the act sought to be prohibited is a nuisance in fact, and not made such by the ordinance alone.⁹ But where a city threatens to dis-

App. 600; reversed 128 Ill. 465, 21 N. E. 558.

7. *Russell v. Tate*, 52 Ark. 541, 13 S. W. 130, per Sandels, J.: "In the present case the appropriation was made, the warrant was drawn and the money paid before an attorney could have comprehended the situation and have written the caption of a complaint. Chancery has ample power to prevent further wrong and require reparation for that which has been done. *Frost v. Belmont*, 7 Allen (Mass.), 152; *Citizens Loan Ass'n v. Lyon*, 29 N. J. Eq. 110; *People v. Fields*, 58 N. Y. 491; *Attorney General v. Boston*, 123 Mass. 460; *Attorney General v. Dublin*, 1 Bligh, N. R. 312; *Attorney General v. Wilson*, 1 Cr. & Ph. 17."

8. *City of Hutchinson v. Delano*, 46 Kan. 345, 26 Pac. 740, per Hor-

ton, C. J.: "Upon these findings the most that can be said is that there is an apprehensive pollution or fouling of the water at some future time. . . . Upon the findings we do not think the injunction should have been granted. The danger is not imminent but wholly contingent. *Newark Aqueduct v. Passaic*, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55; *Coach Co. v. Horse Car Co.*, 29 N. J. Eq. 299; *Stitt v. Hilton*, 31 N. J. Eq. 285; *Delaware, etc., R. Co. v. Stock Yard Co.*, 43 N. J. Eq. 605, 12 Atl. 374, 13 Atl. 615; *Hagerty v. Lee*, 45 N. J. Eq. 255, 17 Atl. 826; *Stoudinger v. Newark*, 28 N. J. Eq. 187; *Merrifield v. Worcester*, 110 Mass. 216; *Brookline v. Mackintosh*, 133 Mass. 215.

9. *City of Manchester v. Smith*, 64 N. Y. 380, 10 Atl. 700. See § 1295 herein in this connection.

charge sewage from a permanent sewer directly upon private lands, without having acquired the right to do so, the owner is not confined to damages in actions of trespass, but may enjoin the city from so injuring his property.¹⁰ And though an injunction will not be granted when plaintiff has remained inactive, knowing that defendant, in good faith, was incurring great expense in prosecuting the work complained of as injurious, this rule does not apply to an application to restrain a city from committing a nuisance by certain sewage improvements, the right to do which has been denied by a judgment in a former action by one of the parties against the city, as in such case the city, being advised of the illegality of its action, is not acting in good faith.¹¹ Again, where a city attempts unlawfully to take away the right of a railroad to load and unload its cars along a city street, equity will not refuse to protect the company simply for the reason that the attempted invasion of its rights are accompanied by acts constituting personal trespass.¹² And where a city attempts, by an ordinance, to deprive a railroad of a vested right to load and unload its freight cars along a city street, equity will not refuse to interfere in behalf of a railroad simply because the ordinance is *quasi* criminal in character.¹³ Where the facts stated in the complaint of a property owner against a township for overflowing his lands, show that he is entitled to an injunction for which he prays, the complaint is not bad by reason of the characterization of the culvert which causes the overflow as a nuisance, even if it is not such, or by reason of a prayer for relief to which plaintiff is not entitled.¹⁴

§ 1302. **City enjoined by street railway, etc.**—A street railway company cannot be compelled by the city to tear up its track

10. *N. Y. Central R. Co. v. Rochester*, 127 N. Y. 591, 28 N. E. 416. See, also, *Carmichael v. Texarkana*, 94 Fed. 561.

Construction of sewer across land owned by a married woman and her husband and he alone was served with notice of condemnation proceedings may be enjoined in suit by her.

Grosser v. Rochester, 148 N. Y. 235, 42 N. E. 672.

11. *Vick v. Rochester*, 46 Hun (N. Y.), 607.

12. *Mobile v. Louisville R. Co.* (Ala.), 4 So. 106.

13. *Mobile v. Louisville R. Co.* (Ala.), 4 So. 106.

14. *Patoka Twp. v. Hopkins*, 131

laid in the center of a street pursuant to an ordinance duly accepted, to permit the laying of a sewer under it, where it appears that the receipts of the company, which has expended large amounts in laying its track and making a safe roadbed there, would be greatly diminished, and public convenience interfered with, and the sewer can just as well be laid on one side of the track; and an injunction will lie, at the instance of the street railway, to prevent the city and the city officers from unreasonably requiring it to tear up its tracks.¹⁹ And a municipality may be restrained from interfering with a street railway in the construction of its

Ind. 142, 30 N. E. 896. And see *Bayless v. Glenn*, 72 Ind. 5.

15. *Des Moines City R. Co. v. Des Moines*, 90 Iowa, 770, 58 N. W. 906, per Robinson, J.: "It is said by the appellee that every franchise is accepted subject to the police power of the State, which cannot be bartered away, and the appellant assents to that proposition. But it is claimed that the demand made by the city is unreasonable, and therefore should be enforced. It is well settled that a municipal ordinance or by-law, to be valid, 'must be reasonable, consonant with the general powers and purposes of the corporation and not inconsistent with the laws or policy of the State,' and that the courts may declare void ordinances and by-laws which are not reasonable. *Meyers v. Railroad Co.*, 57 Iowa, 557, 10 N. W. 896, and authorities therein cited; *Town of State Center v. Barenstein*, 66 Iowa, 249, 23 N. W. 652. See, also, *City of St. Louis v. Weber*, 44 Mo. 547; 1 *Beach. Pub. Corp.* § 512; 1 *Dill. Mun. Corp.* §§ 319-322; *Ex parte Chin Yan*, 60 Cal. 82. An ordinance is unreasonable if it be partial, unfair, or oppressive in its effects, as by imposing a serious burden without adequate cause. *Id.*; *Ex parte Frank*, 52 Cal. 606; *Harrisburg City Pass.*

Ry. Co. v. City of Harrisburg, 149 Pa. 465, 24 Atl. 56. It is not shown that the sewer in question was located in the center of Twelfth street by ordinance, but, conceding that it was so located by action as formal, and entitled to as much weight, as an ordinance, we are required to determine whether that action was reasonable and valid. The ordinance of the year 1866 required that all single tracks be laid in the center of the streets in all cases when it should be practicable to so lay them. The railway in question was constructed according to that requirement, and a large amount of labor and material has been used, and much time spent, in making a good roadbed. The cost to the plaintiff of removing its track to permit the construction of the sewer, and replacing it after the sewer is constructed, including the making of a good roadbed, would be about \$3,000. It would require years to make as good and safe a roadbed as the one now under the track, and the tearing up of the track would cause great inconvenience to patrons of the road, and would necessarily reduce the receipts of the plaintiff during the time that the sewer was being constructed."

line where it has received the proper authorization to construct it.¹⁰ Again, where the surveyor-general issues a permit to use a part of a city water front for a railroad right of way, the city cannot enjoin the construction of a wharf thereon by the railroad company without proof that a municipal right has been invaded, and cannot allege a trespass to public lands by the railroad, or a forfeiture of a corporate privilege by delay, since the State, only, can complain of such trespass, or enforce such forfeiture.¹¹

§ 1303. **Protecting abutting owners.**—An abutting owner who is subject to assessment for a street improvement may maintain a suit for an injunction restraining municipal authorities from paying for the same, though they have accepted the work, where it appears that the work has not been done according to the contract requirements.¹² But an injunction to restrain a city from depositing material to be used for a sewer on any portion of a street which has been dedicated but not publicly accepted brought by the abut-

10. *Akron B. & C. R. Co. v. Bedford*, 6 Ohio N. P. 276.

17. *San Pedro City v. Southern Pac. R. Co.*, 101 Cal. 333, 35 Pac. 993, per Harrison, J.: "As the permit is only a license for a right of way over the public lands of the State, and does not confer any proprietorship in the lands themselves, the State would have the right to revoke the license at any time, and would be justified in doing so if it should appear that there was unnecessary delay on the part of the corporation in availing itself of the privilege; but, unless the State makes the objection, the privilege cannot be declared forfeited at the instance of any other person. Upon the organization of a railroad corporation, it makes a selection of the route over which it intends to construct its road; and in making such selection, ordinary prudence would dictate that it should include the entire route over

which its road would ultimately be constructed. Necessarily, some time must elapse before the road can be completed, and circumstances may arise during the process of its construction which will render a delay or suspension will not of itself work a forfeiture of any privilege which the State may have granted, unless the statute under which it was granted expressly so provides, as has been done in the case of street railroads (Civ. Code, § 502), and it is a well recognized rule that, when only the right to the forfeiture of a corporate privilege or of a franchise exists, it can be invoked only at the instance of the State. See *Western R. Co.'s Appeal*, 104 Pa. St. 399. The judgment and order denying a new trial are reversed."

18. *McCartan v. Trenton*, 57 N. J. Eq. 571, 41 Atl. 830; *Collingwood v. White*, 57 N. J. Eq. 490, 42 Atl. 95.

ting owner on the west side of the street whose deed gives him title to one-half of the street and an easement in the other half, will be denied as to the east half where the complainant will have an unobstructed use of nineteen feet on the west half of the street and the entrance to his land on another street for the obstruction would cause him but little inconvenience for which he would ordinarily have an adequate remedy in damages.¹⁹

§ 1304. **City tax.**—In an action to enjoin the collection of city taxes levied on plaintiff's property, it appeared that plaintiff voted at city elections before bringing suit; that the town was constructing streets near his land, and improving others; that stores were being erected in his vicinity; and that he kept boarders who worked in the town, and had other advantages which accrue to residents therein. It was held that plaintiff was not entitled to an injunction on the ground that the corporate limits were extended so as to include such property solely for the purpose of increasing the city revenue at his expense, and without benefit to him.²⁰

§ 1305. **Enjoining village incorporation, etc.**—An injunction will not be granted to restrain an illegal corporation of a village,

19. *O'Rourke v. Orange City*, 51 N. J. Eq. 561, 26 Atl. 858. And see *Booraem v. Railroad Co.*, 40 N. J. Eq. 557; *Higgins v. Water Co.*, 36 N. J. Eq. 538; *Stevens v. Railroad Co.*, 20 N. J. Eq. 126, 134; *Railroad Co. v. Prudden*, 20 N. J. Eq. 530; *Quackenbush v. Van Riper*, 3 N. J. Eq. 350.

20. *Beattyville v. Daniel* (Ky.), 25 S. W. 746, per Hazelrigg, J.: "Prior to the filing of this petition, the appellee exercised his right to vote in the town elections; he is not, therefore, subject to taxation without representation. The city authorities have made improvements on the streets in the vicinity of the appellee's property, and are pushing the construction of the streets and alleys in the direction of, and near to, his

property. The town is growing rapidly. The town marshal lives near by him, as well as one of the trustees. Storehouses are being erected further out, and close to the appellee, where goods are now being sold. Appellee's residence is on the old county road, but will be on Arlington street, when extended. He is not assigned for work on any county road. He has kept boarders who worked in the mills of the town, which is a lumber center, and on other public improvements. His own work was in and about the town at the mills. We do not think that the legitimate object of improving the town has been lost sight of in this extension, or that the motive for the extension was improper, or violative of the constitu-

where the plaintiff may obtain redress by the usual modes of the law or under the statute governing the invalid proceedings, and where the proceedings will not injure plaintiff's property beyond legal remedy.²¹ And in an action to restrain such incorporation, the proper parties defendant are not those who signed the notice required by the general village act, or the officers of the town who would be inspectors of election, but the village itself or the trustees as exercising the franchises.²² It is a sufficient excuse to village trustees for disobeying a mandamus that they have been regularly enjoined from doing the very acts which by the mandamus they are required to do.²³

§ 1306. **Dispensary liquor act; county board enjoined.**—An injunction will lie in South Carolina, at the suit of taxpayers, to restrain a county board of control from establishing a State liquor dispensary at a certain place, on the ground that the "dispensary act" of that State providing for such establishment is unconstitutional, as being designed to embark the State in a trade which involves the purchase and sale of an article of commerce for profit.²⁴

§ 1307. **Parties; joinder of taxpayers.**—A bill by taxpayers to restrain the payment of money by a village under a contract is fatally defective, in not making the person entitled to the payment under the contract, or his successor in interest, a party thereto.²⁵

tional rights of the appellee. In the case cited heretofore it is said: 'As in ordinary cases of taxation, in which the reciprocal benefits are deemed commensurable, so the subjection of land included in the town extension to the burden of a municipal tax is not considered an unlawful appropriation of private property to public use unless the legitimate object of improving the town has been palpably prevented to the unauthorized purpose only of lessening the burden of taxation on the inhabitants

who will not be otherwise benefited by the extension.' See, also, *Board v. Gill*, 94 Ky. 138, 21 S. W. 579."

21. *Willis v. Stapels*, 30 Hun (N. Y.), 644.

22. *People v. Clark*, 70 N. Y. 518. And see *People v. Carpenter*, 24 N. Y. 86.

23. *People v. West Troy Village*, 25 Hun (N. Y.), 179.

24. *McCullough v. Brown*, 41 S. C. 220, 19 S. E. 458. And see *Mauldin v. City Council*, 33 S. C. 1, 11 S. E. 434.

In an action to enjoin a city from paying for lighting by electricity, a statement in the petition that plaintiff is a taxpayer on property subject to assessment, under an ordinance providing for such expenditure out of the general fund, instead of by special taxation on property benefited, is a sufficient averment of injury to entitle plaintiff to maintain his action, if the grounds thereof are well founded.²⁶ Several of the taxpayers of a city may jointly sue to enjoin *ultra vires* acts of the city, which may injure them as taxpayers.²⁷ And abutting lot owners may join in a suit to prevent a town from laying a drain through the street.²⁸

§ 1308. **Jurisdiction.**—An injunction lies to restrain a city from taking land for a street without instituting proceedings for condemnation, and without payment of compensation.²⁹ And a preliminary injunction restraining a city from opening a platted but unopened street, which has been occupied by plaintiff with its buildings for thirty years, will not be disturbed on appeal where it is not made to appear that the city or any citizen will be injured by allowing it to stand.³⁰ If selectmen, acting under instructions from the town, are about to grade complainant's land as part of a highway and to destroy his trees, an injunction properly issues against the town.³¹ And a city has no right to destroy a wooden building within the fire limits because it is maintained in violation of the permit granted for its erection, and an injunction to restrain such destruction is proper.³² But a telephone company is not

25. Hoppock v. Chambers, 96 Mich. 509, 56 N. W. 86.

26. Hanson v. Hunter Electric Light Co. (Iowa), 48 N. W. 1005.

27. Alpena City v. Kelley, 97 Mich. 550, 56 N. W. 941, per Montgomery, J.: "We think that the question of the power of the court to grant an injunction at the suit of an individual injuriously affected by the *ultra vires* acts of the corporation is settled in the affirmative by the previous adjudications of this court. See Curtenius v. Railroad Co., 37 Mich. 583. We also think that the complainants were properly joined in the

action, having a common ground of complaint. Scofield v. Lansing, 17 Mich. 437."

28. Sullivan v. Phillips, 110 Ind. 320, 11 N. E. 300; Tate v. Ohio, etc., R. Co., 10 Ind. 174, limiting Heagy v. Black, 90 Ind. 534.

29. New Albany v. White, 100 Ind. 206.

30. Paine Lumber Co. v. Oshkosh, 86 Wis. 397, 56 N. W. 1088.

31. Wetherell v. Newington, 54 Conn. 67, 5 Atl. 858.

32. Northern Pac. R. Co. v. City of Spokane, 52 Fed. 428.

entitled to a preliminary injunction to restrain the authorities of a town from removing poles for telephone wires when the claim on which the right is founded is, as a matter of law, unsettled.³²

§ 1309. **Same subject.**—A creditor of a municipal corporation will be granted an injunction against its officers only as an adjunct to a remedy for enforcement of the debt.³⁴ And a creditor of a city cannot enjoin it from collecting taxes from him on the ground that it is indebted to him, and has in its treasury a fund which would not legally be applied otherwise than by paying its debt to him, and which it refuses to pay until he has paid his taxes.³⁵ The fact that the title to a lot on which the common council of a city has determined to build a city hall is defective affords no ground for an injunction to restrain the building on such lot, at the suit of plaintiff, who alleges that the city contracted to erect a city hall on a lot conveyed by plaintiff to the city.³⁶

§ 1310. **Miscellaneous.**—A board of education will not be enjoined at the suit of a taxpayer, where it hired the basement of a

33. *New York & N. J. Tel. Co. v. East Orange*, 42 N. J. Eq. 490, 8 Atl. 289.

34. *Droz v. East Baton Rouge Parish*, 36 La. Ann. 307. In *Kendall v. Frey*, 74 Wis. 26, 42 N. W. 466, Cole, C. J., said: "The general principle that equity possesses no power to revise, control or correct the action of public or executive officers or bodies, is of course well understood. It never does so at the suit of a private person, except as incidental to the protection of some private right, and then only when the case falls within some acknowledged rule of equity jurisprudence. *Judd v. Fox Lake*, 28 Wis. 587. The common council had authority under the charter to acquire the real estate in question for the city hall site, and if they acted prudently in the exercise of their best judgment, their discretion will not be

revised by a court of equity. *Konrad v. Rogers*, 70 Wis. 492, 36 N. W. 261."

35. *Cartersville Waterworks Co. v. Cartersville*, 89 Ga. 689, 16 S. E. 70.

36. *Kendall v. Frey*, 74 Wis. 26, 42 N. W. 466, per Cole, C. J.: "Certainly a court of equity ought not to interfere to control or revise the discretion and judgment of the common council, if it acts honestly in the matter. How and where a public building shall be erected is necessarily a question of public policy and involves a variety of considerations. The common council is vested by law with full authority to decide them. The court cannot wisely review their action on such a subject." As to compelling specific performance of such a contract, see *Beck v. Allison*, 56 N. Y. 366; *Danforth v. Railroad Co.*, 30 N. J. Eq. 12.

Catholic church for school purposes, and it appeared that a public school was carried on there by Catholic teachers and according to the religious rites and creed of that church, but did not appear that the board required any religious doctrine to be taught in the school.³⁷ And equity will not interfere, at the suit of a taxpayer, to enjoin *ultra vires* proceedings by a city to establish a system of water works, when the city has done nothing further in that direction than to pass a resolution directing the mayor and clerk to take steps for the letting of a contract for the construction of such works. Nor is it sufficient that those officers "threaten and declare that they intend" to carry out the resolution.³⁸

37. A bill filed by a taxpayer of a school district set out that the board of education had rented the basement of a church under the control of a congregation of Roman Catholics, and was maintaining one of the public schools there; that only Romanist teachers were employed; that the children of Catholic parents, and the teachers, were "required" regularly to attend mass; to listen to instruction in the Catholic catechism in the school-room; that the *angelus* prayer was said by pupils and instructors, and that such basement had never been established as a school-site by a vote of the people of the district. It was held, it appearing that the district had voted down a proposition to bond the district to erect a new school-house, that the board had power to rent the basement of the church for school purposes, and no grounds were presented for equitable relief, it not appearing by whom the religious exercises were "required." *Millard v. Board of Education*, 121 Ill. 297, 10 N. E. 669. Under the

statute of 1887, which authorizes an injunction at the instance of a taxpayer to prevent the officers of a municipality from doing any illegal act, or from wasting the funds, etc., under their control, a city council will be enjoined from completing a contract for the purchase of a school-house site at a price greater by one-fourth than its value, at the highest estimate both of a large majority of the witnesses and of those best qualified to decide; no apparent effort being made to obtain the land at a less price. *Winkler v. Summers*, 5 N. Y. Supp. 723, 22 Abb. N. C. 80. And a verbal promise by the comptroller, acting under authority of the council, to take the land at the price asked, though followed by the delivery of the deed to the corporation counsel for examination, is not such a completion of the contract as to prevent the maintenance of an action to restrain its consummation.

38. *Pedrick v. City of Ripen*, 73 Wis. 622, 41 N. W. 705.

CHAPTER XLV.

RELATING TO STREETS AND HIGHWAYS.

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Section 1311. Jurisdiction; parties.—Where the Legislature has committed a part of its sovereignty to cities, towns, or villages in respect to streets, highways, and public grounds, within their limits, they are invested with the authority of the State in this respect and may maintain a bill in equity to restrain any highway obstructions within their limits.¹ And the obstruction of a public

1. Metropolitan R. Co. v. Chicago, 96 Ill. 620, per Sheldon, J.: "The authorities abundantly establish that upon application of the government

the courts of chancery of England, of this State and of the United States will respectively exercise their authority to restrain the placing of ob-

way by a fence, may be restrained by injunction at the instance of the town though the fence be easily removable.² In such a case the liability of the town to pay damages in case a person is injured by the obstruction is a sufficient interest to entitle it to be a party plaintiff in equity to prevent the obstruction.³ And a county may maintain an action to enjoin a railroad company from laying its railroad, without any lawful authority, along and in a county road in several towns.⁴ But while in a case which involves the public safety or convenience the people can maintain a suit in equity to abate a public nuisance in a highway, a court of equity will not

instructions in or upon public highways, streets, bridges, grounds and navigable waters. Attorney General v. London, 8 Beav. 270; Attorney General v. Richards, 2 Anst. 603; Attorney General v. Forbes, 2 Myl. & Cr. 123; Attorney General v. Mayor, 1 Molloy, 103; Georgetown v. Alexandria Canal Co., 12 Pet. 93; United States v. Duluth, 1 Dill. 469; Watertown v. Cowen, 4 Paige (N. Y.), 510; Attorney General v. Cohoes Co., 6 Paige (N. Y.), 133; People v. St. Louis, 10 Ill. 351; Jacksonville v. Jacksonville R. Co., 67 Ill. 540.

2. Burlington v. Schwarzman, 52 Conn. 181. See, also, Craig v. People, 47 Ill. 496, and compare Bunnell's Appeal, 69 Pa. St. 62.

3. New Haven v. Sargent, 38 Conn. 50; Derby v. Alling, 40 Conn. 410; Watertown v. Cowen, 4 Paige (N. Y.), 510; Mayor v. Bolt, 5 Ves. 129.

4. County of Stearns v. St. Cloud R. Co., 36 Minn. 425, 32 N. W. 91, per Dickinson, J.: "If such a road is destroyed or rendered useless and in consequence it becomes necessary to vacate it and lay out a new road the county board has the proper authority to do so and the county would be chargeable with the expense. Such roads can only be changed or vacated by order of the

county board; and that board is by statute charged with the duty of general supervision of county roads with power to appropriate the county funds for opening, vacating or otherwise improving the same. In view of this duty and interest there should be implied the corresponding power to maintain such action as may be appropriate to prevent or abate a public nuisance destructive of the highway or rendering it useless. Hooksett v. Amoskeag Mfg. Co., 44 N. H. 105; Town of Troy v. Cheshire R. Co., 23 N. H. 83; Springfield v. Conn. Riv. R. Co., 4 Cush. (Mass.), 63; Easton, etc., R. Co. v. Greenwich, 25 N. J. Eq. 565; Rio Grande R. Co. v. Brownsville, 45 Tex. 88; Philadelphia v. Passenger R. Co., 8 Phila. 648. It may be that the supervisors of the several towns might prosecute several actions, but if so their right to do so is not exclusive; and one of the purposes which induces courts of equity to assume jurisdiction in such cases—to prevent multiplicity of suits—will be accomplished if, by one action prosecuted by the county a complete remedy is afforded in respect to the whole line of road in the several towns."

interfere by injunction when the matter can be effectually dealt with by the local officers to whom the State has delegated a part of its authority.⁵ And where a city has granted to a railroad company the right to grade and use certain streets in such manner as may suit the company's convenience, provided that the street shall be so graded that vehicles may conveniently cross them, the company cannot be enjoined, at the suit of the city, from so obstructing the streets as to prevent their free use by the public as public streets, but only from so grading them as to prevent vehicles from crossing.⁶

§ 1312. **Taking property without compensation.**—An injunction is the proper remedy to prevent the making of a permanent location under claim of right of a street or other highway on the land of an owner before making just compensation for such land.⁷ And this rule is applicable also where private land is taken for a bridge without compensation.⁸ So injunction is a proper remedy to restrain a town from opening a street through a person's land, without first condemning it according to law, where there has been

5. *People v. Equity Gas. Co.*, 141 N. Y. 232; *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515; *Attorney General v. Brick Co.*, 115 Mass. 431.

6. *Chicago R. Co. v. City of Quincy*, 136 Ill. 489, 27 N. E. 232.

7. *New Albany v. White*, 100 Ind. 206. Citing *Sidener v. Norristown*, etc., *Turnpike Co.*, 23 Ind. 623; *Erwin v. Fulk*, 94 Ind. 235. Land-owners are entitled to have a street-railroad company which proposes to build its road without just compensation on a highway, laid out under a statute securing to the land-owners the right to compensation for any railroad built thereon, perpetually restrained therefrom, though they may have a remedy at law. *Spofford v. Southern Boulevard R. Co.*, 4 N. Y. Supp. 388.

8. *Kyle v. Board*, etc., 94 Ind. 115, per Elliott, J.: "It is true that an

injunction will not be granted to restrain the commission of a simple trespass but it is also true that an injunction will lie where the entry on land is under claim of right which might by lapse of time grow into a title. In this case if the appellant had tacitly assented to the building of the bridge on the line of the abandoned highway and a considerable period of time had elapsed without objection on his part a dedication might have been presumed against him, and to prevent such a result he had a right to an injunction against the unauthorized use of his land for the purposes of a highway. A land owner has a right to invoke the strong arm of the court to prevent a permanent wrongful occupancy or appropriation of his land. *Webb v. Portland Mfg. Co.*, 3 Sumn. 189; *Ross v. Thompson*, 78 Ind. 90."

no dedication of such street to public use.⁹ And where the supervisors of a town threaten to enter upon and permanently occupy land for a public highway against the will of the owner and without having acquired the right thus to use it by proceedings taken for that purpose under the statute, such owner is entitled to an injunction to prevent the injury, the ground of relief being that the injury would be irreparable.¹⁰ And where the evidence was undisputed that the road through the plaintiff's premises was originally worked and laid out by the road commissioners of a certain width and that the county authorities were attempting to widen it so as to embrace land of the plaintiff without first acquiring, in the manner prescribed by law, the right to do so, it was decided that the court erred in refusing to enjoin the taking of a strip of the plaintiff's land so as to widen the road beyond the limits originally worked out.¹¹ And before a county can appropriate lands for a public road, it must provide for the payment of damages for the right of way, either by the appropriation of money from the proper fund for that purpose, or the levy of sufficient taxes to pay the damages, upon which a warrant may be drawn. In either case, the compensation must be sure, and the land-owner may enjoin the use of his property by the public until such compensation is made.¹²

⁹ *Yates v. Town of West Grafton*, 33 W. Va. 507, 11 S. E. 8. Following *Pierpoint v. Harrisville*, 9 W. Va. 215.

¹⁰ *Uren v. Walsh*, 57 Wis. 98. And see *Church v. School District*, 55 Wis. 399; *Bohlman v. Green Bay R. Co.*, 30 Wis. 106; *Wilson v. Mineral Point*, 39 Wis. 160.

¹¹ *Buchanan v. James*, 130 Ga. 546.

¹² *Zimmerman v. Kearney County*, 33 Neb. 620, 50 N. W. 1126. The charter of the borough of Curwensville confers on the burgess and council power to regulate and improve streets, but not to open or widen them. Act Pa. April 22, 1856 (P. L. 525) provides that the burgess and

town council may petition the court of quarter sessions for authority to open, widen, and extend streets. Const. Pa. art. 16, § 8, declares that "a municipal corporation shall make just compensation for property taking, injured or destroyed," before such taking, etc. It was held that injunction would lie to restrain the burgess and town council from taking complainant's land, which had been included in the borough, by an extension of the limits thereof, for street purposes, under the right of eminent domain, without legal proceedings or tender of compensation, as there is no other adequate remedy. Appeal of Borough of Curwensville, 129 Pa. St. 74, 18 Atl. 561. And see

§ 1313. **Where there is a statutory or adequate remedy.**—A bill to enjoin the condemnation of land, or gravel thereon, for the construction of a free gravel-road, which alleges that the commissioners have established a second gravel-road for which plaintiff's land will be taxed; that the gravel on his land can easily be used for the construction of the second road; and that the cost of its construction will be much greater if the gravel is taken for the first road—cannot be maintained, where the statutes relating to assessment of damages to land by the construction of such roads, furnish an adequate remedy.¹³ And where the commissioners of highways institute proceedings under the statute, to determine the damages caused to a landowner by the construction of a proposed drain, such proceedings should not be enjoined at the suit of the landowner on the ground that the commissioners exceeded their authority in constructing such ditch, since the landowner has a remedy at law by-raising that objection in the proceeding to assess damages.¹⁴ And an injunction will not be granted at the suit of abutting owners against a railroad company to prevent its entering into a contract with the county commissioners whereby it is permitted to maintain its tracks in a street at an alleged illegal grade; the remedy being by mandamus to compel the commissioners

Harper's Appeal, 109 Pa. St. 9, 1 Atl. 791; Conner's Appeal, 103 Pa. St. 356; St. Clair School's Appeal, 74 Pa. St. 252.

13. Smith v. Goodknight, 121 Ind. 312, 23 N. E. 148, per Olds, J.: "By the free gravel road act the contractor is authorized by law to take real property for the construction of a graded and gravel road of public utility and is granted the right of a writ for the assessment of damages and no limit is provided as to the questions to be tried. These various statutes constitute one general system of legal procedure and must be construed to-

gether and when so construed give to the landlord a just and adequate remedy at law. See Swinney v. Fort Wayne R. Co., 59 Ind. 205. It has been repeatedly held by this court and is the settled law of this State that where a party has a just and adequate remedy at law the extraordinary remedy of injunction will not lie. Hendrick's v. Gilchrist, 76 Ind. 369; Ricketts v. Spraker, 77 Ind. 371; Caskey v. Greensburgh, 78 Ind. 233."

14. Dierks v. Commissioners of Highways, 142 Ill. 197, 31 N. E. 496.

to perform their duty.¹⁵ Again, where the orders of the court, in proceedings to appropriate property for the purpose of laying out a county road, are subject to remedy by appeal, an injunction will not lie to restrain the execution of such orders on account of errors in the proceedings.¹⁶ And the rule that equity will not grant relief by injunction where the complainant has a complete and adequate remedy at law applies in the case of one who seeks to enjoin a town from vacating a portion of a highway.¹⁷ Where the condemnation proceedings were commenced under the California statute, entitled "An act to provide for opening streets in the town of Alameda," approved March 23, 1876, an injunction order restraining such proceedings made four months after the passage of another act repealing the first act mentioned, was held to be erroneous, as the threatened wrong against the plaintiff would have been averted by the intervention of the Legislature, and the condemnatory proceedings would fall of their own weight.¹⁸ After a claim for damage in laying out a road has been made and allowed, and no appeal been taken, equity will not enjoin the opening of the road on the ground that the damages were inadequate.¹⁹

15. *Dyer v. Cincinnati R. Co.*, 7 Ohio, C. C. 255.

16. *Chicago & A. R. Co. v. Mad-dox*, 92 Mo. 469, 4 S. W. 417.

17. *McLachlan v. Gray*, 105 Iowa, 259, 74 N. W. 773, holding in such a case that the complainant had an adequate remedy by certiorari.

18. *Cohen v. Gray*, 70 Cal. 85, per McKee, J.: "An injunction was therefore useless and the order for an injunction was erroneous. *Linden v. Case*, 46 Cal. 171; *Bucknall v. Story*, 36 Cal. 70; *Houghton v. Austin*, 47 Cal. 647; *Gates v. Lane*, 49 Cal. 266."

19. *Hopkins v. Keller*, 16 Neb. 569, per Maxwell, J.: "Upon a petition duly signed as required by law for the location or vacation of a public road the county commissioners are duly invested by the statute with

authority in the premises. The extent to which error will lie to the district court to correct their proceedings is not now before the court and need not be considered, but in the absence of some equitable grounds for relief such as fraud, corruption, or undue means, error cannot be corrected by injunction. *McClelland v. Miller*, 28 Ohio St. 488; *Frevort v. Finfrock*, 31 Ohio St. 627. . . . The reason is, the aggrieved party has a full and adequate remedy at law and has no occasion to resort to a court of equity for redress. *Coe v. Columbus R. Co.*, 10 Ohio St. 372; *Coughron v. Swift*, 18 Ill. 414; *Winkler v. Winkler*, 40 Ill. 179; *Poage v. Bell*, 3 Rand. (Va.), 586; *Webster v. Couch*, 6 Rand. 519; *Akrill v. Selden*, 1 Barb. (N. Y.) 316; *Wooden v. Wooden*, 3 N. J. Eq. 429."

§ 1314. **Private injury versus public benefit.**—The fact that complainants' traffic, whose volume does not appear, will be compelled to make a long detour in consequence of the proposed destruction of the thoroughfare in a vacated portion of a street, does not constitute such irreparable injury as to warrant an injunction, in the face of the undeniable benefit to the public which will accrue from the intended alteration.²⁰ And where plaintiff's bill prayed an injunction against the removal of a bridge, part of a highway running through his farm, which lay on both sides of the stream, and defendants showed that a part of the highway, including the bridge in question, had been relocated to avoid railroad crossings, and a new bridge built which was likewise on plaintiff's farm and might be used by him by traveling a slightly greater distance; and that the old bridge had been abandoned by the public, it was held that, as it had ceased to be a highway, plaintiff was not entitled to an injunction against its removal.²¹ Again, where, in an action by a taxpayer for the use of a city to enjoin the construction of a street railroad, there is no averment or proof that any injury resulted to the city through any irregularity of the council or clerk in granting the right to construct it, an injunction should not be granted.²²

§ 1315. **Complainant's special injury.**—A petition to restrain the obstruction of a highway, which fails to show any special injury to plaintiff other than that suffered by the public, is bad on demurrer.²³ And an application for an injunction against the

20. *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351, 11 Atl. 751.

21. *Brockhausen v. Bochland*, 137 Ill. 547, 27 N. E. 458.

22. *Sloane v. Electric R. Co.*, 7 Ohio C. C. 84.

23. *San Jose Ranch Co. v. Brooks*, 74 Cal. 463; 16 Pac. 250. And see *Aram v. Schallenberger*, 41 Cal. 450; *Blanc v. Klumpke*, 29 Cal. 156; *Bigley v. Nunan*, 53 Cal. 404; *Shirley v. Bishop*, 67 Cal. 543. A contract between the owners of land abutting on

a street and a railway company provided that the latter might occupy the centermost 20 feet of the street for their tracks, and that the residue of the street should "remain open for public use as a public highway forever." The railroad company having laid tracks on the part of the street outside their 20-foot strip, a property owner sued to enjoin such occupation, and for a specific performance of the contract. It was held that the suit could not be sustained, in the ab-

obstruction of a highway, alleging that the obstruction prevents access of petitioners to a public cemetery in which members of their family are buried does not show special damages.²⁴ And where a railroad company proposed, in the occupation of street, the graded portion of which was twenty-four feet wide, to appropriate to its exclusive use about two feet of such graded portion, it was held that, whether plaintiff, whose property fronted on the street, owned the fee of the street or not, there was no such destruction of the value of the plaintiff's property as would entitle him to an injunction to restrain the railroad company from constructing its road until the damages were ascertained and paid.²⁵ And an injunction will not issue to restrain the maintenance of a turnpike gate over a highway, even if unauthorized by law, unless it appears that the complainant suffers therefrom some special injury not sustained by the public.²⁶ Nor can a landowner have an injunction against a gravel road company, which he avers has unlawfully taken possession of a public highway and is exercising corporate franchises thereon. An information, in the name of the State, on the relation of the State's attorney, affords the remedy.²⁷

§ 1316. **Discretion of road officers.**—Under the statute which directs the commissioners of highways to improve and repair the roads in their respective towns "by proper grading and thorough drainage," a court of equity will not enjoin the commissioners from constructing a ditch beside a public road where the evidence

sence of any allegations that the tracks complained of were laid contrary to law, or that the laying of such tracks destroyed the use of the street as a highway, or specially damaged the plaintiff. *Appeal of Kemble* (Pa.), 21 Atl. 225.

24. *Sunderland v. Martin*, 113 Ind. 411, 15 N. E. 689.

25. *Arbenz v. Wheeling R. Co.*, 33 W. Va. 1, 10 S. E. 14.

26. *Perkins v. Moorestown Turn-*

pike Co., 48 N. J. Eq. 499, 22 Atl. 180. And see *Van Horne v. Newark Pass. R. Co.*, 48 N. J. Eq. 332; *Board v. N. Y. Manure Co.*, 47 N. J. Eq. 1; *Van Wagenen v. Cooney*, 45 N. J. Eq. 24, 16 Atl. 689; *Zabriskie v. Railroad Co.* 13 N. J. Eq. 314; *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371.

27. *Palmer v. Logansport & Rock Creek Gravel Road Co.*, 108 Ind. 137, 8 N. E. 905.

does not clearly show that the proposed ditch will be an abuse of the discretion vested in the commissioners.²⁸

§ 1317. Highway by prescription; enjoining road officers.—

In an action to determine the character of a roadway and for a judgment declaring it to be a private and not a public way, and to perpetually restrain the highway commissioners from interfering with it in any manner as a public highway, it was held that in the absence of any record in relation to the road, as required by statute, it must be presumed that the facts required to be recorded never existed, and that the mere fact that people had traveled over the road for twenty years did not make it a highway by prescription, and that it was error for the special term to dismiss the complaint asking for injunctive relief against the highway commissioners.²⁹

28. *Hotz v. Hoyt*, 135 Ill. 388, 25 N. E. 753. And see *Thornton v. Roll*, 118 Ill. 364; *Dunning v. Aurora City*, 40 Ill. 486; *Brush v. Carbondale City*, 78 Ill. 74.

29. *Harriman v. Howe*, 78 Hun, 280, per Dykman, J.: "The public authorities at no time worked or repaired the road prior to this controversy with the plaintiff. The defendants do not claim that the road in question was ever laid out under the statute, but they have now caused the same to be ascertained and entered of record as a road which has been used as a highway for over twenty years. That record was made after the commencement of this action, and confines the defendants to the contention that the road is a highway by prescription. The question for our determination, therefore, is whether the road has become a public highway by prescription, and that question is not answered in the affirmative by the mere proof of user for the prescriptive period, as user alone is in-

sufficient to constitute a public highway. It must be associated with some act showing such use to be claimed as a right hostile to, and independent of, the will of the owner, such as reparation or assuming the control of the road in some ostensible manner. The presumption of a grant of the right of way springs from the lapse of twenty years in connection with the adverse use by the public. *City of Cohoes v. D. & H. Canal Co.*, 134 N. Y. 402, 31 N. E. 887. So far as presumptions can be indulged, they favor the position of the plaintiff for this reason. By the Highway Law of 1813 (2 R. L. 270), it was made the duty of commissioners of highways in the several towns of this State to cause such of the roads as were not already described and recorded, to be ascertained, described and entered of record in the town clerk's office. By the Revised Statutes highway commissioners were directed to cause such roads as have been used for

§ 1318. **Protecting sidewalks and curbing.**—A city may restrain by preliminary injunction a lot owner from tearing up a sidewalk and curbing in front of his lot rendered necessary by a change of grade in the street though he was not allowed compensation for the damage caused to him by the changed grade, where having had notice of the beginning and progress of the work

twenty years, but not recorded, to be ascertained, described and entered of record in the town clerk's office. 1 R. S. 501, § 1, subd. 3. No such record was ever made in relation to this road, and as the law constantly presumes that public officers have performed their official duty, the presumption is, in the absence of explanation, that the facts required to be recorded never existed. The whole tract has for half a century been used in connection with the Greenwood Iron Works, to furnish cordwood and charcoal for those works, and all the woodroads have been used for drawing the products of these lands to the furnace. The presumption is natural that all the woodroads originally came into use in that way and for that purpose. For what other purpose could this fifty miles of mountain road have come into use, and what reason is there for presuming that this particular road had an origin differing from that of the others? It cannot be that the land of the plaintiff is subject to confiscation in that way, for it would be nothing less than that. A portion of the language of the opinion of the Court of Appeals in the case of *Speir v. The Town of New Utrecht*, 121 N. Y. 420, 24 N. E. 692, is entirely applicable to this case, and it is this: 'All we have here is, that the road was used by the public generally. But the mere fact

that a portion of the public travel over a road for twenty years cannot make it a highway; and the burden of making highways and sustaining bridges cannot be imposed upon the public in that way. There must be more. The user must be like that of highways generally. The road must not only be traveled upon but must be kept in repair or taken in charge and adopted by the public authorities. We think all this is implied in the words: "Used as public highways." . . . A private way opened by the owners of land through which it passes for their own uses does not become a public highway merely because the public are also permitted for many years to travel over it.' In the case of *Lewis v. New York*, etc., R. Co., 123 N. Y. 496, 503, 26 N. E. 357, the court of appeals unanimously affirmed the same doctrine, and in respect to it used the following language: 'We have recently determined what facts constitute a public highway within the meaning of the statute relating to user. *Speir v. New Utrecht*, 121 N. Y. 420, 24 N. E. 692. We there held that it must have been traveled by the public for twenty years, and either kept in repair or taken in charge by the public authorities.' The question of whether title can be acquired by adverse possession to a public alley of a town cannot arise on demurrer to

he allowed it to go on to completion without opposition or resort to his legal remedies. In such a case, however, his right to compensation for the damage sustained remains unimpaired.³⁰ But it has been decided that an abutting owner may maintain a

a complaint for injunction against the town, under an allegation of the complaint that an officer of defendant informed plaintiff that he objected to the erection of certain buildings on land claimed by plaintiff by adverse possession, because he (the officer) claimed them to be on an alley belonging to the town; there being no admission that the land was ever the property of the town. *Crocker v. Collins*, 37 S. C. 327, 15 S. E. 951. In an action to procure the removal of a fence along an alleged highway, it appeared that the statutory proceedings to establish the highway were defective, but that a highway had been created by prescription, and that plaintiff had built her fence along each side of the beaten track, where it passed through her farm. It was held that, in the absence of any evidence that the road had any other boundary lines than those defined by the driveway, or that defendant's fence, complained of as an encroachment, was not built wholly on her own land outside the highway, an injunction was improperly awarded. *Wakeman v. Wilbur*, 4 N. Y. Supp. 938.

30. *Trenton City v. McQuade*, 52 N. J. Eq. 669, 29 Atl. 354. Doubtless the city authorities had the right to make the changes in the grade of the streets, curbs, and sidewalks above mentioned. The fact that the streets had once been graded, and the different elevations and depressions prescribed, did not exhaust the power of the city authorities, such power being

a continuing one. *McKevitt v. Mayor*, etc., of Hoboken, 45 N. J. Law, 482; 2 Dill. Mun. Corp. § 686; *Smith v. Corporation of Washington*, 20 How. 135; *In re Furman Street*, 17 Wend. 651; *City of Delphi v. Evans*, 36 Ind. 90. The city authorities have the power to determine the grade of the streets, and, when properly exercised, such authority is exclusive or inherent in the municipal authorities, to the exclusion of courts of justice, 2 Dill. Mun. Corp. § 686. The defendant justifies his course, and objects to any restraint because neither the city nor the company, nor both by mutual agreement, had the right to proceed and make the proposed changes or improvements without first making compensation to him for the damages which he would sustain by such changes or improvements. It is claimed that, under the constitution, neither the city nor the company, nor both, had the right to impose any new burdens upon his land, as was done by raising the grade of the street in order to effect convenient access to the bridge over the railroad by means of ordinary approaches, without such compensation. In support of this view many authorities are cited. *Mettler v. Railroad Co.*, 25 N. J. Eq. 214; *Morris & E. R. Co. v. Hudson T. R. Co.*, Id. 388; *Redman v. Railroad Co.*, 33 N. J. Eq. 165; *Johnson v. Railway Co.*, 45 N. J. Eq. 460, 17 Atl. 574; *Folley v. City of Passaic*, 26 N. J. Eq. 216; *Morris Canal & Banking Co. v. Mayor*, etc., of Jersey City, Id. 294;

suit for an injunction to restrain the municipal authorities from cutting down shade trees on the edge of the walk in front of his land where he is the owner of the fee of the street and neither public necessity nor convenience require the removal of such

Jersey City v. Central R. Co., 40 N. J. Eq. 417; 2 Atl. 262. The general doctrine here invoked no one questions; but whether it is applicable at this stage of the proceedings between these parties admits of very grave doubt, in the sense in which the defendant desires that it shall be applied. The relative rights of these parties are to be determined by the situation in which they were with respect to each other at the time of the filing of this bill, and not in respect to the time in which the changes and improvements were begun. Parties may not lose any of their substantial rights of property or of action for damage thereto, by delay, but they may lose the right to pursue remedies which they otherwise would enjoy under well-settled provisions of the law. I think these remarks are controlling in this case. The defendant has by his delay forfeited his right to protection in interfering with the full completion of this work of change upon the part of the city until he shall have been compensated for all the damages which he now alleges he has sustained because of all the other changes in the grade and elevation of the street which have been carried on to absolute completion, and which he says so result to his damage. He allowed all of this work so far to be finished without in any manner offering any opposition. *Rettinger v. City of Passaic*, 45 N. J. Law, 147; *State v. Mayor, etc., of Paterson*, 40 N. J. Law, 244. Nothing remains to be

done but making the sidewalk and curbing conform to the rest of the work which is so complete. Under the law, his right of compensation for any damages which he may have sustained remains unimpaired. The seventieth section of an act concerning roads expressly provides a remedy in such cases. Revision, p. 1009; *Vorath v. Hoboken*, 49 N. J. Law, 285, 8 Atl. 125; *State v. Mayor, etc., of Morristown*, 34 N. J. Law, 445. Since all of the changes in grades were determined upon by ordinance, and all completed accordingly, except the sidewalk and curbing in front of the defendant's dwelling, many months before the filing of the bill, and since he had ample notice of the beginning, progress, and completion of such work, and availed himself of none of the legal remedies which the law affords him, and since from the broken, irregular, and bad condition of the sidewalk and curbing pedestrians may be injured, and, in consequence thereof, the city may be liable to actions for damages, and since, according to the cases cited, the law seems to be so well settled as to the rights of the city and the citizen, I regard it my plain duty to advise a preliminary injunction, restraining the defendant, not only from further interfering with the laying and completion of the sidewalk and curbing mentioned in the bill of complaint, but also from in any manner removing, disturbing, or interfering with the said pavement, sidewalk, or curbing after the same shall have been completed.

trees.³¹ And where, in case of any proposed change affecting the sidewalk or curb, an abutting owner is entitled to notice thereof and a hearing, if such rights are not accorded him it is decided that he is entitled to an injunction against such a change.³²

§ 1318a. **Change of grade of street.**—Where the right of access of an abutting owner will be impaired by a proposed change of grade of the street by an individual he may have an injunction restraining such change.³³ And it has been decided that where there has been no ascertainment of damages from a proposed change of grade which it is shown will materially injure abutting property, the owner of such property is entitled to an injunction against the change.³⁴ But where no substantial damage is shown from a proposed change of grade equity will not interfere at the suit of an abutting owner.³⁵ And in the case of a public improvement which is of great benefit to the public generally, equity will not enjoin a change of grade caused in the construction of such improvement where the giving of a bond will afford the complainant adequate relief.³⁶ And a statutory provision as to altering a street is held not to apply to a change of grade of a street, and hence it has been decided that an abutting owner will not be entitled to an injunction restraining local authorities from changing a grade of a street because there has not been a compliance with provisions of a statute as to what is essential where it is sought to “alter” a street.³⁷

§ 1319. **Sidewalk assessment.**—A court of equity will not enjoin the collection of a tax assessment on a town lot to pay for the construction of a sidewalk in front of the same, ordained by the council of an incorporated city or town, on the sole ground that

31. *Atlanta v. Holliday*, 96 Ga. 546, 23 S. E. 509.

32. *Buchanan v. Beaver*, 171 Pa. St. 567, 33 Atl. 115.

33. *Swan v. Colville*, 19 R. I. 161, 32 Atl. 854.

34. *Hart v. City of Seattle* (Wash. 1906), 84 Pac. 640. Compare *Murray Judge A. I. Co. v. Agricul-*

tural Iron Co., 138 Mo. 608, 39 S. W. 467.

35. *Kokomo v. Mahan*, 100 Ind. 242.

36. *Cincinnati C. & W. T. Co. v. Hamilton County*, 5 Ohio N. P. 423, 7 Ohio Dec. 509.

37. *Rogers v. Village of Attica*, 113 App. Div. (N. Y.) 603.

such tax or assessment is illegal; some additional circumstances bringing the case under some recognized head of equity jurisdiction must also appear. And the fact that the statute declares that such assessment made for constructing a sidewalk shall be a lien on the lot in front of which the same is constructed does not create such a cloud upon the title as to confer equitable jurisdiction.³⁸

38. *Wilson v. Town of Philippi* (W. Va.), 19 S. E. 553, per English, J.: "In the case of *Sands v. City of Richmond*, 31 Gratt. 571, it was held that 'the city council of Richmond has authority, under its charter and the constitution of Virginia, to remove the owner of a lot upon a street which has been graded, paved and guttered by the city to pave the sidewalk in front of his lot, and when it is the corner of a street to pave the sidewalk on the side of the lot; and, if the owner does not have the work done within the time prescribed by the ordinance, the city may have it done, and collect the money from him. And see *Norfolk City v. Ellis*, 26 Gratt. (Va.) 224. The case of *City of Norfolk v. Chamberlain*, 89 Va. 196, 16 S. E. 730, cited by the appellant in his brief, was a case in which the city of Norfolk, in a proceeding to condemn certain land in the city for the purpose of opening and widening a street, attempted to assess the adjoining landowners with the whole expense of widening and extending said street, which, as we have seen presents a very different case from the one under consideration, in which the assessment referred alone to the sidewalk. In the case of *Davis v. City of Litchfield*, 145 Ill. 313, 33 N. E. 888, reported in 21 L. R. A. 565, a well-defined distinction is drawn between an assessment made for the

purpose of improving a street in front of a lot and a like assessment for a sidewalk; and in the notes on that page it is said: 'Almost everywhere the right to compel lot owners to build sidewalks is recognized, although otherwise held in regard to other street improvements. This is put in many cases on the basis of police power, but it is suggested that a reasonable basis for it might be generally the proximate justice of the rule of apportionment of benefits, as in ordinary cases the cost would not vary much from the amount of an assessment according to frontage.' In this note numerous authorities are cited and quoted from, upholding the validity of assessment for construction of sidewalks, from the supreme courts of different states. The case of *Davis v. City of Litchfield*, *supra*, to which this note is appended, was a case in which abutting lot owners were assessed for paving and improving the street in front of their lots, and it was held that such contribution can be sustained, if at all, only when made under an express grant by the legislature. It is neither alleged nor shown that a multiplicity of suits will result if the proceeding complained of is not restrained, nor that the cloud upon the title cannot be readily removed at law; and, considering the pleadings and circumstances above detailed in connection with the ruling of this court in the

And where the County Court gave permission to build a road across plaintiff's land and assessed the damages and the plaintiff enjoined the surveyor from laying out the road because the damages were not paid it was held that the injunction was properly dissolved on payment of the damages even by a volunteer.³⁹

§ 1320. **Enjoining city from street nuisance.**—Where the power to open streets and the incidental power of grading and improving them is not impaired by an amended city charter which provides for the creation of a board of health, such board cannot enjoin the mayor and city council from grading and improving a street on the ground that the work will be dangerous to the public health.⁴⁰ But a municipal government, though invested with plenary powers over streets, drainage and sanitation, may be enjoined by an individual from continuing the manholes in such a condition as to allow the escape of noxious gases, where the nuisance does not result from defects inherent in the general system of the sewers, but from defective execution of the system in failing to adapt it to local conditions.⁴¹

§ 1321. **Sidewalk nuisance, etc.**—Where in a suit to restrain the defendant from obstructing a sidewalk, the court rendered a decree perpetually enjoining him from using a plank or bridge, elevated above the sidewalk, in unloading his trucks, and from hindering plaintiffs' firm the free use of the sidewalk, it was held, on appeal, that the decree should be modified so as to enjoin him from unreasonably using such bridges, or hindering or obstructing the free use of the sidewalk.⁴² And the erection of weigh-scales

case of *Douglass v. Town of Harrisville*, 9 W. Va. 162, that a bill of injunction in equity will not lie to restrain the collection of a tax assessment or tax made or levied by 'the council of an incorporated town,' 'on the sole ground that the assessment or tax is illegal.' our conclusion is that there was no error in the decree complained of dissolving said injunc-

tion, and the same is therefore affirmed, with costs and damages."

39. *Chenault v. George* (Ky.), 25 S. W. 4.

40. *Mayor of Brunswick v. King*, 91 Ga. 522, 17 S. E. 940, citing *Lingo v. Harris*, 73 Ga. 30.

41. *Atlanta v. Warnock*, 91 Ga. 210, 18 S. E. 135.

42. *Callanan v. Gilman*, 107 N. Y.

upon a public highway in such a manner as to be a continuing nuisance, will be enjoined by a court of equity.⁴³

§ 1321a. **Street obstructions.**—A private individual may be restrained from obstructing a highway at the suit of a municipal corporation,⁴⁴ and an abutting owner who is also the owner of the fee in the street may obtain similar relief.⁴⁵ So where defendant threatens to obstruct a public alley, complainant has a right to have the obstruction restrained notwithstanding the claim that the title to the land may be said to be in dispute and that defendant is entitled to the trial of that question in an action at law and the bill will lie even if defendant is in possession of the premises.⁴⁶ And a bill will lie to restrain the wrongful obstruction of a public alley, notwithstanding the impropriety of complainant's summary abatement of the obstruction.⁴⁷ So a municipality may enjoin the erection of poles by a telephone company which has not obtained the required consent of the common council.⁴⁸ In a recent case in New York it is, however, decided that a corporation proposing to erect, upon a lot abutting upon a street in the business section of a city, a bank building the plans for which involve the erection, as a part of the front wall of the building, of five columns extending beyond the face of the wall into the street for a distance of

360, 14 N. E. 264. And see *Welsh v. Wilson*, 101 N. Y. 254, 4 N. E. 633; *Mathews v. Kelsey*, 58 Me. 56.

43. *Huddleston v. Township of Killbuck* (Pa.), 7 Atl. 210.

44. *Toronto v. Lorsch* (Q. B.), 24 Ont. Rep. 227.

As to nuisance by obstruction of public highway, see §§ 1083 and 1084 herein.

45. *Coatsworth v. Lehigh Valley R. Co.*, 156 N. Y. 451, 51 N. E. 301, affg. 28 App. Div. 273, 48 N. Y. Supp. 511. See also *Downing v. Corcoran*, 112 Mo. App. 445, 87 S. W. 114; *Renner v. Junker*, 190 Pa. St. 423, 43 Atl. 72.

The removal of an electric

light pole may be required by a mandatory injunction at suit of an abutting owner in front of whose premises it was placed for the purpose of injuring the value of his property. *Snyder v. Fort Madison St. R. Co.*, 105 Iowa, 284, 75 N. W. 179, 41 L. R. A. 345.

46. *Mineral Bath Co. v. Strob Brewery Co.*, 151 Mich. 555, 115 N. W. 715.

47. *Detroit Mineral Bath Co. v. Strob Brewery Co.*, 151 Mich. 555, 115 N. W. 715.

48. *Utica v. Utica Teleph. Co.*, 24 App. Div. (N. Y.) 361, 48 N. Y. Supp. 916. See *Mutual Elec. L. Co. v. Ashworth*, 118 Cal. 1, 50 Pac. 10.

between one and two feet will not be enjoined from encroaching upon the street with the columns at the suit of the owner of an adjoining store building, where it appears that the street was originally a State road created by an act of the Legislature, that the title of the abutting owners extends only to the street line, that the portion of the sidewalk left unobstructed by the projecting columns is of ample width to accommodate the public needs, that the common council of the city pursuant to a provision of the city charter, authorizing it to permit the use of sidewalks for business purposes which do not interfere with the public use and to permit "columns, pilasters and ornamental portions of any building to encroach upon any street" adopted a resolution permitting the corporation to allow the columns to encroach upon the street for a certain distance, which was in excess of the distance which in fact the columns did encroach, that the projecting columns "would not interfere with the reasonable and substantial use of said street" unless it appears that the complaining property owner has sustained private and peculiar injury therefrom and that such injury is substantial and not merely nominal.⁴⁹ In this connection it is decided in New York that where the commissioner of highways has notified an abutting owner to remove a building as an encroachment upon the highway, in accordance with the authority conferred upon him,⁵⁰ such owner may bring a suit to enjoin the commissioner from removing the building without waiting until the act of removing it has actually commenced.⁵¹

§ 1321b. Street encroachments; mandatory injunction.—

Where the complainant has an adequate remedy at law in the case of a street obstruction and there are no special circumstances calling for the interposition of a court of equity it is held that an injunction requiring the removal of the obstruction will not be granted.⁵² And where an abutting owner has stood by and silently

49. *Sautter v. Utica City Nat. Bank*, 45 Misc. R. (N. Y.) 15, *aff'd* 119 App. Div. (N. Y.) 898.

50. N. Y. Laws, 1890, ch. 568, § 105.

51. *Flood v. Van Wormer*, 147 N. Y. 284, 41 N. E. 569.

52. *Greenfield Twp. v. Norton*, 111 Mich. 53, 69 N. W. 95, holding that an adequate remedy at law in such

permitted an adjoining owner to erect a building which encroaches beyond the building line of the street, it is decided that a court of equity will not grant an injunction requiring the removal of such building, but that he will be remitted to his action at law for damages.⁵³ So where the complainant in a suit for a mandatory injunction to compel the removal of a building projecting into the street saw the plans of the building, had an office near where the work was going on, commended rather than objected to the projection, and took no action looking to a removal for a year after its completion and not until after the agents of respondent sought to remove certain occupants from one of his houses, he was held estopped to maintain the suit.⁵⁴ So in New Jersey it is decided that under the settled rule authorizing relief by injunction to public authorities, charged with the protection of public highways, from invasion by public service corporations, under color of statutory authority, if the complainant makes out at final hearing a case showing that water pipes are laid without authority, for the reasons alleged in the bill, then the court may by mandatory injunction require the removal of the pipes, unless there are circumstances which require the settlement at law of the questions raised.⁵⁵

§ 1322. **Abating obstructions; relator; estoppel.**—In an action by the people on the relation of an individual to abate an obstruction in a public street, where it appears that the street was never dedicated or accepted, plaintiff cannot invoke an estoppel on the ground that relator, an abutting property owner, acted on an agreement with defendant to open the street, since the action by the people is not to vindicate relator's private rights.⁵⁶

a case was given by How. Ann. Stat. §§ 1371-1378.

53. *Hoskins v. Wathen Bros. Co.*, 20 Ky. Law Rep. 814, 47 S. W. 595.

54. *Adams v. Birmingham Realty Co.* (Ala. 1908), 45 So. 891.

55. *Woodbridge Twp. v. Middlesex Water Co.* (N. J. Ch. 1908), 68 Atl. 464.

56. *People ex rel. Howland v.*

Dreher, 101 Cal. 271, 35 Pac. 867, per *Curiam*: "Much of the argument of appellant is directed to the point that the relator, Howland, who, with the defendant, Dreher, agreed to open a public highway upon the line dividing their respective lands, and who was at expense in grading such contemplated highway, and who is

§ 1322a. **Poles and wires in street.**—If it appears that the object of placing a pole in front of a person's property was to annoy him and to injuriously affect such property, it has been held that its removal can be compelled by mandatory injunction.⁵⁷ An abutting owner is not, however, entitled to an injunction against the erection and maintenance of electric light poles and wires in front of his property where the fee to the street is owned by the municipality which has granted the right to erect and maintain such poles and wires for the purposes of public lighting.⁵⁸ So where the placing of a telephone pole in front of a person's property was not shown to cause such owner any inconvenience of a peculiar character differing from that sustained by others, the court refused to grant an injunction against the erection of such pole.⁵⁹ And where it was not shown that there had been any failure to comply with the requirements of the statute preliminary to the right to construct its line or that any irreparable injury was threatened the court refused, at the suit of an abutting owner,

claimed to have altered his condition in view of such proposed highway, so that pecuniary injury will ensue to him if the road is not opened, may invoke the doctrine of estoppel as against the defendant. This action is not brought to vindicate the private rights of the relator, or to secure to him any privilege not enjoyed equally by others. It is brought by the people, to conserve the rights which the general public have in the *locus in quo* as a highway. The predicate of those rights is that it is a highway. Failing in this, the public has no right to conserve. In *Clements v. West Troy*, 16 Barb. 251, the proprietors of the village had laid out the same by a plan upon which an alley was laid down, and house lots conveyed, bounded by the alley. The court said: 'As between the original proprietors and those to whom they conveyed, this act of the proprietors secured a right of way. But the alley

thus designated, and in respect to which the purchasers had acquired an indefeasible right of way, did not thereby become a public highway. The dedication must be accepted. The highway must be laid out. Until that is done, the alley would remain the property of the original proprietors, subject to the right of way in those who had taken the deeds of lots bounded upon the alley.' To much the same effect are *Underwood v. Stuyvesant*, 19 Johns. 186; *Child v. Chappell*, 9 N. Y. 257; *Oswego v. Oswego Canal Co.*, 6 N. Y. 257; *Trustees v. Otis*, 37 Barb. 50."

57. *Snyder v. Fort Madison S. R. Co.*, 105 Iowa, 284, 75 N. W. 179, 41 L. R. A. 345.

58. *McWethy v. Aurora Elec. L. & T. Co.*, 41 N. J. Eq. 35, 2 Am. Elec. 220, 67 N. E. 9.

59. *Hershfield v. Rocky Mountain B. T. Co.*, 12 Mont. 102, 4 Am. Elec. Cas. 73, 29 Pac. 883.

to enjoin the company from stringing its wires in front of his property.⁶⁰ Again, the right of an electrical company which has been given the necessary authorization to construct its line in the streets of a city may be protected by injunction. So such relief will be granted under these circumstances to restrain a cutting down of the company's poles and wires.⁶¹ But where, owing to an increase of traffic and other changed conditions, the poles of a telephone company interfere with the proper use of the streets by the public, an injunction restraining interference therewith by the proper authorities, who are not abusing the discretion vested in them, will not be granted.⁶²

§ 1322b. **Same subject; non-compliance with statutory requirements; consent of local authorities.**—Where the consent of the local authorities is required by statute as a prerequisite to a right to construct a street railway, the fact that such consent has not been obtained is held to be a sufficient ground for the granting of an injunction restraining its construction.⁶³ So an abutting owner, whose consent has not been obtained to the placing of the poles of an electrical company in front of his property, may obtain an injunction against their maintenance there, where his property is materially injured thereby.⁶⁴ And where the consent of the local authorities is essential to the right of a telephone company to construct its line in the streets of a city, if such consent has not been obtained it has been decided that the construction of such line may be enjoined at the suit of a rival telephone company.⁶⁵ Again, where a telephone company had not complied with certain statutory requirements prior to the construction of its line in the

60. *Roake v. American Teleph. & T. Co.*, 41 N. J. Eq. 35, 2 Am. Elec. Cas. 218, 2 Atl. 618.

61. *Williams v. Citizens Ry. Co.*, 130 Ind. 71, 29 N. E. 408.

62. *American Teleg. & Telph. Co. v. Harborcreek Twp.*, 23 Pa. Super. Ct. 437.

63. *Thomas v. Inter-County St. R.*

Co., 167 Pa. St. 120, 5 Am. Elec. Cas. 175, 31 Atl. 476.

64. *Callen v. Columbus Edison El. L. Co.*, 66 Ohio St. 166, 6 Am. Elec. Cas. 243, 64 N. E. 141.

65. *East Tennessee Telph. Co. v. Anderson County Telph. Co.*, 115 Ky. 488, 8 Am. Elec. Cas. 19, 74 S. W. 218.

streets, an injunction restraining the construction of the line until this had been done was granted.⁶⁶

§ 1322c. **Conduits in streets.**—Where the right to construct conduits in city streets for the placing of electrical wires therein has been granted by ordinance, under the authority of a statute, if the company to which such right has been given has acted in reliance thereon and in compliance with the conditions imposed in respect thereto, it is held that its right is in the nature of a contract and that the municipal authorities will be restrained by injunction from interference with the exercise thereof.⁶⁷

§ 1323. **Constructing streets on railroad track.**—Private corporations acquire the right to construct roads, subject to the dominant right of the State to cross such road whenever the public necessity demands that new roads or streets shall be opened, and the general power to open and construct streets or other public highways carries with it the power to construct them over railroad tracks.⁶⁸ Under the New York statute regulating the construction of streets and roads across railroad tracks, without compensation to the company, the word "track" has been construed to signify the entire roadbed, including turn-outs, switches, etc., for to hold otherwise would enable a company, by a judicious adjustment of switches, turn-outs, turn-tables, water-tanks and other accessories, so to control its whole way as to exclude a new street or highway from crossing at any point along its line.⁶⁹ And the crossing of a railroad by a street will not be enjoined because of inconvenience and additional expense to the company, for this result is often

66. *Broome v. New York & N. J. T. Co.*, 42 N. J. Eq. 141, 2 Am. Elec. Cas. 259, 7 Atl. 851.

67. *Chesapeake & Potomac T. Co. v. Baltimore*, 90 Md. 638, 7 Am. Elec. Cas. 151, 45 Atl. 446. See *Chesapeake & Potomac T. Co. v. Baltimore*, 89 Md. 689, 43 Atl. 784.

68. *Lake Erie R. Co. v. Kokomo*, 130 Ind. 224, 29 N. E. 780; *State v. Easton R. Co.*, 36 N. J. L. 181; *Bal-*

timore, etc., Co. v. Union R. Co., 35 Md. 224; *Little Miami R. Co. v. Dayton*, 23 Ohio St. 510; *St. Paul, etc., R. Co. v. Minneapolis*, 35 Minn. 141, 27 N. W. 500.

69. *Delaware, etc., Canal Co. v. Whitehall*, 90 N. Y. 21. And see *Albany R. Co. v. Brownell*, 24 N. Y. 345; *Boston, etc., R. Co. v. Greenbush Village*, 52 N. Y. 510.

inevitable.⁷⁰ But assuming the right of a city to construct a street across a railroad track, it may, in the absence of an express authority by statute, be enjoined from taking part of a railroad company's right of way by the construction of a public street opened longitudinally.⁷¹

§ 1324. Enjoining opening of road; defective proceedings.—

Where the commissioners' court has ordered the opening of a road other than the one located in the report of the jury of view, a landowner through whose land the road passes, who has not been paid or allowed damages, may enjoin the opening of such road, since, no order having been made allowing damages, and no notice given as to the intention to lay out the road so ordered, he was not a party to the proceedings, and could not appeal.⁷² And an attempt to appropriate land for the purposes of a highway where the proceeding is illegal or void because of non-compliance with statutory requirements may be restrained by injunction.⁷³ So where the record of the board of town trustees does not show that the necessary steps were taken to appropriate land for a street, the owner may enjoin the opening of the street through his land, unless he has in some way estopped himself from denying the fact of appropriation. Thus, where in proceedings to enjoin a town from opening a street, it appeared that the record of the board of trustees failed to show that they accepted the report of the commissioners appointed to assess benefits and damages, within twenty days from the filing of the same with the town clerk, as required by statute, it was held that parol evidence was inadmissible to show that the trustees had actually accepted the report within the time prescribed.⁷⁴

70. Little Miami, etc., R. Co. v. Dayton, 23 Ohio St. 510.

71. Fort Wayne v. Lake Shore R. Co., 132 Ind. 558, 32 N. E. 215.

72. Cummings v. Kendall County, 7 Tex. Civ. App. 164, 26 S. W. 439. And see Dunston v. Jamestown, 7 N. D. 1, 72 N. W. 899; McIntyre v. Lucker, 77 Tex. 259, 13 S. W. 1027; Vogt v. Bexar Co. (Tex. App.),

23 S. W. 1044; Floyd v. Turner, 23 Tex. 293.

73. Hardinsburg v. Cravens, 148 Ind. 1, 47 N. E. 153; Jones v. Zink, 65 Mo. App. 409; Robson v. Byler, 14 Tex. Civ. App. 374, 37 S. W. 872.

74. Byer v. New Castle, 124 Ind. 86, 24 N. E. 578. "It would be going too far to hold that a municipal corporation might prove by parol that

But a landowner whose claim for damages in the location of a township road was disallowed by the viewers, is not entitled to an injunction against the petitioner, who is proceeding with an order to open the road, on the ground that the proceedings are erroneous; but ordinarily the claimant has no other remedy than error or appeal, even if the rejection of the claim was for an insufficient cause.⁷⁵

§ 1325. **Same subject.**—Under the public statutes of Rhode Island, conferring the power to lay out and make highways exclusively upon town councils, and defining their powers and duties, the town council for these purposes are public officials, and not the agents and servants of the town, and a suit will not lie against the town to restrain it from exercising this power, and for an account as to damages for the unauthorized acts of its town council, as it has no control over the town council.⁷⁶ But where land over which a highway has been established by prescription has been fenced in by the owner for more than ten years before the passage of the statute, which prohibits the acquisition by limitation of land over which a street has been established, such owner is entitled to an injunction restraining the reopening of such highway.⁷⁷ An

the essential steps required to be taken by the body representing the municipality in proceedings to appropriate real estate had been taken, although the records of the corporation indicate nothing upon the subject. Whether the board might cause its record to be corrected is quite a different question, with the decision of which we are not now concerned. *Chamberlain v. Evansville*, 77 Ind. 542."

75. *Frevert v. Finckrook*, 31 Ohio St. 621, per Okey, J.: "In *Reckner v. Warner*, 22 Ohio St. 275, it was held that if the claimant of damages can, by appealing, obtain the assessment of such damages by a jury, the assessment or denial of damages in

the first instance by viewers is not in violation of the above-mentioned provision of the constitution, and the proceedings will not be restrained. For a stronger reason, where the regularity of proceedings is the ground of objection, the claimants will not be permitted to resort to the remedy of injunction, but will be confined to his appeal, or if the proceedings are so erroneous as to be reversible to his petition in error. *McClelland v. Miller*, 28 Ohio St. 488."

76. *Smart v. Town of Johnston*, 17 R. I. 778, 24 Atl. 830. And see *Donnelly v. Tripp*, 12 R. I. 97.

77. *Ostrom v. City of San Antonio*, 77 Tex. 345.

injunction, however, against the opening of streets and alleys should not be granted on evidence of mere naked possession by the complainant.⁷⁸ And where a complaint against township trustees alleged a location and marking by viewers of a highway upon the line of plaintiff's fence, as the section line, and that the highway so located was opened, and the fence removed to its boundary, and prayed for an injunction restraining its further removal, it was held that an answer pleading the legal proceedings by which the highway was viewed, located, and marked is sufficient; and that where there was judgment for the plaintiff on an issue conceded by defendant, and for defendant on another issue, defendant may have costs, except for the filing of the complaint, and for issuing, serving, and returning the summons.⁷⁹

§ 1326. **Same subject; in Indiana.**—An injunction will not lie to restrain the opening of a proposed highway, where the proceedings are not void or so defective as not to afford the information as to the effect the proposed highway would have upon those interested.⁸⁰ And no injunction will lie to the establishment of a highway over which the board of commissioners has taken jurisdiction, unless the proceedings are void, or so defective as to be an absolute nullity; and especially where there is an adequate remedy by appeal.⁸¹ The essential description of a public highway includes its beginning, course, termination, and width. If in any of these par-

78. *Smith v. City of Navasota*, 72 Tex. 422, 10 S. W. 414.

79. *Hawkins v. Stanford*, 138 Ind. 267, 37 N. E. 794.

80. *McDonald v. Payne*, 114 Ind. 359, 16 N. E. 795; *McIntyre v. Marine*, 93 Ind. 193; *Erwin v. Fulk*, 94 Ind. 235; *Adams v. Harrington*, 114 Ind. 66; *Board v. Hall*, 70 Ind. 469; *Faris v. Reynolds*, 70 Ind. 359; *Mulikin v. Bloomington*, 72 Ind. 161; *Hume v. Little Flat, etc., Assoc'n*, 72 Ind. 499; *Porter v. Stout*, 73 Ind. 3; *Brokaw v. Board*, 73 Ind. 543; *Muncey v. Joest*, 74 Ind. 409; *Stod-*

dard v. Johnson, 75 Ind. 20; *Hume v. Conduitt*, 76 Ind. 598; *Argo v. Barthand*, 80 Ind. 63; *Million v. Board*, 89 Ind. 5; *Cauldwell v. Curry*, 93 Ind. 363; *Smith v. Clifford*, 99 Ind. 113; *Ely v. Board*, 112 Ind. 361, 14 N. E. 236.

81. *Adams v. Harrington*, 114 Ind. 66, 14 N. E. 603; *Houk v. Barthold*, 73 Ind. 21; *Caskey v. Greensburgh*, 78 Ind. 233; *Sims v. Frankfont*, 79 Ind. 446; *Madison City v. Smith*, 83 Ind. 502; *Cauldwell v. Curry*, 93 Ind. 363.

ticulars the description is so uncertain that a practical surveyor could not locate the highway from the petition report of viewers and the final order of the board the entire proceeding is void and the order establishing the highway will not be upheld.⁸²

§ 1327. **Complainant estopped.**—The opening of a road will not be restrained because it will require the removal of complainant's house, which is shown to have been built by him with knowledge that it was within the line of the road as marked out and claimed by the authorities, but he will be left to a court of law for redress.⁸³ And equity will not entertain a bill of an abutting proprietor to enjoin a railroad from running trains over a track in a public street under legislative authority, on the ground that he has not been compensated for incidental damages, where his property has not been actually taken, and he has made no effort to arrest the work, nor given notice that he claims damages, until after the track has been laid, though a constitutional provision requires compensation in advance for the taking or damaging of property for public use.⁸⁴

§ 1328. **Abutting owner's protection.**—In addition to the general rights of citizens to the use of a street, an abutting owner has rights peculiar to his ownership, and for an unlawful invasion thereof by another's using the streets for unlawful purposes such as are not embraced within those of a highway, he may maintain an action in his own right irrespective of the ownership of the fee in the street.⁸⁵ An abutting owner on a street has a right of access

82. *Smith v. Weldon*, 73 Ind. 454; *Ruston v. Grimwood*, 30 Ind. 364; *Suits v. Murdock*, 63 Ind. 73.

83. *Verga v. Miller*, 45 N. J. Eq. 93, 15 Atl. 835. In *Smith v. Navasota City*, 72 Tex. 422, 10 S. W. 414, *Slayton, C. J.*, said: "If appellant made improvements wholly or in part in the street or alley under the findings of the court this was done not only with the means of knowledge furnished by his own deeds

and map to which they referred, but with actual notice that he was placing improvements in the street. Under this state of facts such improvements were made in bad faith and furnished no ground for relief."

84. *Osborne v. Missouri Pac. Ry. Co.*, 35 Fed. 84.

85. *Staton v. Atlantic Coast Line R. R. Co.*, 147 N. C. 428, 61 S. E. 455.

to and egress from his land abutting on the street; and this right is property of which he cannot be deprived, even for a public purpose, without compensation first made, and this right exists though the owner has no estate in fee in the street but only an easement, and entitles him to prevent by injunction a wrongful appropriation of the street.⁸⁶ So in a recent case in New York it is decided that the owner of the fee of land to the center of a city street, subject to the easement of the public thereon for the purpose of a road or highway, is entitled to an injunction enjoining and restraining a telephone company, which has not obtained his consent, from entering upon such land for the purpose of digging holes and erecting poles for the stringing of wires, and, also, to damages for injuries caused thereby to the shade trees upon such land, notwithstanding the telephone company had been granted a franchise by the city to use the streets for the erection of poles and the stringing of wires, since such use of a street is not a use deemed to be within the grant of the land for street purposes but is an additional burden upon the fee for which compensation must be made to the owner.⁸⁷ And an injunction lies in favor of an abutting owner against a trespasser who is about to raise the street above the level of his property, as such a raising of the street is an obstruction to his reasonable use of the street.⁸⁸ And in such a case the defendant's

86. *Lahr v. Railroad Co.*, 104 N. Y. 268, 10 N. E. 628; *Story v. Railroad Co.*, 90 N. Y. 122; *Williams v. Railroad Co.*, 16 N. Y. 97, 111; *Elizabethtown R. Co. v. Combs*, 10 Bush. (Ky.), 382; *Lexington R. Co. v. Applegate*, 8 Dana, 310. Under Rev. Stat. Ill., ch. 24, art. 5, item 90, declaring that a city council shall have no power to grant the right to lay down railroad tracks in any street of the city except upon the petition of the owners of more than half of the street frontage, an injunction may issue at the instance of an abutting owner to enjoin the laying down of railroad tracks under an ordinance granting permission without the requisite petition. *Bez*

v. Chicago & P. R. Co., 23 Ill. App. 137.

87. *Osborne v. Auburn Teleph. Co.*, 189 N. Y. 393.

Effect of removal of pole by complainant.—Where there is an alley in the rear of a lot the fact that the owner of such lot during the pendency of an equity suit for a mandatory injunction to require a telephone company to remove a pole from the alley, removes the pole, does not render him liable as for a trespass, upon the ground that there is an estoppel. *Maryland Teleph. & Teleg. Co. v. Rutt* (Md. 1907), 68 Atl. 358.

88. *Schaufele v. Doyle*, 86 Cal. 107, 24 Pac. 832.

solvency will not defeat the plaintiff's right to an injunction, as such an obstruction to plaintiff's easement is an injury to his inheritance, which, if permitted to continue, would ripen into a right.⁸⁹ And an abutting owner on a street may restrain the taking of such street for the purpose of an elevated railroad under an act of the Legislature giving permission therefor, where he has not been compensated for such taking.⁹⁰ Again, a lot owner, claiming under a deed from the original owner of the plat, describing the lot by metes and bounds along a designated street, and who made valuable improvements thereon, may bring a bill to restrain one who claims title to the whole street from so obstructing the same as to interfere with such owner's right therein, though such street may never have been opened to the public.⁹¹ And where an abutting owner owns the fee in the street to the center line and has an easement over the other half is entitled to an injunction restraining the erection of a building on such street.⁹² And where one builds within the limits of a private road in violation of covenants in the original deed to his grantor, he will be enjoined from so building.⁹³ But the improvement of a street at the cost of abutting lot-owners will not be enjoined because the improvements were not made according to the contract awarded nor on the grade established by the civil engineer.⁹⁴ And though it may be the law in a State that the use of the streets for a telephone system is an additional burden upon the fee, yet an abutting owner will not be entitled to an injunction against the erection of such a line in that portion of the

89. *Richards v. Dower*, 64 Cal. 62.

90. *Jewett v. Union E. R. Co.*, 1 N. Y. Supp. 123; *Lahr v. Metropolitan El. R. Co.*, 104 N. Y. 263; *Story v. N. Y. El. R. Co.*, 90 N. Y. 122. And see *Western Ala. R. Co. v. Ala., etc., R. Co.*, 96 Ala. 272, 11 So. 483.

91. *Appeal of Ferguson*, 117 Pa. St. 426, 11 Atl. 885.

92. *Clymer v. Roberts* (Pa. 1908), 69 Atl. 548.

93. *Gawtry v. Leland*, 40 N. J. Eq. 323, per Bird, V. C.: "It is clear that the act of building within the

limits of said road was an invasion of the rights of the owner of Stake's tract, for which both law and equity provide redress, but not complete at law without a multiplicity of actions; therefore this court justifies the complainant in asking relief in equity. *Rogers Locomotive Works v. Erie R. Co.*, 20 N. J. Eq. 379; *Shimer v. Morris Canal Co.*, 27 N. J. Eq. 364."

94. *McEneney v. Town of Sullivan*, 125 Ind. 407, 25 N. E. 540.

street of which he does not own the fee and upon which his property does not abut.⁹⁵

§ 1329. **Protecting purchaser of street lot.**—Where the original owner of a plotted tract of land, after conveying a lot abutting on a street cuts down the graded and established roadbed of such street, the grantee is entitled to enjoin him from cutting down the grade in such a manner as to substantially interfere with the grantee's convenient access to and from his premises, but an injunction restraining the improvement of the street in other respects would be too broad.⁹⁶

§ 1330. **Grantee's right to removal of obstructions.**—Where the owner of land, in conveying a portion of it by deed, bounds that portion by a street laid down upon a city map as though it were thus an existing highway, though in fact it is not opened as such, the grantee is entitled, as against the grantor and his assigns, to a mandatory injunction to compel the removal of a fence which would obstruct it.⁹⁷ And incidental to the injunctive relief in such

95. DeKalb County Teleph. Co. v. Dutton, 228 Ill. 178, 81 N. E. 838.

96. Cunningham v. Fitzgerald, 138 N. Y. 165, 33 N. E. 840. In Lord v. Atkins, 138 N. Y. 184, 33 N. E. 1030, O'Brien, J., said: "It is well settled that when the owner of land lays it out into distinct lots, with intersecting streets or avenues, and sells the lots with reference to such streets, his grantees or successors cannot afterwards be deprived of the benefit of having such streets kept open. Where in such a case a lot is sold, bounded by the street, the purchaser and his grantees have an easement in the street for the purposes of access, which is a property right. Story v. Elevated R. Co., 90 N. Y. 145; Bissell v. N. Y. Central R. Co., 23 N. Y. 61; White's Bank v. Nichols, 64 N. Y. 65; Taylor v. Hop-

per, 62 N. Y. 649; Huttemeier v. Albro, 18 N. Y. 48; Wyman v. Mayor, 11 Wend. (N. Y.) 487; Trustees v. Cowen, 4 Paige (N. Y.), 510."

97. White v. Tide Water Oil Co., 50 N. J. E. 1, 25 Atl. 199, per McGill, Ch.: "If the way be permanently obstructed by the fence and wall in question, the complainant will be without adequate remedy at law. He may repeatedly, by successive suits, recover damages because of the continuance of the nuisance; but such recoveries will not necessarily suffice to secure him the enjoyment of his right. In such a case adequate relief can only be afforded in equity. Gawtry v. Leland, 40 N. J. Eq. 323; Dill v. Board of Education, 47 N. J. Eq. 421, by mandatory decree and injunction. Rogers Machine Works v.

a case the complainant's legal right must and properly should be determined and declared in the court of equity.⁹⁸ And where two co-tenants agree on a division, and adopt an existing highway through the land as the division line, a purchaser of one part has no right to close the highway, and construct a new road on the other part; and a purchaser of the latter, in addition to the public damage, has a special damage, and may have an injunction, and compel removal of the obstructions.⁹⁹ Again, where a person encloses a discontinued street in a village with land on both sides thereof owned by him, and occupies it for three years, and then conveys such land and all his interest in such street, the title of his grantee in possession is sufficient to enable him to enjoin an interference by such village with, and irreparable injury to, the land formerly used as such street.¹

Erie R. Co., 20 N. J. Eq. 379." Where a railroad company has built its road, in accordance with Civil Code, § 465, subd. 5, on a strip of land dedicated as a highway by the owner, it is entitled to an injunction to restrain the destruction of its track over such a strip by a grantee of the land who asserts ownership thereto because it was never actually used as a highway. *Southern Pac. R. Co. v. Ferris*, 93 Cal. 206, 28 Pac. 828.

98. *White v. Tide Water Oil Co.*,

50 N. J. Eq. 1, 7, 25 Atl. 199; *Gawtry v. Leland*, 40 N. J. Eq. 323; *Lehigh Zinc Co. v. Trotter*, 43 N. J. Eq. 205, 7 Atl. 650, 10 Atl. 657; *Hart v. Leonard*, 42 N. J. Eq. 416, 7 Atl. 865; *Dill v. Board of Education*, 47 N. J. Eq. 421, 20 Atl. 739.

99. *Dewitt v. Van Schoyk*, 110 N. Y. 7, 17 N. E. 425.

1. *Excelsior Brick Co. v. Haverstraw*, 142 N. Y. 146, 36 N. E. 819. And see *Horey v. Haverstraw*, 124 N. Y. 273, 26 N. E. 532.

CHAPTER XLVI.

RELATING TO CORPORATIONS GENERALLY.

- SECTION 1331.** Interfering with corporate business, etc.
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Section 1331. Interfering with corporate business, etc.—An injunction will not ordinarily be granted to restrain a business corporation in its general management and business and the investment of its funds, unless it is shown that it is exceeding its powers.¹ So long as directors of a corporation keep within the

1. *Bach v. Pacific Mail, etc.*, 12 Abb. N. S. 373. In *Moses v. Tompkins*, 84 Ala. 613, 621, 4 So. 763, *Clopton, J.*, said: "Equity will not interfere, at the instance of a stockholder, with the internal management of a corporation by the directors, whether *de jure* or *de facto*, so long as it is kept

within the scope of the chartered powers and the purposes of its creation, unless such administration is destructive or injurious to the corporation, and the corporation itself refuses or is incapable to seek redress." See, also, *Russell v. New York Produce Exchange*, 27 Misc. R. (N. Y.) 381, 58 N. Y. Supp. 842;

scope of their powers and act in good faith, their acts are not subject to judicial control.² So where the selection of a route for a railroad involves a discretionary power which has been exercised within the appointed termini of the road and within the general scope of the authority conferred on the corporation, a court of equity will not interfere by injunction.³ And an injunction will not be granted on the application of a receiver of a corporation to restrain garnishment proceedings by a creditor of the corporation.⁴ Again, where it is alleged in the complaint and moving affidavits that plaintiffs are trustees, *de jure* and *de facto*, of a corporation and in quiet possession of its property and business, and that defendants are about to take possession by force, on the ground that they are such trustee *de jure*, a proper case is presented for an injunction to restrain them from acting as such trustees; but the injunction should be dissolved on its being shown that the active plaintiff has himself been enjoined for similar reasons from interference with the corporate property and management, and has imposed upon the court by the suppression and concealment of that fact.⁵ But in the case of an illegal dividend it is decided that its

Supreme Lodge v. Supreme Lodge, 94 Wis. 234, 68 N. W. 1011.

The California Code, providing that an injunction to suspend the general and ordinary business of a corporation, cannot be granted without due notice to the corporation, is held not to apply to an injunction to a corporation engaged in buying and selling mining claims or in working them, restraining it from allowing any tailings from its hydraulic machines or earth or sediment from flowing into a certain river. *Golden Gate Mining Co. v. Yuba County Superior Court*, 65 Cal. 187, 3 Pac. 628.

In New York it is provided by statute that no decree restraining the business of any life or casualty insurance company of the State shall be made, otherwise than upon the ap-

plication of the Attorney-General or of the Insurance Superintendent, except in an action by a judgment creditor or in supplementary proceedings. *Laws 1890, ch. 400.*

2. *Edison v. Edison Phono. Co.*, 52 N. J. 620, 29 Atl. 195.

3. *Walker v. Mad River R. Co.*, 8 Ohio, 38. In *Attorney-General v. Foundling Hospital*, 4 Bro. C. C. 165, it was held that where the management of a charity was entrusted by law to trustees, they had to exercise their discretion, and that the court would not set up its opinion against that of the trustees, but would prevent their abuse of the trust; an injunction was denied.

4. *Baldwin v. Hosmer*, 101 Mich. 432, 59 N. W. 669.

5. *Ciancimino v. Man*, 20 N. Y. Supp. 702; *Dietlin v. Egan*, 19 N. Y.

payment may be enjoined,⁶ as may also an illegal appropriation of the funds of a corporation,⁷ or the levying of an illegal assessment.⁸ And where there were not a sufficient number of votes for the adoption of a resolution further proceedings thereunder were enjoined.⁹ And interference by the officers and directors of a corporation with its receiver may be restrained.¹⁰

§ 1332. **Public enterprises favored.**—As it is against the policy of the law to restrain industrial progress and such enterprises as tend to develop the country and its resources, courts of equity will sometimes refuse to suspend the business of a corporation where the plaintiff's case is not wholly satisfactory, and instead of granting an injunction will require the corporation to give him a bond to secure him from damage.¹¹ The operation of an electric street

Supp. 392; *Higgins v. Dewey*, 14 N. Y. Supp. 894; *Depeyster v. Graves*, 2 Johns. Ch. 148.

6. *Marquand v. Federal Steel Co.*, 95 Fed. 725.

7. *Bastian v. Modern Woodmen*, 166 Ill. 595, 46 N. E. 1090.

8. *Carmien v. Cornell*, 148 Ind. 83, 47 N. E. 216. But see *Condon v. Mutual Reserve F. L. A.*, 89 Md. 89, 42 Atl. 944, 44 L. R. A. 149.

Where the rights of a member were doubtful under a contract of assessment insurance and the superintendent of insurance recommended an increase of assessment, an injunction against such increase was refused. *Seymour v. Mutual Reserve F. L. A.*, 14 Misc. R. (N. Y.) 151, 35 N. Y. Supp. 793.

9. *Young v. South African & A. E. & D. C.* [1896], 2 Ch. 268, 74 Law T. R. 527.

10. *Excelsior Pebble P. Co. v. Brown*, 74 Fed. 321, 42 U. S. App. 55, 20 C. C. A. 428.

11. *Burke County v. Catawba Lumber Co.* (N. C.), 19 S. E. 636, per

Shepherd, C. J.: "While it may be true that an injunction is the relief asked for in this case, it does not necessarily follow that a refusal to grant one pending the action will defeat his main purpose, as it would have done in *Marshall v. Commissioners*, 89 N. C. 103, and similar cases. It is not denied that the bond required by the court is sufficient in amount to cover all damages that may probably be sustained; and it appears from the affidavits of the defendants that they have a large number of logs on the banks of the stream, that will become worm-eaten and worthless, if they are not permitted to float them, and that an injunction 'will entirely stop the operation of said company's mill, to the great detriment of innumerable citizens of Burke county, who thereby lose the only market for their timber, and to the great and lasting loss and damage of the said company, of one hundred dollars per diem.' It is hardly to be presumed that, in view of their liability upon the bond, the

railway by the overhead wire system is not so dangerous to those who reside or do business on a public street as to authorize its restraint by injunction, as it affords greater speed and convenience to the traveling public than the horse railroad.¹² And a preliminary injunction to stay the progress of a public work will not be allowed unless the act threatened to be done will cause irreparable injury.¹³

§ 1332a. **Public service corporations; discriminations.**—A water company which is obligated by the terms of its franchise to furnish water to the public generally may be restrained, at the suit of an electrical corporation, from cutting off its supply.¹⁴ And a telephone company may be compelled by mandatory injunction to furnish service to an individual at a reasonable rate.¹⁵ So the rules of a telephone company, though they may be just and proper in themselves, may not be so enforced as to constitute unjust discrimination, as where they are enforced against one patron of the company and ignored as to others. And in such a case an action may be maintained to enjoin such unjust discrimination, either against the company or against one who is only an employee, where it is shown that he is acting perversely without authority from his employer and using his employer's authority to gratify his own personal spite.¹⁶ And the charging of excessive rates by a gas company may be enjoined.¹⁷ In New York it is decided that

defendants will not use proper care in floating logs during the pendency of the action; and we are of the opinion that the order of the court is sustained by the principle upon which this court acted in *Lumber Co. v. Wallace*, 93 N. C. 22, in which an injunction was declined, and in lieu thereof a bond was required of the defendants. The court in that case said: 'It is against the policy of the law to restrain industries and such enterprises as tend to develop the country and its resources. It ought not to be done, unless in extreme cases, and this is not such a one.'

12. *Louisville, etc., M'fg Co. v. Central Pass. R. Co.*, 95 Ky. 50, 23 S. W. 592.

13. *Booraem v. North Hudson R. Co.*, 40 N. J. Eq. 557; *Citizens Coach Co. v. Camden R. Co.*, 29 N. J. Eq. 299.

14. *Jenkins v. Columbia Land & I. Co.*, 13 Wash. 502, 43 Pac. 328.

15. *Wright v. Glen Island Teleph. Co.*, 112 App. Div. (N. Y.) 745, 90 N. Y. Supp. 85, *aff'g* 48 Misc. R. 192.

16. *Plummer v. Hattelsted* (Iowa, 1908), 117 N. W. 680.

17. *Westfield Gas & M. Co. v. Mendenhall*, 142 Ind. 538, 41 N. E.

there is nothing in chapter 125 of the Laws of 1906 fixing the price of gas in the city of New York, which in any way repeals, modifies or affects the sections of the Transportation Corporations Law, which provide that a gas company may require a deposit as security for the payment of gas, and hence a customer who refuses to make such deposit on demand is not entitled to an injunction restraining the company from shutting off his supply.¹⁸

§ 1333. **Suit by stockholders.**—In order that a stockholder in a corporation may sue in his own name to restrain the directors it must be made to appear that they are about to take action beyond their authority which will result in serious injury to the corporation and the stockholders or that the majority of the stockholders are illegally pursuing a course in the name of the corporation which is in violation of the rights of the other stockholders; and in such a case the plaintiff must show that he has exhausted all available means to obtain redress within the corporation itself for the redress of his grievances and must show with particularity what efforts he has made to obtain such redress from the directors and from the body of stockholders.¹⁹ Thus where certain stockholders of a railroad company sue to restrain the company and officers from removing a certain station house it is not enough to allege that they have in vain requested the directors to take action

1033; *Madison v. Madison Gas & E. Co.* (Wis. 1906), 108 N. W. 65.

18. *Pollitz v. Consol. Gas Co.*, 118 App. Div. (N. Y.) 92.

19. *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827; *Huntington v. Palmer*, 104 U. S. 483, 26 L. Ed. 834; *Detroit v. Dean*, 106 U. S. 537, 27 L. Ed. 300, 1 S. Ct. 560; *Dimpfell v. Ohio, etc., R. Co.*, 110 U. S. 209, 28 L. Ed. 121, 3 S. Ct. 573; *Quincy v. Steel*, 120 U. S. 241, 7 S. Ct. 520, 30 L. Ed. 624; *Slattery v. St. Louis Trans. Co.*, 91 Mo. 217; *Doud v. Wisconsin R. Co.*, 65 Wis. 108, 25 N. W. 533; *Alexander v. Searcy*, 81 Ga. 536, 8 S. E. 630. And see *Cates v. Spark-*

man, 73 Tex. 619, 11 S. W. 846; *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 15 S. W. 448.

An injunction against interference with right to examine corporate books will not be granted a stockholder where no acts of interference or a denial of such right are shown. *Coquard v. National Linsseed-Oil Co.*, 171 Ill. 480, 49 N. E. 563.

The foreclosure of a mortgage on the property of a corporation will not be enjoined on a ground which is a defense to the foreclosure proceedings and which if the corporation does not interpose it, the com-

to prevent such removal, but they must also specifically allege acts of fraud or *ultra vires* on the part of the directors or managers.²⁰ So in a recent case in New York it is decided that a stockholder is charged with knowledge that the statute gives majority stockholders the right to elect the officers of the corporation, to dictate its policy, and to control its management, and if the acts of the majority do not meet with his approval he has no legal ground of complaint, unless he can show acts which in effect amount to a fraud against him or to bad faith on the part of the majority, and a court of equity will interfere in the management of a corporation at the solicitation of a minority stockholder only when his complaint is based upon some illegal or unauthorized act of the majority to his prejudice.²¹ And an injunction will not be granted, at the suit of a holder of a very small number of bonds or shares of stock, to enjoin a large majority of the stockholders or bondholders from carrying out a plan which such majority deem to be for their benefit, unless it plainly appears that some legal right of the minority is infringed or jeopardized. And the execution of a new mortgage and the issue of new bonds to be secured thereby and substituted for bonds secured by the old mortgage when the holders thereof will consent, in pursuance of a reorganization scheme assented to by a large majority of the bondholders, does not infringe or impair any of the legal rights of the minority bondholders who do not consent thereto.²² And where a mortgage made by the

plaining stockholders may. *Waymire v. San Francisco & S. M. R. Co.*, 112 Cal. 646, 44 Pac. 1086.

Irregularity in calling a meeting not ground for an injunction. *Weinburgh v. Union St. R. A. Co.*, 55 N. J. Eq. 640, 37 Atl. 1026.

Where an assessment is levied on capital stock its collection will not be enjoined if the assessment was levied by a *re jure* board of directors. *Chandler v. Sheep Rock M. & M. Co.*, 15 Utah. 434, 49 Pac. 535.

20. *Latimer v. Richmond R. Co.*, 39 S. C. 44.

21. *Colby v. Equitable Trust Co.*, 124 App. Div. (N. Y.) 262.

22. *Emery v. New York, etc., R. Co.*, 9 Misc. N. Y. 310, per Ingraham, J.: "To grant this injunction would be in substance to allow the wishes of the holder of \$40,000 of these bonds to control the holders of the rest of the \$38,000,000, and that in a case where the courts have ample power in a proper proceeding at any time to protect the plaintiff, and enforce every right of his, notwithstanding any agreement that may be made between the holders of a majority of the

officers of a corporation has been foreclosed a stockholder cannot interfere by injunction to restrain a levy and sale under the mortgage *feri facias* without showing some sufficient reason why the corporation itself is not the party plaintiff.²³ Nor can a stockholder in a corporation maintain an action at law against the officers and directors thereof to recover damages for wilful waste of the assets, whereby the value of his shares was decreased, and he became liable to an assessment thereon, but if the corporation itself refuses to act in a proper case his remedy must be sought in equity.²⁴

§ 1334. **Same subject.**—A court of equity, at the suit of a minority stockholder, will interfere to enjoin a proposed action by the majority stockholders when the same is so detrimental to the

bonds, the mortgagor or the mortgagee; and I can see no legal right of the plaintiff that has been or is to be infringed or impaired, and I do not think that the plaintiff is entitled to any injunction.”

23. *Henry v. Elder*, 63 Ga. 347, per Warner, C. J.: “According to the rulings of this court in *Blackman v. Central R. Co.*, 58 Ga. 189, and *Ware v. Bazemore*, 58 Ga. 316.” In the case last cited Warner, C. J.: “The complainants as stockholders in the company had no standing in court inasmuch as there is no allegation in complainant’s bill that the corporation had been requested to act in its corporate name in behalf of its stockholders and had refused to do so—the general rule being that the stockholders in a company must sue in the name of the corporation. *Colquitt v. Howard*, 11 Ga. 556; *Atlanta v. Grant*, 57 Ga. 340.”

24. *Hirsh v. Jones*, 56 Fed. 137, per McCormick, C. J.: “This is an action at law, by a shareholder in a national bank, against the officers and directors of the bank, claiming against them damages for willful

waste of the assets of the bank by which his stock became liable to assessment, and decreased in value, details of which are given in the petition. Defendants demur. The demurrer is general and special. We have with some care, examined the authorities cited by each party. We do not deem it useful to review the authorities. We consider the general demurrer to the jurisdiction well taken. In our view, the authorities are uniform in support of the proposition that where the cause of action affects all the interests of the corporation, as such, the corporation is the proper party to sue, and on its refusal to sue, or failing under the control to those liable to the suit, and thus not to be trusted to bring and conduct the action, the injured stockholder has his remedy in equity, and must seek it in that jurisdiction. *Cook, Stock. & S.* 701, 734; *Kendig v. Dean*, 97 U. S. 423, 24 L. Ed. 1061; *Dewing v. Perdicaries*, 96 U. S. 193, 24 L. Ed. 654; *Dodge v. Woolsey*, 18 How. 341, 15 L. Ed. 464; *Conway v. Halsey*, 44 N. J. Law, 462.”

interest of the corporation itself as to lead to the necessary inference that the interests of the majority of the stockholders lie wholly outside of and in opposition to the interest of the corporation and of a minority of the stockholders, and its consummation would be a wanton or fraudulent destruction of the right of the minority stockholders.²⁵ So where the officers of a corporation, responsible for its management, are shown to have abused their trust, to the great damage of such corporation, in the interest of another corporation, of which they were then, and still remain, managing officers, any stockholder of the corporation wronged may bring an action in his own name for the benefit of the wronged corporation against the other corporation for the redress of such grievance, and for an accounting between said corporations; and for these purposes may properly join both corporations as defendants.²⁶ And

25. *Robinson v. New York, Westchester & B. R. Co.*, 123 App. Div. (N. Y.) 339. See, also, *Hunt v. American Grocery Co.*, 81 Fed. 532; *Lowe v. Pioneer Threshing Co.*, 70 Fed. 646; *Stewart v. Belt (Miss.)*, 19 So. 957; *Dow v. Northern R. Co.*, 67 N. H. 1, 36 Atl. 510; *Burden v. Burden*, 8 App. Div. (N. Y.) 160, 40 N. Y. Supp. 499; *Lewisohn v. Anaconda Copper M. Co.*, 26 Misc. R. (N. Y.) 613, 56 N. Y. Supp. 807; *Ernst v. Elmira Municipal I. Co.*, 24 Misc. R. (N. Y.) 583, 54 N. Y. Supp. 116.

The collection by a director of debts due a corporation and the payment out by him of corporate assets may be enjoined. *Pizo v. Butler*, 90 Hun (N. Y.), 254, 35 N. Y. Supp. 721.

A receiver appointed after the granting of an injunction against the corporation is bound thereby. *Steel v. Gordon*, 14 Wash. 521, 45 Pac. 151.

A voting of the corporate stock by either of two stockholders who own it all will be granted. *Villamil v. Hirsch*, 143 Fed. 654.

26. *Fitzgerald v. Construction Co.*, 41 Neb. 374, 59 N. W. 838, per Ryan, C.: "In argument it was insisted with great tenacity that it was necessary in every case to show that a demand has actually been made by the stockholders upon the directors that they move for the protection of the corporation, and that their refusal be shown, before an action might be commenced on the relation of a stockholder to enforce the rights of such corporation. Ordinarily, perhaps, this contention is correct. In the case at bar, however, it was sufficiently shown and found that the directors of the construction company were so immediately under the control of the management of the Missouri Pacific Railway Company, against whom suit must be brought, and had, in connection with that management, shown such a disposition to betray the interest of the company in favor of which they owe their best endeavors, that an application to them as directors to act was altogether unnecessary. In section

the directors of a trading corporation may be enjoined at the suit of a minority of the stockholders from wasting the corporate funds

886 of Beach on Private Corporations the following language occurs: 'Where the request that a corporation itself bring a desired suit is apparently useless, it is excused, and need not be made. Accordingly, where the directors of a corporation, having the authority to direct its litigation, are themselves guilty of a wrong complained of, a court of equity will interfere at the instance of a stockholder without a demand and refusal on the part of the directors to bring suit; for it would be against the plainest principles of justice to permit the perpetrators of a wrong to conduct a litigation against themselves.' In *Barr v. Railroad Co.*, 96 N. Y. 444, Miller, J., delivering the opinion of the court, said: 'We are referred by the learned council for the appellants to the case of *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, as authority for the doctrine that no action can be maintained by a stockholder of a corporation under the allegations contained in the complaint in the action at bar. We do not think the case cited sustains the position contended for. It is there laid down that, where the board of directors of a corporation is acting in a manner destructive of the rights of other shareholders, or where a majority of the shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity, an action to obtain relief may be maintained by a stockholder.' In *Cook on Stock and Stock-*

holders and Corporation Law (section 741) we find this statement of the rule: 'There are occasions when the allegation that the stockholder has requested the directors to bring suit, and they have refused, may be omitted, since the request itself is not required. This occurs when the corporate management is under the control of the guilty parties. No request need then be made or alleged, since the guilty parties would not comply with the request; and, even if they did, the court would not allow them to conduct a suit against themselves.' In an action by a stockholder against a railroad corporation and its directors the bill alleged a violation of agreements between the corporation and others, the use of its credit for unauthorized purposes, the wasting and diversion of its assets from their proper purpose, and the aiding in the construction of a competitive line. It was held that a preliminary injunction will not be granted where the conflict of facts in the bill answer, and affidavits raises a doubtful question as to whether the defendant corporation had assumed or ratified an agreement between its predecessor and a third party in relation to the construction of its lines and equipment, and where the defendant corporation had sued in a State court such third party, and questions arising under the agreement might properly be determined there. *Weidenfeld v. Allegheny & K. R. Co.*, 47 Fed. 11. Citing *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24, 35 L. Ed. 55.

See *Wolf v. Shortridge*, 8 Pa. Dist. R. 1, 22 Pa. Co. Ct. R. 81.

and from fraudulent mismanagement of the business for their own private benefit.²⁷

§ 1334a. **Misapplication.**—In case of a threatened misapplication of the property or funds of a corporation by its officers, it is within the jurisdiction of a court of equity to restrain such act by injunction.²⁸ This power has been exercised to restrain a wrongful disposal of the property of a corporation by its directors,²⁹ to enjoin the making of improper purchases from favored stockholders,³⁰ the payment of an unauthorized bonus to a stockholder,³¹ the execution to stockholders of judgment notes for claims not due;³² where a deed of trust to a majority of the stockholders is alleged to have been fraudulent, to prevent its enforcement,³³ to enjoin the execution of an alleged illegal lease,³⁴ and to restrain a diversion of funds to a purpose inconsistent with the objects of the corporation.³⁵ But where nearly five-sixths of the total number

27. *Sears v. Hotchkiss*, 25 Conn. 171.

28. *United States*.—*Pollock v. Farmers' Loan & T. Co.*, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759; *Hunt v. American Grocery Co.*, 81 Fed. 532; *Lowe v. Pioneer Threshing Co.*, 70 Fed. 646.

Connecticut.—*Scofield v. Eighth School District*, 27 Conn. 499.

Georgia.—*Atlanta Real Estate Co. v. Atlanta Nat. Bank*, 75 Ga. 40.

Maryland.—*State v. Northern Central Ry. Co.*, 18 Md. 193.

Massachusetts.—*Phillips v. Eastern R. Co.*, 138 Mass. 122.

Mississippi.—*Stewart v. Belt*, 19 So. 957.

New Hampshire.—*Dow v. Northern R. Co.*, 67 N. H. 1, 36 Atl. 510.

New York.—*Burden v. Burden*, 8 App. Div. 160, 40 N. Y. Supp. 499; *Gray v. De Castro & D. S. F. Co.*, 57 Hun, 592, 10 N. Y. Supp. 632; *Belmont v. Erie R. Co.*, 52 Barb. 637; *Commercial Nat. Bank v. Syracuse*

Rapid T. R. Co., 25 Misc. R. 36, 54 N. Y. Supp. 429.

Pennsylvania.—*Weckerly v. Fell D. & B. C. R. Co.*, 8 Pa. Dist. R. 89, 22 Pa. Co. Ct. R. 209.

Wisconsin.—*City of Platteville v. Galeva & S. W. R. Co.*, 43 Wis. 493.

29. *Hunt v. American Grocery*, 81 Fed. 532.

30. *Lowe v. Pioneer Threshing Co.*, 70 Fed. 646.

31. *Commercial Nat. Bank v. Syracuse Rapid T. R. Co.*, 25 Misc. R. (N. Y.) 36, 54 N. Y. Supp. 429.

32. *Weckerly v. Fell*, 8 Pa. Dist. R. 89, 22 Pa. Co. Ct. R. 209.

33. *Stewart v. Belt (Miss.)*, 19 So. 957.

34. *Dow v. Northern R. Co.*, 67 N. H. 1, 36 Atl. 510. Compare *Jenkins v. Auburn City R. Co.*, 27 App. Div. (N. Y.) 553, 50 N. Y. Supp. 852.

35. *Burden v. Burden*, 8 App. Div. (N. Y.) 160, 40 N. Y. Supp. 499. See *Commercial Nat. Bank v. Syracuse Rapid T. R. Co.*, 25 Misc. R. (N. Y.) 36, 54 N. Y. Supp. 429.

of shares voted in favor of a sale of the corporate property the court refused to enjoin such sale, at the suit of a stockholder who alleged that the price was inadequate.³⁶

§ 1335. **In case of deviation from purpose of incorporation.**—The directors or trustees of a corporation may be restrained at the suit of stockholders from a material deviation from the original idea and purpose of the incorporation and from the agreement under which they had associated.³⁷ So a stockholder in a railroad company may bring a suit for himself and other stockholders to restrain the company from giving the management of its line to another company.³⁸ But a corporation cannot be so restrained from doing what is in direct furtherance of the object of its creation and is for the benefit of all the stockholders as such, though it may be injurious to him and to others in another character.³⁹ And a stockholder in a railroad company cannot have an injunction to restrain the company from running its cars on Sunday unless he shows a case of special injury to himself in the enjoyment of his property or other personal rights.⁴⁰ In England an injunction was refused to restrain a joint stock company from applying in its corporate capacity to Parliament to obtain its sanction for the remodelling of its constitution and the extension of its object and powers.⁴¹

36. *Peabody v. Westerly Water-works*, 20 R. I. 176, 37 Atl. 807.

37. *Kean v. Johnson*, 9 N. J. Eq. 401; *Livingston v. Lynch*, 4 Johns. Ch. 573; *Ware v. Grand Junction Co.*, 2 Russ. & M. 470; *Stevens v. Rutland R. Co.*, 1 Am. L. Reg. 154. And see *Bagshaw v. Railway Co.*, 7 Hare, Ch. 114; *Preston v. Grand, etc., Dock Co.*, 11 Simons, 327; *Salmon v. Randall*, 3 Myl. & Cr. 444.

38. *Beman v. Rufford*, 6 Eng. L. & Eq. 106; *Winch v. Birkenhead R. Co.*, 13 Eng. L. & Eq. 506. But see *Graham v. Birkenhead R. Co.*, 6 Eng. L. & Eq. 132; *Ffooks v. London, etc., Co.*, 19 Eng. L. & Eq. 7. In *Colman*

v. Eastern, etc., R. Co., 10 Beav. 1, a single stockholder obtained an injunction to prevent the running of steamers to the continent though it was found that he bought shares in the company for the very object of preventing it, he being in the interest of a rival company.

39. *Baltimore, etc., R. Co. v. Wheeling*, 13 Gratt. (Va.) 40. And see *Leslie v. Lorillard*, 110 N. Y. 519, 535, 18 N. E. 363.

40. *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 401.

41. *Ware v. Grand Junction Co.*, 2 Russ. & M. 470; *Cunliff v. Manchester Canal Co.*, 2 Russ. & M. 480.

§ 1336. **Protecting stockholder from sale of stock.**—Where a solvent corporation assesses nonassessable stock, and demands payment of the assessment, on penalty of a forfeiture and sale of the stock, an injunction will lie, at suit of a stockholder, to prevent the sale of his shares of stock.⁴² And after a sufficient tender in payment of stock a stockholder may maintain an action to set aside a sale of it at public auction, and to enjoin the corporation from transferring it to the purchaser.⁴³ But an injunction does not lie to restrain the sale of stock to satisfy a valid assessment, merely because the notice of the sale was published for an insufficient length of time, unless the stockholder has paid or offered to pay the amount.⁴⁴

§ 1337. **Enjoining sale of shareholder's stock; stock certificates.**—Where a stockholder in a corporation is indebted to it and there is a dispute as to the extent of the indebtedness and as to the equities existing between him and the corporation, a threatened sale of the stock by the corporation to satisfy the debt may be enjoined, upon a proper showing, until such dispute can be adjusted.⁴⁵ And where a corporation refuses, upon indemnity

42. *San Antonio R. Co. v. Adams* (Tex.), 25 S. W. 639, per Fly, J.: "We are of the opinion that the allegations in the petition justified the issuance of the writ of injunction to prevent the forfeiture and sale of the stock owned by appellees. The fact of the solvency of the corporation did not preclude appellees from obtaining a writ of injunction to prevent the sale of the shares which are non-assessable. The case would stand in the same position as though the shares were assessable, and the amount of the assessment had been tendered. There would probably be no way of accurately estimating the market value of the shares, and irreparable injury might have resulted from the sale of the shares. We are

of the opinion that, under the allegations of the petition, the writ of injunction offered the only adequate remedy for the wrong about to be perpetrated, in the sale of the shares. *Sierra Mining Co. v. Sears*, 10 Nev. 346; *Archer v. Waterworks Co.*, 50 N. J. Eq. 33, 24 Atl. 508; *Sherman v. Stove Co.*, 85 Mich. 169, 48 N. W. 537; *Roberts v. Lewald*, 107 N. C. 305, 12 S. E. 279."

43. *Mitchell v. Vermont Min. Co.*, 67 N. Y. 280.

44. *Burham v. San Francisco M'fg Co.*, 76 Cal. 26, 17 Pac. 939.

45. *Bosworth v. Sumter Real E. & I. Co.*, 105 Ga. 469, 30 S. E. 662.

Pleading.—Where a bill is filed to enjoin the sale of stock of a shareholder to satisfy an indebtedness due

being tendered, to issue a new certificate to the owner of corporate stock, who has lost his old certificate, he may maintain an action in equity to compel the issue of such new certificate, where the statute does not give a remedy at law in such a case, but a cumulative equitable remedy.⁴⁶ And the breach of an agreement by the incorporators of a company to sell the treasury stock and to use the proceeds for the purposes of the corporation, may be enforced by an injunction restraining them from selling their personal stock before the treasury stock is sold as agreed.⁴⁷ And the fact that corporate stock has no market value may in some cases be a ground for enjoining its sale.⁴⁸ But where the sale of corporate stock has been consummated by officers of a corporation to whom full authority to sell was given it is held that a court of equity will not then interfere by injunction.⁴⁹ And a subscription for that portion of the authorized capital not taken before the corporation was organized, made by one of the directors with the consent of the others and payment of the par value, when the transaction is free from fraud and beneficial to the corporation, will not be set aside at the suit of a stockholder; and in such a case the board of directors will not be enjoined from issuing a certificate of stock to such subscriber.⁵⁰

§ 1338. **Election of directors; meetings; by-laws.**—A court of equity will inquire into the regularity of an election of directors

the corporation, on the ground that the debt is not due, or has been paid, or that the corporation is indebted to complainant to a greater amount, and the bill prays for a statement of account, the corporation is an indispensable party; and in such a suit averments that on a settlement of accounts there would be found a balance due complainant, without any allegation as to the insolvency of the corporation, or other facts to justify the interposition of a court of equity, are insufficient. *Elliott v. Sibley*, 101 Ala.

344, 13 So. 500; *Moses v. Tompkins*, 84 Ala. 613, 4 So. 763; *Tate v. Evans*, 54 Ala. 16.

46. *Kinnan v. Forty-Second Street, etc.*, R. Co., 140 N. Y. 183, 35 N. E. 498.

47. *Brown v. Bracking* (Ida. 1906), 83 Pac. 950.

48. *McLure v. Sherman*, 70 Fed. 190.

49. *Huet v. Piedmont Springs L. Co.*, 138 N. C. 443, 50 S. E. 846.

50. *Sims v. Street R. Co.*, 37 Ohio St. 556.

of a corporation only when the question arises incidentally and collaterally in a suit of which the court has rightful jurisdiction, and the grant of relief depends on its decision.⁵¹ And where a stockholder and director of a corporation sought to enjoin a proposed meeting of the directors, at which it was alleged a legal quorum would not be present, the injunction was properly denied, as any act of such meeting would be void and plaintiff would not be injured.⁵² And an injunction will not be granted to restrain directors of a corporation from enforcing an invalid by-law against the plaintiff, where it does not appear that he has exhausted his remedy within the corporation, and where he has a remedy at law to protect him from the threatened injury.⁵³ But where a bill

51. *Elliott v. Sibley*, 101 Ala. 344, 13 So. 500, per *Curiam*: "The court will inquire into the regularity of the election, or the right of the person to the office, only when the question arises incidentally and collaterally, in a suit of which the court has rightful jurisdiction, and the grant of relief depends upon its decision." *Perry v. Oil Mill Co.*, 93 Ala. 364, 9 So. 217; *Nathan v. Tompkins*, 82 Ala. 437, 2 So. 747. The relief sought in the present case is against the corporation. The validity of the claims of the corporation against the complainant, and his defenses to the note, and the rightfulness of his claim for improvements, which he avers to be in excess of his indebtedness for rent to the corporation, in no way depend upon any act of the alleged illegal directors, or of the corporation since their election. The note for \$500 passed to the corporation before their election, and the rental contract was executed prior to their election. Whether, therefore, the election of these directors was legal or illegal, can have no influence upon his right to relief. We hold, therefore, complainant's bill does not

present a case which will authorize a court of equity to inquire into the legality of the election of the directors." And see *Thompson v. Tammany*, 17 Hun (N. Y.), 305.

Irregularities in connection with the election of officers is not a ground for a court of equity to interfere by injunction to restrain them from acting. *Archer v. Murphy*, 26 Wash. Law R. 98; *Supreme Lodge v. Simering*, 88 Md. 276, 40 Atl. 723, 41 L. R. A. 720, 77 Am. St. Rep. 409.

52. *Sullivan v. Venner*, 45 N. Y. St. Rep. 688, citing *McHenry v. Jewett*, 90 N. Y. 62.

53. *Thomas v. Musical Mut. Union*, 121 N. Y. 45, 24 N. E. 24, per *Ruger*, C. J.: "Even in the case of offenses involving the penalty of expulsion from similar societies actions have been maintained to enjoin such societies from denying the privileges of membership to a party expelled only after action by the society expelling such member has been had. No case has been cited where an injunction has been granted in anticipation of such an event, and we think within

charged that transfers of stock had been colorably made to certain persons for the purpose of fraudulently controlling an election, it was held that an injunction against the voting of said stock was the appropriate remedy.⁵⁴

§ 1338a. **Fraternal and social organizations; rights of members; expulsion of.**—A court of chancery is said to have no more jurisdiction over the proceedings of a court of special and limited jurisdiction than over the proceedings of courts of general jurisdiction to correct and restrain alleged irregularities in the pleadings and procedure or in the constitution of the body of triers.⁵⁵ And where the charter of a society gives it power to try and expel members for certain offenses such tribunals are regarded at common law as courts of special and limited jurisdiction and a court of chancery has no jurisdiction to interfere with their proceedings by injunction.⁵⁶ So the right of a corporation not organized for pecuniary profit to adopt rules and by-laws providing for the expulsion of members is said to be recognized and the power to expel to be essential for the healthful existence of the corporate

settled rules that suit in equity for such a purpose is not maintainable. *Hurst v. N. Y. Produce Exchange*, 100 N. Y. 605, 3 N. E. 42; *Fisher v. Keane*, L. R. 11 Ch. D. 353; *Labouchere v. Wharnccliffe*, L. R. 13 Ch. D. 346; *Gregg v. Mass. Med. Society*, 111 Mass. 194; *Wolfe v. Burke*, 56 N. Y. 118; *West v. Mayor*, 10 Paige (N. Y.), 539; *White v. Brownell*, 3 Abb. N. S. 318, *aff'd* 4 Abb. N. S. 162; *Gebhard v. New York Club*, 21 Abb. N. C. 248; *Baum v. New York Cotton Exchange*, 21 Abb. N. C. 253.

54. *Webb v. Ridgely*, 38 Md. 364; *Campbell v. Poultney*, 6 Gill & J. (Md.) 94.

55. *Gregg v. Mass. Med. Soc.*, 111 Mass. 185, 15 Am. Rep. 24.

Where the laws of an association provide for an appeal and

the validity of an order to a subordinate lodge in respect to property is in dispute by such procedure, a court of equity will not interfere by injunction. *Grand Castle v. Bridgeton Castle* (N. J. Eq.), 40 Atl. 849.

The proceedings of an ecclesiastical society will not be enjoined where no property right is involved or can be directly affected thereby. *Fussell v. Hail*, 233 Ill. 73, 84 N. E. 42. See, also, *Wehmer v. Fokenga*, 57 Neb. 510, 78 N. W. 28. See in this connection §§ 923, 923a, herein.

56. *Gregg v. Mass. Med. Soc.*, 111 Mass. 185, 15 Am. Rep. 24. See *Mead v. Sterling*, 62 Conn. 586, 27 Atl. 591; *Lawson v. Hewell*, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400; *Thomas v. Musical Mut. Prot. Union*, 121 N. Y. 45, 24 N. E. 24, 8 L. R. A. 175.

body and an injunction will not be granted to restrain the expulsion of a member his remedy, if any, being declared to be in an action at law.⁵⁷ And in a recent case in Maryland it is declared that although the decisions in some other jurisdictions are to the contrary, the general rule is thoroughly established in that State that a member of a beneficial association cannot, in the absence of fraud, resort to the courts for relief, when there is a by-law or rule in force which requires him to exhaust the remedies furnished by the association.⁵⁸

§ 1339. **Expulsion of members continued.**—A bill for injunction will not lie at the suit of an expelled member of a corporation to restore him to the corporation, on the ground that the expulsion deprives him of a valuable property interest in his membership.⁵⁹ And where members of a medical society sought to enjoin the society from bringing them to trial on certain charges, on the ground that the body to try them was wrongly constituted, and that the proceedings were irregular and void, it was held that the court had no jurisdiction to interfere by injunction, and that they could be tried only by the corporation.⁶⁰ And where a member of

57. *Allen v. Chicago Undertakers Ass'n*, 232 Ill. 458, 83 N. E. 952. See *Ball v. Evans*, 98 Iowa, 708, 68 N. W. 435. Compare *Cheney v. Ketcham*, 5 Ohio N. P. 139, 7 Ohio Dec. 183.

58. *Camp No. 6 v. Arrington* (Md. 1908), 68 Atl. 548.

59. *Pitcher v. Chicago Board of Trade*, 121 Ill. 412, 13 N. E. 187, per Magruder, J.: "The merits of appellant's expulsion cannot be re-examined by us in this proceeding. The minor irregularities of which he complains were waived by his appearance before the board of directors and the submission of his case for trial by them, without objection either to the manner in which that body was constituted or to the mode of its proceeding. Appeal of Sperry, 116 Pa. St. 391, 9 Atl. 478.

The learned judge of the Circuit Court undoubtedly dismissed the bill because we have several times decided that a bill for injunction will not lie in cases of this kind. *Fisher v. Board of Trade*, 80 Ill. 85; *Baxter v. Board of trade*, 83 Ill. 146; *Sturges v. Board of Trade*, 86 Ill. 441."

60. *Gregg v. Massachusetts Medical Society*, 111 Mass. 185, per Chapman, C. J.: "The offense with which the plaintiffs are charged is against their duty as corporators, and for such an offense they can only be tried by the corporation. *Rex v. Richardson*, 1 Burr. 517, 539. In *Murdock v. Phillips Academy*, 7 Pick. 303, 12 Pick. 244, the trial was first had by trustees, then by the visitors by appeal, and again by appeal to this court. But this course of proceeding

an association has been cited to appear before its board of managers and show cause why his rights of membership should not be forfeited for failure to pay assessments, he cannot, without appearing before them to assert his rights, and without anything more being done by the association, maintain a suit to enjoin the forfeiture.⁶¹ A court of equity will not afford relief by injunction where no right of property is involved. Thus, a member of a club in which members have no property rights cannot have an injunction to prevent the club from expelling him, but will be left to his remedy in damages.⁶² In England it was held that a member of the "Beefsteak Club" was entitled to enjoin the committee from interfering with his use and benefit of the club, where it appeared that the committee had acted in his dismissal without full inquiry and without notice to him of any definite charge, and that the general meeting which passed the resolution of expulsion was summoned without proper notice and carried the resolution by an insufficient majority.⁶³

§ 1340. **Nuisance by corporation.**—The Attorney-General cannot maintain an action in the name of the people to prevent the commission of a nuisance by a corporation in a street where local officers have delegated authority to protect the street.⁶⁴ But a private corporation, organized for the purpose of supplying the

is by special statute. The general principle is that a court of chancery is not the proper tribunal to correct the errors of inferior tribunals, and that in ordinary cases the court should not interfere. *Mooers v. Smedley*, 6 Johns. Ch. 28; *Morris Canal Co. v. Jersey City*, 12 N. J. Eq. 252; *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132; *Van Doren v. New York*, 9 Paige (N. Y.), 388; *West v. New York*, 10 Paige (N. Y.), 539; *Heywood v. Bufalo*, 14 N. Y. 534."

61. *Whiteside v. Noyac Cottage Asso'n* (N. Y. App.), 37 N. E. 624, following *Thomas v. Union*, etc., 121 N. Y. 50, 24 N. E. 24.

62. *Baird v. Wells*, L. R. 44 Ch. D. 661; *Rigby v. Connol*, L. R. 14 Ch. D. 482. See, also, *Clark v. Wallace*, 20 Ky. R. 154, 45 S. W. 504; *Wellenvoss v. Grand Lodge*, 20 Ky. Law R. 113, 45 S. W. 360, 40 L. R. A. 488. But see *Supreme Lodge v. Simering*, 88 Md. 276, 40 Atl. 723, 41 L. R. A. 720, 71 Am. St. Rep. 409.

63. *Labouchere v. Wharnccliffe*, L. R. 13 Ch. D. 346. But see *Gebhard v. New York Club*, 21 Abb. N. C. 248.

64. *People v. Equity Gas Co.*, 141 N. Y. 232, 36 N. E. 194.

As to insurance generally, including nuisances by corporations, see Chap. XXXVIII, herein.

inhabitants of a borough with water from an adjacent stream, will be restrained from taking such a quantity of water as will render the supply insufficient for the purposes of a borough situate lower down the stream, which borough, in the exercise of rights conferred by the borough act, is maintaining water works connected with such stream.⁶⁵ And powerful corporations may be restrained from taking, under color of authority, proceedings which are of doubtful legality, and which will place those against whom they are proceeding in a position of great embarrassment.⁶⁶

§ 1341. **Iron Hall association.**—In an association like the Iron Hall, where all the members, although residing in different jurisdictions, are bound by a common contract by the supreme representative of the order, which manages a trust fund for the benefit of the entire membership, if a court at the domicile of the association appoints a receiver, on account of its insolvency, it is competent for a court in another jurisdiction to order trust funds forming a part of the trust funds held by a local branch to be paid into the hands of the receiver, and the members of such branch are not entitled to an injunction to prevent the sending of its funds beyond the limits of the State.⁶⁷

65. Appeal of Haupt, 125 Pa. St. 211, 17 Atl. 436.

66. Mayor v. Groshon, 30 Md. 436; Pinchin v. London R. Co., 31 Eng. L. & Eq. 252; Western, etc., R. Co. v. Owings, 15 Md. 204; Bonaparte v. Camden R. Co., 1 Baldw. 231.

67. Durward v. Jewett, 46 La. 559. 15 So. 386, per McEnery, J.: "When the corporation became insolvent, and was placed in the hands of a receiver, the entire amount became due and demandable in order to satisfy those who had claims upon it. The fund had been paid in on assessments. Individual ownership over the amount ceased. Title was vested in the supreme sitting, and the local branch only held it for it, and it did not re-

linquish ownership, but only regulated a call on it at stated periods. The inability to carry out this regulation did not cause the fund to revert to those who had paid the assessments. In the case of Failey v. Talbee, 55 Fed. 892, there was a proceeding instituted by the receiver of the Iron Hall to gain possession of the reserve fund held by a local branch in Rhode Island. The defendants in that case argued, as the plaintiffs do here. The United States district judge in that case said: 'The argument, then, is that, according to this law, the supreme sitting can call for the reserve fund only at certain times and for certain purposes, and therefore the receiver can call it in

§ 1342. **Restraining corporate officers from patent infringements.**—Officers, agents and stockholders of a corporation, made defendants and served with process in a suit for infringement of a patent by them while acting for the corporation, may be restrained from such infringement, although the corporation is not a party, and is not within the jurisdiction of the court.⁶⁸

only at these times and for these purposes, and not for the general purpose of liquidating the whole trust fund. This argument, I think, rests on a misapprehension of the effect of the laws of the society. They undoubtedly do impress upon the funds the character of trust funds, and perhaps affect different parts of the fund with different equities, but as to the time and manner of ascertaining and marshaling these equities, and as to the method of administration of the fund accordingly, the ymust be taken to be abrogated in the case where, as this bill alleges, the society is insolvent.”

See in this connection § 1338a herein.

68. *Edison Elec. Co. v. Packard Elec. Co.*, 61 Fed. 1002, per *Ricks, J.*: “The courts have gone so far as to restrain the officers of a corporation who aided in promoting the infringing sale or use by transporting the infringing articles. In the case of *Supply Co. v. McCready*, 17 *Blatchf.* 291; *Fed. Cas. No. 295*, Judge *Blatchford* enjoined the officers of the *Old Dominion Steamship Company* from transporting from New York to Norfolk, Va., cotton ties which were an infringement of letters patent owned by *Brodie & McComb*. The corporation was a citizen of Delaware, and was not served with process, or made a defendant in the case. Its president and general freight agent were made defendants, and the restraining

order was to prohibit them from accepting or transporting, as freight, any cotton ties infringing patents owned by the complainant. The defendants answered that they were only officers of a corporation, which was not sued, which was a common carrier, and, as such, transported all freight tendered, and that they could not be expected to know what articles of manufacture offered for shipment were infringements of patents, and that, therefore, an injunction of the character prayed for would be a great hardship. But Judge *Blatchford* met the objections, and said: ‘It is entirely clear that the owners of infringing and unlicensed cotton ties, who are causing them to be transported by vessels of the *Old Dominion Steamship Company*, are sending them for sale and use, and are employing said company and its officers as agents and servants in promoting such sale and use. It would seem, on principle, that there ought to be no difficulty in restraining by injunction all persons whether officers of the corporation or not, who are aiding in the promotion of the infringing sale and use, whether such persons would be liable for profits and damages or not. It has been so held by this court. *Goodyear v. Phelps*, 3 *Blatchf.* 91.’ The court extended relief in that case further than we are asked to do in this case. The defendants in the case cited were merely promoting the sale and use of the infringing ar-

§ 1343. **Restraining consolidation.**—To effect a consolidation of railroad companies subsisting under special charters which do not provide for consolidation, it has been decided that every stockholder must assent to it, and any dissenting stockholder may prevent it by injunction,⁶⁹ until he is paid for his stock.⁷⁰ And in an action by a stockholder to restrain the corporation from consolidating with another corporation, brought on the ground that the proposed consolidation is unlawful, and that defendant's property will be confused with other property, causing loss and confusion, an injunction *pendente lite* will be granted.⁷¹ In New York,

ticles by transporting them as common carriers. In this case they are active in the infringement itself, and interested, as officers and stockholders of the corporation infringing, in the profits to be realized from the illegal acts. The acts they are performing are flagrant, and the proximate cause of the injuries inflicted upon the complainants. They are illegal and tortious, and the complainants are entitled to have the infringement suppressed, without reference to whether the infringers are acting for themselves, or whether they are acting in a representative capacity for others, who are non-residents of this district. When the act to be restrained is lawful, but becomes illegal only when performed by a certain person, the injunction can only restrain that person or his agent from doing the forbidden act; but when it is an illegal and tortious act, no matter by whom or where it is done, the perpetrator may be restrained wherever found." And see section 804, *ante*.

69. *Mowrey v. Indianapolis R. Co.*, 4 Biss. 78. And see *State v. Bailey*, 16 Ind. 46. In *Blatchford v. Ross*, 54 Barb. (N. Y.) 42, Ingraham said: "The proposed merger of the com-

pany in another without the consent of the stockholders is as to those who do not agree beyond the powers of the committee and directors; and if the union had not been substantially executed by a transfer of property and by a large number of stockholders, it should be enjoined until the final hearing of the case."

As to monopolies, trusts, and pooling agreements, see §§ 513-516 herein.

70. *Lauman v. Lebanon R. Co.*, 30 Pa. St. 42.

When the proposed stock of a consolidated company is in excess of the "fair aggregate value" of the property, franchises, and rights of the corporations to be consolidated, contrary to the statute, the consolidation may be enjoined at the suit of a stockholder, he not being limited to the remedy provided by Laws 1890, ch. 567, § 14, allowing any stockholder objecting to consolidation to have his stock appraised, and receive the value thereof, thereupon ceasing to be a stockholder. *Langan v. Francklyn (City Ct. Brook.)* 20 N. Y. Supp. 404.

71. *Young v. Rondout Gas-Light Co.*, 15 N. Y. Supp. 443.

Where a statute prohibits certain combinations as unlawful,

where an agreement to consolidate several water companies had been entered into by the trustees and ratified by the stockholders, as authorized by the statute of 1867, the right to carry out the agreement was held not to be affected by the general corporation laws of 1890, and would not be enjoined at the suit of a stockholder.⁷² And a court of equity will not interfere with a proposed merger of corporations authorized by a large majority of the stockholders and in good faith and in accordance with the statute, simply because some of the minority think the proposed agreement is unsatisfactory or unfair.⁷³

§ 1344. **Ultra vires; monopoly.**—Where a New Jersey railroad company in violation of statute leased its franchises and roads to a corporation of another State, and the effect was to combine coal producers and carriers, and to destroy competition in the production and sale of anthracite coal, it was held that such a corporate excess of power tending to monopoly and the public injury might be enjoined at the suit of the Attorney-General.⁷⁴ The rule is well settled that where a corporate excess of power tends to the public injury or to defeat public policy, it may be restrained in equity at the suit of the Attorney-General.⁷⁵ And a *quasi* public

a foreign corporation may be enjoined from violating it. Attorney-General v. Booth & Co., 143 Mich. 89, 106 N. W. 868.

Where a pooling agreement is contrary to public policy, a voting of the stock under such agreement may be enjoined. Harvey v. Linville Imp. Co., 118 N. C. 693, 24 S. E. 489, 32 L. R. A. 265.

72. Cameron v. New York, etc., Water Co., 133 N. Y. 336, 31 N. E. 104.

73. Colby v. Equitable Trust Co., 124 App. Div. (N. Y.) 262.

74. Stockton v. Central R. Co., 50 N. J. Eq. 52, 24 Atl. 964. And see National Trust Co. v. Miller, 33 N. J. Eq. 162; Black

v. Delaware, etc., Canal Co., 24 N. J. Eq. 465. And see Central Transp. Co. v. Pullman Co., 139 U. S. 24, 35 L. Ed. 55; Thomas v. West Jersey R. Co., 101 U. S. 71; Penn. R. Co. v. St. Louis R. Co., 118 U. S. 290, 30 L. Ed. 83; Union Steamboat Co. v. Green Bay, etc., R. Co., 107 U. S. 98.

75. Attorney-General v. Delaware, etc., R. Co., 27 N. J. Eq. 631; Attorney-General v. Railroads, 35 Wis. 525, and cases there cited; Attorney-General v. Shrewsbury Bridge Co., L. R. 21 Ch. D. 752; Attorney-General v. Local Board, L. R. 18 Eq. 172; Attorney-General v. Great Eastern R. Co., L. R. 11 Ch. D. 449. See, also, Chicago Fair Grounds Ass'n v. People, 60 Ill. App. 488.

corporation which is entrusted by the State with public powers to be exercised for the public good must perform its duties with due regard to its trust and the rule is said to be well settled that equity will not permit an *ultra vires* act on the part of such a corporation which will operate to impair its ability to properly discharge its public duties.⁷⁶ So a company specially created and authorized for railroad purposes may be enjoined from carrying on the business of coal merchants at the suit of the Attorney-General and on the relation of a stranger to the company.⁷⁷ In a recent case, however, in New Jersey it is said: "It has been held that a court of equity cannot interfere at the instance of the State to prevent a bare usurpation of corporate authority by a private corporation. I understand the underlying principle of such cases to be that there is no reason why chancery should, at the instance of the State, enjoin or relieve against acts of a private corporation constituting a breach of the law in any case in which similar relief would not be granted against an individual."⁷⁸

§ 1345. *Ultra vires*; acquiescence.—Stockholders may in some instances be estopped from enjoining directors from acting, beyond the scope of their powers by their own acquiescence in the acts charged to be *ultra vires*. Thus, though a holder of common stock has an equitable right to enjoin the issue of preferred stock, yet if through his acquiescence in such issue innocent third persons have been led to put themselves in a position where harm would come to them if such issue were held invalid, he will not be allowed to enjoin the payment to holders of preferred stock of dividends in excess of those paid on common stock.⁷⁹ And an injunction was

The State is a proper party to maintain a suit to enjoin a quasi-public corporation from doing an *ultra vires* act. *McCarter v. Pitman*, *Glassman & C. G. Co.* (N. J. Eq. 1908), 69 Atl. 211.

76. *McCarter v. Pitman*, *Glassman & C. G. Co.* (N. J. Eq. 1908), 69 Atl. 210.

77. *Attorney-General v. Great Northern R. Co.*, 1 Dr. & Sm. 154.

78. *McCarter v. Pitman*, *Glassman & C. G. Co.* (N. J. Eq. 1908), 69 Atl. 211. See *Steinway v. Steinway & Sons*, 17 Misc. R. (N. Y.) 43, 40 N. Y. Supp. 718.

79. *Kent v. Quicksilver Min. Co.*, 78 N. Y. 159. And see *Zabriskie v. Cleveland R. Co.*, 23 How. (U. S.) 395; *Evans v. Smallcombe*, L. R. 3 H. of L. 249. And see *Hazlehurst v. Savannah R. Co.*, 43 Ga. 13.

refused to restrain the completion of an *ultra vires* purchase of the railroad of another company, where it appeared that some of the complaining stockholders had known of the purchase for five years, and the others might have known at any time, by an examination of the books of this company.⁸⁰ But a contract *ultra vires* between a corporation and another, under which the corporation has received value, will be so far enforced as to estop the corporation from refusing payment on the ground of its own want of power.⁸¹ And a corporation will be restrained from recovering possession of property which has passed under an *ultra vires* contract, without due process of law and a return of the consideration paid.⁸²

§ 1346. **Injunction with receivership; insolvency.**—In a proceeding for the voluntary dissolution of a corporation under the New York Code, the court may at the time of appointing a temporary receiver grant an injunction against the prosecution of suits against the corporation. It is not necessary that a separate motion for such injunction should be made after the receiver's appointment.⁸³ The injunction in such a case is incidental to the receivership and will not be granted unless the receiver is appointed, the object of the Code being to guard the assets of an insolvent corporation against the invasion of creditors who are scrambling for a preference in the collection of their claims.⁸⁴ The Indiana rule is that a court of equity has no power, except by force of statute, to dissolve an insolvent corporation.⁸⁵ Under the New Jersey corporation act where a corporation has ceased to do business and nothing remains but to liquidate its affairs, a court of equity may protect the stockholders by restraining the directors from unlawful acts and from disposing of assets except

80. *Cozart v. Georgia R. Co.*, 54 Ga. 379.

81. *Bradley v. Ballard*, 55 Ill. 417; *Parish v. Wheeler*, 22 N. Y. 494.

82. *Atlantic, etc., Tel. Co. v. Union Pac. R. Co.*, 1 Fed. 745.

83. *In re Simonds Soap Co.*, 41 N. Y. St. Rep. 355, distinguishing.

In re French Mfg. Co., 12 Hun (N. Y.), 488.

84. *In re Simonds Soap Co.*, 41 N. Y. St. Rep. 355. And see section 988, *ante*.

85. *Order of Iron Hall v. Baker*, 134 Ind. 293, 33 N. E. 1128.

in payment of debts until a meeting of stockholders shall be held.⁸⁶ And under the Missouri life insurance law the insurance superintendent may maintain an action to restrain an unsound company from continuing its business.⁸⁷ But though insolvency be proved if it also appears that the managers of the corporation are honest and capable and are striving with a fair prospect of success to relieve it from embarrassment, and its property is free from judgment or other lien under which it may be speedily sold at a sacrifice, a court of equity should not interfere either by enjoining the managers or transferring the management and property to a receiver.⁸⁸ A temporary injunction may sometimes be granted to restrain corporate officers from illegal acts until the appropriate relief can be obtained under the constitution and by-laws of the corporation instead of wresting the management of corporate affairs from its legally constituted officers and turning them over to a receiver.⁸⁹ And where at the suit of stockholders an injunction has been granted to restrain the directors from acts of mismanagement and fraud which threaten to wreck the valuable property of the corporation it is not error to continue the injunction until the hearing on the merits, notwithstanding the denials of fraud and intentional wrong in the answers.⁹⁰ And where a

86. *Streit v. Citizens' Fire Ins. Co.*, 29 N. J. Eq. 21.

87. *Price v. St. Louis, etc., Ins. Co.*, 3 Mo. App. 262. In *State v. Ross* (Mo.), 25 S. W. 947, a railway company filed a petition alleging its ownership of certain property under divers incumbrances; that it owed much defaulted interests and floating debt, and was insolvent; that certain small creditors were about to sue on interest coupons, in order to injure the road and its creditors; that this would interfere with operation of the road, and impair the creditors' security; that the value of the property was such that, if handled under the orders of the court, it would pay out—and praying the court to take pos-

session by a receiver, enjoin interference, and operate the property for the benefit of creditors and stockholders. The defendants named were the trustees of the bonded debts. It was held that no cause of action or real controversy being alleged against anybody, the appointment of a receiver thereunder was a nullity, and collaterally assailable.

88. *Atlantic Trust Co. v. Electric, etc., Co.*, 49 N. J. Eq. 402, 23 Atl. 934. And see *Brundred v. Paterson Machine Co.*, 4 N. J. Eq. 294, 305; *North Fairmount B. & S. Co. v. Rehn*, 6 Ohio N. P. 185.

89. *Order of the Iron Hall v. Baker*, 134 Ind. 293, 316, 33 N. E. 1128.

90. *Birmingham Min. Co. v. Mu-*

corporation has absolutely ceased to exist, equity may enjoin threatened acts of a person assuming to act for it at the suit of the Attorney-General.⁹¹

§ 1347. **Enjoining use of corporate name.**—Where, in an action to restrain a corporation from using its corporate name on the ground of its misleading resemblance to the name of the plaintiff corporation, there was no finding or sufficient proof that any one had been deceived by such resemblance, it was held that the injunction might be denied in the exercise of a sound discretion.⁹² And an insurance association will not be enjoined at the suit of another association from using a similar name where the former had been in business and had used such name several years before the organization of the complainant association.⁹³ But where a foreign corporation by reason of the similarity of its name to plaintiff's was refused permission by the insurance superintendent to do business in New York and it appeared that it kept an office in New York and issued policies filled out in New Jersey the plaintiff was held entitled to enjoin it from so doing business as being injured by its unlawful acts.⁹⁴ And members of a voluntary association who have incorporated themselves under the name of the association without its consent, may be enjoined from using that name.⁹⁵

tual Loan Co., 96 Ala. 364, 11 So. 368. But it was held in this case that if the corporation were insolvent the stockholders would be without pecuniary interest and could not apply for an injunction. And see *St. Mary's Bank v. St. John*, 25 Ala. 566; *Smith v. Huckabee*, 53 Ala. 191; *Montgomery, etc., R. Co. v. Branch*, 59 Ala. 139.

91. *Attorney-General v. Chicago & Evanston R. Co.*, 112 Ill. 520.

92. *Hygeia Ice Co. v. N. Y. Hygeia Ice Co.*, 140 N. Y. 94, 35 N. E. 417. See *Calhoun v. Millard*, 121 N. Y. 69, 24 N. E. 27. And see § 766, *ante*.

93. *High Court v. Commissioner of Insurance*, 98 Wis. 94, 73 N. W. 326.

94. *Employer's Liability Assur. Co. v. Employer's Liability Ins. Co.*, 41 N. Y. St. Rep. 390, 61 Hun (N. Y.), 552. See, also, *Farmers' Loan, etc., Co. v. Farmers' Loan, etc., Co.*, 21 Abb. N. C. 104. And see, as to society not incorporated, *McGlynn v. Post*, 21 Abb. N. C. 97. And see, on second appeal, *Employer's, etc., Co. v. Employer's, etc., Co.*, 78 Hun (N. Y.), 446.

95. *Rudolph v. Southern Beneficial League*, 7 N. Y. Supp. 135, 23 Abb. N. C. 199.

§ 1348. **Protecting corporate officers.**—Where trustees of a corporation, intending to bind the corporate property only, give a mortgage bond which, in law, binds themselves, equity will enjoin an action against them on the bond.⁹⁶ And where the verified complaint and the affidavit of one of the plaintiffs in an action to have defendant's election as trustee of a corporation declared illegal and void, and for injunctive relief, allege that plaintiffs are trustees *de jure* and *de facto* of such corporation, in quiet and peaceable possession of the corporate property and the management of its business, and that defendants are about to take such property and business from them by force, on the ground that such defendants were trustees *de jure*, a proper case is presented for an injunction restraining such defendants from acting as trustees of the corporation.⁹⁷ But where a complaint in a suit to enjoin the removal of the plaintiff from the board of directors of a corporation merely alleges that through a conspiracy certain of the defendants threaten to remove the directors of a corporation, including plaintiff, from office, and have called a meeting of stockholders for that purpose, and that the corporation has collected moneys from the shareholders and is paying it out without the order and direction of the board of directors and has called a meeting at which an assessment is to be levied so that a certain sum can be paid out for a purpose unknown to plaintiff as a director, is held not to state a cause of action.⁹⁸ And it has been decided that a court of equity has no inherent power to enjoin one in possession of a corporate office the title to which is disputed, from the exercise of its functions at the suit of a rival claimant.⁹⁹ Again, where the president and secretary of a natural gas company, with the consent of only one director, and without authority, give a party permission to take gas from a well of the company free of charge, they, the consenting director, and the person to whom such consent was given, are joint wrongdoers, and an injunction against taking the gas was properly granted as to all of them.¹ And in a recent case in New

96. *Maps v. Cooper*, 39 N. J. Eq. Realty Co., 113 App. Div. (N. Y.) 316. 759.

97. *Ciancimino v. Man*, 20 N. Y. 99. *Ciancimino v. Man*, 1 Misc. R. Supp. 702. (N. Y.) 121.

98. *Shulman v. Star Suburban* 1. *Henshaw v. People's Mut. Nat-*

York it is decided that a contract made through general agents or managers appointing a local insurance agent for five years, may be revoked by the principal, and, whether the revocation be right or wrong, the principal is entitled to enjoin the agent from continuing the occupation. In such a case it is held that if the principal has been guilty of a breach of contract, the agent's remedy is an action for damages and he is not entitled to continue to act after revocation.² But where the officers of a corporation are made co-defendants, a decree for an injunction and accounting will not issue against them individually where the corporation is solvent, and they have not as individuals violated, and are not threatening to violate, any rights of complainant.³

§ 1349. **Adequate remedy at law; absence of injury.**—An employee of a corporation sued it to recover advances made in the course of his employment. The corporation sought to enjoin the action on the ground that the advances were unauthorized, and that the advances were to be returned in stock or out of the net profits of the business. It was held that these defenses might have been made in the action at law, and were no ground for equitable jurisdiction.⁴ And where a bank charter provides that judgment obtained on its bills may be levied on the individual property of its stockholders upon a return of no property being made as to the bank, a stockholder who has had notice of a suit against the bank, and has made no defense to it, but has compromised and offered to settle the suit, without, however, paying the amount of the compromise, is not entitled to enjoin the enforcement of the judgment obtained against him by the creditor of the bank.⁵ And

ural Gas Co., 132 Ind. 545, 32 N. E. 318.

2. *Star Fire Ins. Co. v. Ring*, 118 App. Div. (N. Y.) 107.

3. *Howard v. St. Paul Plow Works*, 35 Fed. 743.

4. *New Orleans Lime M'fg Co. v. Lowenstein* (Miss.), 11 So. 187.

5. *Lowry v. Sloan*, 51 Ga. 633. A policyholder sued to enjoin an insur-

ance company from buying certain land and from erecting a building, and to compel it to sell land already acquired, on the ground that it was exceeding its charter rights and was rendering itself liable to a forfeiture. The complaint failed to allege an intention to buy the land, and showed that the building was already in process of erection. It did not show that

where a manufacturing company has sold part of its plant, and has ceased to do business for more than a year, it cannot maintain an action to enjoin any person from asserting that the company has gone out of business, and that he is its successor, since such acts cannot injure it.⁶ But a minority of the stockholders of a corporation may enjoin the directors from a fraudulent mismanagement of its business, though they might have a remedy at law by a suit against the solvent corporation, but the remedy at law would be more expensive and would require a multiplicity of suits.⁷ To entitle a party to relief by injunction against the illegal or fraudulent proceedings of corporate officers, the party seeking relief must be a stockholder of the corporation.⁸

a sale of the land acquired could properly be made, or that such sale could be made without injury to defendant, nor did it show that plaintiff would suffer in any way by the action of the company, or that its assets would not meet all liabilities if the charter was forfeited. It was held that the complaint should be dis-

missed. *Levy v. Mutual Life Ins. Co.*, 7 N. Y. Supp. 562.

6. *Shonk Tin Printing Co. v. Shnk*, 138 Ill. 34, 27 N. E. 529.

7. *Sears v. Hotchkiss*, 25 Conn. 171, 179; *Gray v. Portland Bank*, 3 Mass. 364.

8. *Roebling v. First Nat. Bank*, 30 Fed. 744.

CHAPTER XLVII.

RELATING TO RAILROAD CORPORATIONS.

- SECTION 1350.** Preventing abuse of eminent domain—Parties.
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Section 1350. Preventing abuse of eminent domain; parties.—

The special jurisdiction of courts of equity to prevent corporations invested with the right of eminent domain from abusing their powers rests upon a different principle from that which governs in cases of trespass, nuisance or waste and is exercised in proper cases without reference to the insufficiency of legal remedies or to irreparable injury.¹ Where a railroad company enters upon

¹. *Western Ala. R. Co. v. Alabama, Highland Ave. R. Co. v. Belt Rail-etc., R. Co.*, 96 Ala. 272, 11 So. 483; road Co., 93 Ala. 505, 9 So. 568;

land without the owner's consent or the exercise of the power of eminent domain such entry may be enjoined if application be seasonably made.² And the occupation of land by a railroad company, without compensating or procuring the consent of the owner, will be enjoined, although, by reason of the land having been sold for taxes, the purchaser, under the statute, is entitled to the land for the term of twenty years, and no irreparable damage is immediately done the owner.³ So where a railway company, having obtained from the tenant for life a quitclaim deed of land over

East & West R. Co. v. Railroad Co., 75 Ala. 275. And see §§ 1013-1014-b herein where this subject is considered, *ante*.

The use by an elevated railroad of the easement in the street of an abutting owner, whose rights have not been acquired by purchase or condemnation, is unlawful, and the abutting owner has the right to equitable relief against the mere operation of the road resulting in any injury to such owner. *American Bank Note Co. v. New York El. R. Co.*, 13 N. Y. Supp. 626.

2. *Pittsburgh, etc., R. Co. v. Swinney*, 97 Ind. 586; *Lake Erie, etc., R. Co. v. Kinsey*, 87 Ind. 514; *Chicago, etc., R. Co. v. Jones*, 103 Ind. 386, 6 N. E. 8. And see *Lafayette, etc., Co. v. New Albany, etc., R. Co.*, 13 Ind. 90; *Graham v. Columbus, etc., R. Co.*, 27 Ind. 260; *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178. In an action to restrain a railroad company from building its railway on complainant's land without his consent, or payment of the damages occasioned thereby, a bill alleged ownership of the land, and that the defendant entered thereon and forcibly proceeded to construct its road-bed, though notified to desist; that a jury in proceedings to condemn the right of way, had assessed

the damages to complainant at \$800, after petition made by defendant to the sheriff, as provided in its charter, but that while the proceedings were pending, defendant continued the work of building its road-bed on complainant's land, without his consent, and refused to pay the amount so assessed, although demanded. It was held that an injunction was properly granted. *Chattanooga, etc., R. Co. v. Jones*, 80 Ga. 264; 9 S. E. 1081. In this case defendant answered that the award of the jury was grossly excessive and that it had appealed therefrom, and offered to pay the amount so awarded into court subject to the order of the court after the appeal should be heard and prayed that complainant give bond to protect defendant in case the award should be reduced on appeal. It was held that an order dissolving the injunction on payment of \$800 by defendant into court, subject to the event of the appeal, and directing the clerk of court to pay said sum to complainant upon his filing a bond payable to defendant, and conditioned to repay it or any part thereof that should be found due upon determination of the appeal, was proper.

3. *Pratt v. Roseland R. Co.*, 50 N. J. Eq. 150, 24 Atl. 1027.

which it proposes to construct and operate a line of road, is about to enter on the land for that purpose, against the objection of the owner of the remainder in fee, and without making compensation to him, such proposed action may be enjoined at the suit of such owner.⁴ And where a railroad company has sold its right of way without having paid for it, the owner of the fee may enjoin the second company from building its road until compensation has been made to him.⁵ But when it appears from the facts presented to the court that an injunction would cause great injury to the railroad company as well as to the public without any corresponding advantage to complainant it will not be granted, and complainant will be left to his remedy at law.⁶

§ 1351. **Same subject.**—Where the owner of land sues to recover damages for the construction of a railroad across his lands, and the company files a bill in equity to enjoin the prosecution of his action and for specific performance of his contract to convey to it the land in question, and he claims that the contract was obtained by fraud, the court may, on his cross bill, decree payment of just compensation for the land so taken by the company. In such a case the court of equity having jurisdiction of the injunctive relief prayed for by the company's bill, and also of the question

4. *Gorrill v. Railroad Co.*, 4 Ohio Cir. Ct. 398. A temporary injunction is properly granted restraining a railroad company from appropriating under the right of eminent domain a portion of lands, without first making compensation to the *prima facie* owners. *Georgia R. Co. v. Archer*, 87 Ga. 237, 13 S. E. 636.

5. *Fort Worth, etc., R. Co. v. Jennings*, 76 Tex. 373, 13 S. W. 270. In an action to restrain the operation of an elevated railroad in a street on which abutted property held by plaintiff in trust, an injunction was granted, with a proviso that it should not be operative, if defendants should pay a certain sum for a release by

plaintiff of his legal rights in the easements in the premises affected by defendants' acts. The trustee's power of sale could be only exercised by the assent of certain life tenants. It was held that the judgment should be modified so that plaintiff should not only tender his deed of release, but also the assent and concurrence of such life tenants. *Reed v. Metropolitan El. Ry. Co.* (Sup.), 18 N. Y. Supp. 811.

6. *Highland Ave. R. Co. v. Belt Railroad Co.*, 93 Ala. 505; *Schurmeier v. St. Paul, etc., R. Co.*, 8 Minn. 113; *Zabriskie v. Jersey City R. Co.*, 13 N. J. Eq. 314.

of fraud presented by the cross bill, could proceed to administer complete justice to the parties, and establish purely legal remedies which would otherwise be beyond its jurisdiction.⁷ But the fact

7. *Grand Tower R. Co. v. Walton*, 150 Ill. 428, 37 N. E. 920, per Craig, J.: "The landowner brought an action at law, but the defendant in that action, the railroad company, filed a bill in equity to enjoin its prosecution, and prayed for a specific performance of an alleged agreement, in which the landowner had agreed, upon certain terms and conditions, to convey the right of way. The jurisdiction of a court of equity was thus invoked by the railroad company. It sought a decree compelling the landowner to convey to it the right of way over certain lands owned by her, which the railroad company had taken for its right of way. While it may be true that a court of equity has no jurisdiction to determine the compensation to be paid for lands proposed to be taken for railroad purposes, when a bill has been filed for that purpose alone, yet when a landowner has been brought into a court of equity by the railroad company after it has taken and appropriated the lands for railroad purposes, and it prays for a decree requiring the landowner to convey the lands thus taken, may not the landowner insist upon being paid for the land taken and damaged, and ask the court, by cross bill, to have the amount ascertained and determined, as was done here? The cross bill, in express terms, charged the complainant in the original bill with fraud in procuring the agreement upon which it predicated its bill for a specific performance. It is a familiar rule that courts of

equity have concurrent jurisdiction with courts of law on questions of fraud, and the court which first acquires jurisdiction will retain it until the litigation is finished. If, therefore, the agreement was procured by fraud, no reason is perceived why a court of equity might not investigate that question, and grant such relief as the equity of the transaction demanded. So, also, if the complainant, the railroad company, held a valid contract for a deed for the right of way, a court of equity was the appropriate tribunal to decree a deed in pursuance of the contract. Thus it appears that a court of equity had jurisdiction of the relief prayed for in the bill, and it also had jurisdiction of the question of fraud presented by the cross bill. Being clothed with authority to adjudicate upon these matters, the court had the right, if necessary, to do complete justice between the parties—to settle and determine legal as well as equitable rights, as held in *Tunesma v. Schuttler*, 114 Ill. 156, 164, 28 N. E. 605. The rule seems to be well established that, where equity acquires jurisdiction, it will retain the case, and settle all questions incident to the relief sought in the bill. *Stickney v. Goudy*, 132 Ill. 213, 23 N. E. 1034, is a case in point. It is there said: 'When a court of equity has jurisdiction over a cause for any purpose, it may retain the cause for all purposes, and proceed to a final determination of all the matters at issue. For this reason, if the controversy contains any equitable feature, or requires any

that a court refused to enjoin a railroad company from taking possession of land before condemnation and payment of compensation, did not legalize the possession so taken, nor relieve the company from an action at law for the wrongful entry.⁸

§ 1352. **Injunction pending condemnation.**—Where a railroad company has instituted condemnation proceedings to secure a right of way over land for its road, and has offered to the landowner the amount awarded therein, who has refused it and obtained a preliminary injunction to restrain the company from building its road across his land, it is within the discretion of the court upon a consideration of the relative injury and inconvenience to the parties, and of the public interest to dissolve the injunction.⁹ And even where it has been finally determined that a railroad has been wrongfully constructed on the plaintiff's premises, an injunction has been withheld to enable the company to proceed to effect a legal condemnation of the land.¹⁰ Where application is made to suspend the operation of an injunction against an elevated rail-

purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal remedies which would otherwise be beyond the scope of its authority.”

8. *Grand Rapids R. Co. v. Chesebro*, 74 Mich. 466, 42 N. W. 66.

9. *Myers v. Duluth Transfer Co.*, 53 Minn. 335, per Dickinson, J.: “As this case was presented to the court on the motion for the dissolution of the temporary injunction the court would have been justified in the conclusion that the prosecution of the work sought to be enjoined would not seriously injure the plaintiff's property; that the defendant was empow-

ered to acquire the right of way by condemnation; and that in good faith it had carried forward the proceedings for that purpose to an award of damages and tender of payment before it had entered on the land. In view of these considerations and of the injury which might result from the suspension of such a work, we think it would have been fairly within the discretion of the court to have refused a temporary injunction, and if an injunction might have been refused in the first place, the court might dissolve one granted *ex parte*. Of course, if the defendant's acts were unlawful, the plaintiff is not without a remedy.”

10. *Harrington v. St. Paul R. Co.*, 17 Minn. 215, 229; *Lohman v. St. Paul R. Co.*, 18 Minn. 174. And see *Wood v. Charing Cross R. Co.*, 33 Beav. 290.

road pending proceedings for condemnation, the applicant must show that such proceedings were commenced without unreasonable delay and are prosecuted with reasonable diligence. And where it appears that there has been no unnecessary delay in instituting and prosecuting the proceedings, and that without fault on its part the railroad company is unable to complete them within the period fixed, the court may, in its discretion, grant such further time as may be necessary.¹¹

§ 1353. **Same subject.**—Errors of law in condemnation proceedings by a railroad company are not grounds for awarding an injunction against the company from proceeding to lay out a right of way and construct its road over the condemned land; nor is the fact that it already has one right of way over the lands of plaintiffs; the power to condemn being co-extensive with the requirements for the successful operation of the road.¹² Nor,

11. *Jacquelin v. Manhattan R. Co.*, 9 Misc. (N. Y.) 329, per McAdam, J.: "The actions were brought by abutting owners to enjoin the operation and maintenance of the defendants' elevated railroad in front of the plaintiffs' property on the Bowery. It appears that on November 1, 1893, injunctions were granted restraining the operation and maintenance of the elevated railroad, unless the defendants, within six months from that date, acquired title to the easements in front of the plaintiffs' property, either by 'purchase or due process of law.' The defendants, upon affidavits showing that condemnation proceedings had been instituted for the purpose of acquiring the easements, applied at Special Term to suspend the operation of the injunctions until such proceedings could be completed. The court granted the applications by suspending the operation of the injunctions for three months from May 6, 1894, and the appeals are from these orders. The court below had

the power to grant the orders, and the only question is, whether the discretion exercised in granting them was abused. The discretion was not abused, and the orders are affirmed."

12. *Cooper v. Anniston & A. R. Co.*, 85 Ala. 106, 4 So. 689, per Stone, C. J.: "Nor is there anything in the objection that having once obtained a right of way the railroad company is bound to adhere to it and cannot proceed for a further condemnation. The power is continuous and co-extensive with the wants of the corporation. It should be a clear case of abuse to justify withholding relief on the ground that the easement asked for is not necessary to the successful operation of the railroad. *Chicago, etc., R. Co. v. Wilson*, 17 Ill. 123; *Fisher v. Chicago, etc., R. Co.*, 104 Ill. 323; *Smith v. Chicago, etc., R. Co.*, 105 Ill. 511; *Mississippi, etc., R. Co. v. Devaney*, 42 Miss. 555; *Central Branch, etc., R. Co. v. Atchison, etc., R. Co.*, 26 Kan. 669; *Virginia, etc., R. Co. v. Lovejoy*, 8 Nev. 100.

where the compensation awarded had been deposited in court, is it sufficient ground for such injunction that the company is insolvent, and will not be able to pay a judgment for increased damages, which may be obtained on appeal, as plaintiffs have a lien therefor on the land, enhanced in value by the construction of the road, and an adequate remedy by restraining order out of chancery to compel payment as a condition of further enjoyment of the easement.¹³ And complainant's land having been condemned by a railroad company, and the money paid into court, it is no ground for equitable interference with the construction of the railroad, that a former company holding the same franchise condemned the land to the extent of two-thirds, and that complainant refused to accept the award, as an estoppel by judgment can be set up at law; nor does the fact that the law court has refused to restrain the construction of the road till the rights of the parties could be determined, give equity jurisdiction to interfere.¹⁴ After an adjudication in condemnation proceedings that a railroad company, on paying a specified sum, shall be owner of certain lands for the purpose of building a railroad on them, the former owner, who was a party to the proceedings, cannot allege that the railroad which was accordingly built is a nuisance, the matter being *res adjudicata*.¹⁵ A railroad company organized under the Pennsylvania general railroad act of 1868, which provides for the incorporation of railroads for the conveyance of persons and property, and for acquiring a location, and for the ascertainment and payment of damages done to landowners, but which expressly provides that it shall not authorize the construction of street passenger

13. *Cooper v. Anniston & A. R. Co.*, 85 Ala. 106, 4 So. 689, per Stone, C. J.: "Complainant in this bill has ample means for enforcing any damages he may recover. He has a lien in the nature of that of a vendor on the property taken, enhanced in value by the improvements to be put upon it; and if the payment be withheld, the chancery court, by a restraining order, may compel payment as a con-

dition of further enjoyment of the easement. *Hooper v. Railroad Co.*, 69 Ala. 529; *New Orleans, etc., R. Co. v. Jones*, 68 Ala. 48, 70 Ala. 227; *Thornton v. Sheffield, etc., R. Co.*, 84 Ala. 109, 4 So. 197."

14. *Trimmer v. Pennsylvania, etc., R. Co. (N. J. Eq.)*, 17 Atl. 967.

15. *Kerr v. West Shore R. Co.*, 2 N. Y. Supp. 686.

railways, is necessarily a steam railroad company, and must proceed according to the provisions of the act, failing in which it acquires no route on which it can lawfully build its road; and as permission by a city cannot give such company the right to build and operate an elevated street passenger railroad in the absence of legislation authorizing it, and providing for the ascertainment of damages to lot owners thereby, an injunction will lie at the instance of abutting property owners to restrain the construction of such railway.¹⁶

§ 1353a. **Contract giving right of way; breach of by railroad company.**—Where the owner of land conveys it to a railroad corporation for the right of way of its main line, and the corporation violates its agreement contained in the deed of conveyance to maintain a spur track and depot on the spur track, the grantor of land cannot enjoin the running of trains over the main line, since the public have rights requiring uninterrupted service over that line. But it is decided that specific performance of the agreement can be had unless compliance would interfere materially with the defendant company's duty to the general public. And in this case the court decided that under the facts as they appeared, an appropriate mandatory injunction should be granted, unless the defendant by its answer and proofs to sustain it, could show that the interests of the general public would be injuriously affected thereby.¹⁷

§ 1354. **Condemning railroad land by another company.**—In a suit by a railroad company to enjoin another railroad company from condemning part of its right of way in a city for its (defendant's) road, where the petition alleges that the act incorporating defendant is unconstitutional, and alleges and files affidavits tending to show that all of its land, including that sought to be condemned by defendant, is occupied and used by petitioner for

16. Potts v. Quaker City El. R. Co., 161 Pa. St. 396, 29 Atl. 108. And see Appeal of Pittsburgh, etc., R. Co., 122 Pa. St. 511, 6 Atl. 564; Rafferty

v. Traction Co., 147 Pa. St. 579, 23 Atl. 884.

17. Taylor v. Florida East. C. R. Co. (Fla. 1907), 45 So. 574.

its business, and is absolutely needed; that to allow defendant to also lay and use tracks thereon will greatly crowd and interfere with petitioner's business; and that it is not necessary, except on the ground of economy, that defendant should be allowed to condemn the land, but that it could procure a right of way elsewhere,—there is no abuse of discretion in granting an interlocutory injunction.¹⁸ And where one railroad company has built its road-bed and obtained its right of way through a defile or canyon, the court will grant an injunction restraining another railroad corporation, authorized to build to the same point, from going upon or interfering with the track or right of way of the corporation first in possession until an adjustment of rights can be made by the court under the general railroad law authorizing railroad crossings.¹⁹ But equity will not enjoin a railroad company from proceeding to construct its road on the road-bed of another company, pending an appeal without *supersedeas* from a judgment of the probate court condemning a part of the right of way of the last-named company, but not including its tracks, in the absence of some circumstances showing that an irreparable injury will be inflicted, as the probate court has jurisdiction to condemn so much of the right of way as is not in actual use or necessary to the enjoyment of that part so used, and the invasion of the right of way is a simple trespass, for which the legal remedy is ample.²⁰ In Alabama a part of the road-bed of another railroad, including a sufficient space on each side for the safe passage of trains, cannot be condemned.²¹

§ 1354a. **Telegraph line or railroad right of way; electric light line.**—A railroad company may obtain an injunction restraining a telegraph company from constructing its line along the right of way of the railroad company where such construction is unauthor-

18. *Hoke v. Georgia Railroad & Banking Co.*, 89 Ga. 215, 15 S. E. 124.

19. *Montana Cent. R. Co. v. Helena R. Co.* (Mont.), 12 Pac. 916.

20. *Mobile, etc., R. Co. v. Alabama Midland R. Co.*, 87 Ala. 520, 6 So. 407.

21. *Anniston, etc., R. Co. v. Jacksontonville R. Co.*, 82 Ala. 297, 2 So. 710.

ized.²² But where a railroad company has granted the right to a telegraph company to so construct its line, and poles have been erected by it, an exclusive right to the use of such poles is held to exist which right a court of equity will protect by injunction.²³ A mere grant, however, to a telegraph company to construct its line along the right of way of a railroad is held to confer no exclusive right and will not authorize the granting of an injunction against another telegraph company, restraining it from constructing its line along such right of way.²⁴ Where an electric light company sought to protect by injunction an alleged right to erect and maintain a line of poles for the purpose of carrying electric wires along the tracks of a railroad company, for the purpose of maintaining its business of serving the public with electricity, it was decided that the bill was insufficient in merely alleging that irreparable and serious injury would result if the injunction were not granted and setting up no facts showing that such injury would result.²⁵

§ 1355. **Company's bond in doubtful cases; company's discretion.**—An injunction against the construction of a street railway should be dissolved where the company gives a sufficient bond, conditioned to pay all damages that might be recovered or assessed in favor of plaintiff, none of his property being sought to be taken, and the conflicting evidence making it doubtful that it would be damaged.²⁶ And where, in a suit to enjoin defendants from interfering with the construction by plaintiff of a railroad, the petition alleged that plaintiff was the owner of land on which it proposed to build it, and had commenced building a large elevator, and

And see *East & West R. Co. v. Railroad Co.*, 72 Ala. 275.

22. *New York City & N. R. Co. v. Central Union T. Co.*, 21 Hun (N. Y.), 261, 1 Am Elec. Cas. 315.

23. *Western Union T. Co. v. Chicago & Paducah R. Co.*, 86 Ill. 246.

24. *Pacific Postal T. C. Co. v. Western Union T. Co.*, 50 Fed. 493, 4 Am. Elec. Cas. 232; *Western Union*

T. Co. v. Baltimore & Ohio T. Co., 23 Fed. 12, 1 Am. Elec. Cas. 722; *Western Union T. Co. v. American Union T. Co.*, 65 Ga. 160, 1 Am. Elec. Cas. 306.

25. *Consolidated Gas & E. L. & P. Co. v. Northern Cent. Ry. Co.* (Md. 1908), 69 Atl. 518.

26. *Fouche v. Rome St. R. Co.*, 84 Ga. 233, 10 S. E. 726.

had contracted for a large amount of machinery, and gone to great expense, and that the road was necessary for carrying out the enterprise, and was located entirely on its own land, and defendants claimed title to part of the land over which the road ran, and the evidence left the question of title in doubt, and it appeared that the enterprise was important, and ought to be encouraged; that delay would injure and hinder it; and that the construction of the road could not seriously injure defendants, it was held that an injunction should be granted, and defendants be left to their remedy on plaintiff's bond.²⁷ But where a street railway corporation is constructing its road under its charter over a location granted to it by a town, and is using or intending to use the safeguards required by the statutes, it is held that the Supreme Court of Massachusetts, under its general equity powers conferred by the public statutes, has not the power to compel it by injunction to use different safeguards.²⁸

§ 1356. **Acquiescence.**—It is a recognized rule of equity, supported by principles of justice as well as of public policy, that if one knowingly suffers another to purchase and spend money on land, under circumstances which induce a mistaken belief of title without making known his claim, he shall not afterwards, in a court of conscience, at least, be permitted to assert any right or title against the purchaser.²⁹ Thus, a bill will lie by a railroad company for an injunction to restrain ejectment against it, where it occupies the land in dispute with its tracks and buildings, which were put there without objection from defendant or his grantor, though the company has no title.³⁰ And one who releases

27. *Roanoke Nav. Co. v. Emry*, 108 N. C. 130, 12 S. E. 900. And see *Parker v. Parker*, 82 N. C. 165; *Lewis v. Lumber Co.*, 99 N. C. 11; *Evans v. Railroad Co.*, 96 N. C. 45.

28. *Old Colony R. Co. v. Rockland R. Co.*, 161 Mass. 416, 37 N. E. 370.

29. *Alabama R. Co. v. South & North Ala. R. Co.*, 84 Ala. 580, 3 So. 286.

30. *South, etc., Ala. R. Co. v. Alabama R. Co.*, 102 Ala. 236, 14 So. 747, per Haralson, J.: "The principle upon which this appeal is prosecuted is, that an action at law will not be enjoined in equity, when it appears that defendant has a full and complete defense which may be set up and maintained in the court of law. This certainly

his right in a street to a railroad company for a right of way, "to be occupied by one track, as now located," will not be granted an

is the statement of a correct legal proposition. And, it is insisted, as for its application in this case, that the bill filed—on which the action of ejectment pending in the law court was enjoined—shows that the complainant, the appellee here, could have maintained the defense it sets up, as well at law as in equity—that it has no right to the land, as against appellant's title, so far as is shown by the bill, which is not legal. But this principle, so correct in itself, and so confidently relied on, has no application, but breaks down, where the defense to the action is purely equitable, and can only be adequately made in a court of equity. *Powell v. Higley*, 90 Ala. 108, 7 So. 440. At law, an estoppel *in pais* has no effect on the title to land, but a court of equity accords full effect and operation to it. *Hendricks v. Kelly*, 64 Ala. 388; *Standifer v. Swann*, 78 Ala. 93; *McCarty v. Iron Co.*, 92 Ala. 468, 8 So. 417. Accordingly, it has been held in this court that while a railroad company has no right to enter upon and take possession of the lands of another—without his consent or without having made just compensation therefor in proceedings for the condemnation of the land—and construct its track thereon, yet, if the owner has knowledge that the company is proceeding to locate and construct its road on his land, and he allows it to do so, and expend large sums of money on improvements for such purpose, he will be estopped from ousting the company by ejectment. *New Orleans, etc., Railroad Co. v. Jones*, 68 Ala. 49; *Pollard v. Maddox*, 28 Ala. 321. 'Acquiescence by a land-owner

in the occupation of his land for the roadbed of a railway company will preclude him from maintaining ejectment for the land on which the road is built.' 2 Herm. Estop., § 971; *Kanaga v. Railroad Co.*, 76 Mo. 207; *Baker v. Railroad Co.*, 57 Mo. 265; *Railroad Co. v. Strauss*, 37 Md. 237. In a case involving the application of the foregoing principle, the Supreme Court of Ohio said: 'Considerations of a public policy, as well as recognized principles of justice between the parties, require that we should hold, that the property of the owner cannot be reclaimed, and that there only remains to him a right of compensation.' *Goodin v. Canal Co.*, 18 Ohio St. 169. And this court, giving sanction to this utterance of the Ohio Supreme Court, said: 'This is the doctrine of all the courts, and is rigidly applied even by those courts which interfere most liberally for the protection of the owners of lands against the unlawful entry of railroad and similar corporations'—citing *Binney's Case*, 2 Bland, Ch. 99; *Railroad Co. v. Prudden*, 20 N. J. Eq. 530; *Easton v. Railroad Co.*, 24 N. J. Eq. 49; *Traphagen v. Mayor*, 29 N. J. Eq. 206. In a case similar in its essential features to the one we try—and between these same parties—where a contract for a right of way had been entered into by an agent whose authority to make it was disputed, and the railroad company had, under the contract, located its machine shops, tracks and depots with a view of the right of way acquired under this contract, and the owner of the property—the Elyton Land Company—had stood by and allowed all this

injunction to prevent the putting in of a switch, it not appearing that plaintiff will be injured thereby.³¹

§ 1357. **Landowner's acquiescence.**—The general rule is that a landowner who stands by, without demanding compensation, until a railroad company has so far completed and put in operation its road over his land as to involve the public interest, can neither enjoin the company nor maintain ejectment to recover his land. The only remedy left to the landowner, in such case, is to proceed within the proper time to have his damages assessed and enforced against the railroad company. This rule is founded upon the general principle of public policy.³² Thus the owner of land cannot maintain ejectment against nor enjoin a railroad company which entered upon the land, constructed a depot, and occupied it for six years, as his remedy is confined to the recovery of damages

to be done without protest, this court held that it would be inequitable and unconscientious, after such improvements had been made, and the property had greatly enhanced in value, to allow the transferee of the title of that company to deny or disprove the agent's authority to make the contract. . . . The bill charges, as has been shown, that the defendant acquired the title it received from the Elyton Land Company with full notice of complainant's occupancy of said land, and the improvements it had theretofore placed on it. The vendee of land is not entitled to claim the payment of damages for lands taken or for injuries done before he acquired title, but is confined to those resulting afterwards; and if an owner, by his acquiescence in the occupancy of his land by a railroad company, has waived his right to oust the company, his vendee cannot acquire any other or greater rights than the vendor enjoyed. *Franklin v. Mill Co.*, 88 Ala. 318, 6 So. 685; *Pique v. Arendale*, 71 Ala. 91; *Hen-*

dricks v. Kelly, 64 Ala. 388; *Central Railroad Co. v. Hetfield*, 29 N. J. Law, 206; *Indiana, etc., Railway Co. v. Allen*, 100 Ind. 409; *Pennsylvania Railroad Co. v. Jones*, 50 Pa. St. 417, 6 Am. & Eng. Enc. Law, and authorities there cited, p. 588. The decree of the chancellor overruling the demurrer must be affirmed."

31. *Indianapolis & St. Louis R. Co. v. Calvert*, 110 Ind. 555, 11 N. E. 476.

32. *Indiana, etc., R. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446; *Indiana, etc., Co. v. McBroom*, 114 Ind. 198, 15 N. E. 831; *Bravard v. Railroad Co.*, 115 Ind. 1, 17 N. E. 183; *Louisville, etc., Railway Co. v. Beck*, 119 Ind. 124, 21 N. E. 471; *Sherlock v. Railway Co.*, 115 Ind. 22, 17 N. E. 171; *Louisville, etc., Railway Co. v. Soltwedde*, 116 Ind. 257, 19 N. E. 111; *Strickler v. Railway Co.*, 125 Ind. 412, 25 N. E. 455; *Porter v. Railway Co.*, 125 Ind. 476, 25 N. E. 556; *Midland Railway Co. v. Smith*, 135 Ind. 348, 35 N. E. 284.

for its use.³³ And a turnpike company, a part of whose road-bed has been condemned for railroad purposes on condition that the railroad should build a certain described fence between its track and the turnpike, cannot, after allowing the railroad to be built and operated for six years, without requiring the railroad company to build the fence, and after the railroad has passed into the hands of receivers, obtain an injunction restraining the operation of the road over the condemned land, because of the non-compliance with the condition.³⁴ And one who consents to the use of his land by a railroad company for a right of way and as a sub-contractor grades and constructs the line across his land and for many years acquiesces in the claim of the company, cannot maintain a suit for injunctive relief but is confined to an action for compensation.³⁵

In Minnesota an injunction will not be granted to restrain the condemnation by a railroad of a right of way through university lots, on the ground that they had been appropriated by the State for the use of the university, where it appears that, pursuant to the recommendation of the professor of agriculture, the executive committee purchased the lots without the direct authority of the board of regents, taking title in the name of one of their number, and that this action had not been ratified by the regents, and that both the State and the holder of the legal title had been parties to the condemnation proceedings though the university had not.³⁶

§ 1358. Temporary injunction as part of seasonable application.—In some cases a complainant may lose his right to restrain the construction of a railroad by not in the first place applying for

33. Louisville, etc., R. Co. v. Berkeley, 136 Ind. 591, 36 N. E. 642. One who, for nine months, has not attempted to interfere with the taking possession of his land for a railroad, only objecting that insufficient damages were offered, cannot have an injunction against the running of the cars. Pensacola & Atlantic R. R. Co. v. Jackson, 21 Fla. 146.

34. Spencer v. Falls Turnpike

Road Co., 70 Md. 136, 16 Atl. 451.

35. Midland R. Co. v. Smith, 113 Ind. 233, 15 N. E. 256. And see Campbell v. Indianapolis R. Co., 110 Ind. 490, 11 N. E. 482; Chicago, etc., R. Co. v. Jones, 103 Ind. 386, 6 N. E. 8; Buchanan v. Logansport, etc., R. Co., 71 Ind. 265.

36. University of Minnesota v. St. Paul, etc., R. Co., 36 Minn. 447, 31 N. W. 936.

a temporary injunction to prevent a company's operations pending suit. Thus complainant, a property owner on a street along which defendant was about to construct a railroad track, under authority of the city, filed its bill for equitable relief on the ground that its property would be damaged, and that compensation had not been paid as required as a condition precedent by the State constitution, but no application for a temporary injunction was made, and in the meantime the track was laid, and in daily use; it was held on final hearing, that the court would not grant an injunction, but would leave complainant to his remedy at law.³⁷ But a temporary injunction will be modified so as to allow a railroad company to complete over its own land a side track already commenced, and to use the same until a final adjudication of the cause; this side track not touching any property of the complainants, and its construction and use being more likely to lessen than increase their annoyance or damage for the present.³⁸

§ 1359. **Grade crossing by another company.**—In an action by a railroad company to enjoin another railroad company from constructing a grade crossing at a certain place, it appeared that plaintiff's business at such place required the running of numerous trains daily, that there were up and down grades near the proposed crossing, that it would cause plaintiff great inconvenience and expense to require it to stop its trains for the crossing, and that an over-crossing was impracticable. It was held that an order requiring defendant to construct an under crossing was proper.³⁹

37. *Osborne v. Missouri Pac. R. Co.*, 37 Fed. 830, per Thayer, J.: "If it had made a seasonable application for a temporary injunction when the bill was filed or when defendant began to construct the track the court would undoubtedly have been authorized on the averments of the bill and the showing now made to grant such an order; but it does not follow that it ought for that reason to grant an injunction now. Injunctive relief should be applied for seasonably.

Even where there are some grounds for such relief it is in a measure discretionary with the court to grant or withhold it. *Bassett v. Salisbury Mfg. Co.*, 47 N. H. 436; *Midland R. Co. v. Smith*, 113 Ind. 233, 15 N. E. 256.

38. *Savannah R. Co. v. Fort*, 84 Ga. 300, 10 S. E. 1014.

39. *Chicago, etc., R. Co. v. Chicago, etc., R. Co. (Iowa)*, 58 N. W. 918, per Robinson, J.: "The claim of appellant that its election of the

And where a statute forbid grade crossings and the construction of an overhead crossing within the meaning of the statute was practicable, it was held that the crossing of railroad tracks by the tracks of a street railway company at grade would be enjoined.⁴⁰ And the laying of switch tracks across railroad tracks may be enjoined.⁴¹ And where in a suit to restrain a railroad company from crossing the line of another railroad, a preliminary injunction has been granted, and there is evidence to show that the desired crossing would be a dangerous one, it is proper to leave such

kind of crossing to construct is not a matter for judicial review and control is not, in our opinion, well founded. The right of election sought to be enforced in this case is said to be given by section 1265 of the Code, which is as follows: 'Sec. 1265. Any such corporation may construct and carry its railway across, over, or under any railway, canal, or water course, when it may be necessary in the construction of the same; and in such cases said corporation shall so construct its crossings as not unnecessarily to impede the travel, transportation, or navigation upon the railway, canal, or stream so crossed; said corporation shall be liable for the damages occasioned by any corporation or party injured by reason of said crossing.' This statute gives to a railway corporation the absolute right to carry its railway across, over, or under that of another, when it may be necessary to do so; but the right is subject to the limitation that the crossing shall be so made as not unnecessarily to interfere with the use of the railway crossed. Where such interference is threatened, it is within the jurisdiction of the proper courts to prevent it. It cannot be said that the right of crossing given by the statute is denied if the corporation desiring the crossing is re-

quired so to make it as to avoid unnecessary interference with the transportation of passengers and freight on the railway sought to be crossed. In this case it is shown that the business of plaintiff carried on over that part of its railway in question is large, involving the running of numerous trains daily; that there are ascending and descending grades in the vicinity of the crossing; and that it would cause great inconvenience and expense to the plaintiff to require it to stop its trains for the crossing. Moreover, the delay incident to such stopping of trains would be to the serious detriment of passengers, and dangers always incident to grade crossings would be incurred. An over-crossing would not have been practicable, and is not contended for by either party. The disadvantages of a grade-crossing are so many and so serious that, in view of the practicability of an under-crossing at a comparatively moderate expense, we think the under-crossing was properly required. See *Humeston & S. Ry. Co. v. Chicago, St. P. & K. C. Ry. Co.*, 74 Iowa, 554, 38 N. W. 413."

40. *New York C. & H. R. Co. v. Warren Street R. Co.*, 188 Pa. St. 85, 41 Atl. 333.

41. *Chattanooga T. R. Co. v. Feltton*, 69 Fed. 273.

injunction in force until final hearing on the merits.⁴² But where a railroad company has acquired by condemnation proceedings the right to cross the tracks of another company, and the latter company claims that the proposed manner of crossing is unlawful and constitutes an unreasonable interference with the operation of its road, while the right of possession at the place of crossing condemned may be protected by injunction, yet the court will not grant a preliminary injunction which will permit of the crossing being made in the manner proposed and objected to.⁴³ And where the defendant denies that there is any intention to construct its tracks across those of the complainant it is proper to dissolve a preliminary injunction restraining such crossing.⁴⁴ And an injunction against a crossing of railroad tracks by those of a street railway may be dissolved upon the giving of a bond to pay such compensation to the railroad company as may be awarded.⁴⁵

§ 1360. **Interstate roads; taxation.**—The assessment for taxation of the property, within the State, of a railroad company, whose road extends outside the State, cannot be adjudged excessive and illegal and as such enjoined upon testimony that the valuation was excessive, and that portions of the road outside the State were of largely greater value than any similar length within the State, unaccompanied by evidence that the assessing board reached the valuation by simply dividing the total value of the company's property on a mileage basis, or that it failed to take into consideration such excessive value of portions outside the State.⁴⁶

42. Appeal of Reynoldsville R. Co., 134 Pa. St. 541, 19 Atl. 674. But see Toledo, etc., R. Co. v. Detroit, etc., R. Co., 61 Mich. 9, 27 N. W. 715.

43. National Docks & N. J. C. R. Co. v. Pennsylvania R. Co., 54 N. J. Eq. 10, 33 Atl. 219.

44. Alabama M. R. Co. v. Southern R. Co., 116 Ala. 402, 23 So. 239.

45. Delaware L. & W. R. Co. v. Syracuse L. & B. R. Co., 28 Misc. R. (N. Y.) 456, 59 N. Y. Supp. 1035.

46. Pittsburgh, etc., R. Co. v.

Backus, 14 Sup. Ct. Rep. 1114, per Brewer, J.: "In Franklin Co. v. Railroad Co., 12 Lea, 521, 539, the Supreme Court of Tennessee, in a well-considered opinion, which was quoted with approval by this court in Columbus, etc., Railway Co. v. Wright, 151 U. S. 470, 479, 14 Sup. St. Rep. 396, 38 L. Ed. 238, thus referred to the means of ascertaining the value of a railroad track: 'The value of the

§ 1361. **Same subject.**—The assessment for taxation of a certain number of miles of railroad within a State, forming part of a line of road running into another State, at their actual cash value,

roadway at any given time is not the original cost, nor, *a fortiori*, its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value for taxation of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends—its traffic, as evidenced by the rolling stock and gross earnings, in connection with its capital stock. No local estimate of the fraction in one county of the railroad track running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road.' Counsel sought in argument to narrow the meaning of the words 'railroad track' and 'rolling stock' as though the two did not include the entire railroad property; but evidently the Supreme Court of the State construed, and as we think properly, the two terms as embracing all which goes to make up what is strictly railroad property. By section 3 of the Act it is provided that all property in the State shall be subject to taxation unless expressly exempted; by section 4, that, when the property of

a corporation is taxed to the corporation, the shares held by individuals shall not be subject to taxation. There is in terms no exemption of any railroad property, or any part thereof; and there is no provision of the tax law reaching that which is strictly railroad property, except as embraced within the two terms 'railroad track' and 'rolling stock.' Obviously, it was assumed by that court, though the matter is not discussed in the opinion, that by these two descriptive terms the legislature, carrying out the declared purpose of subjecting all property within the State to taxation, not expressly exempted, meant to include all the property owned or used by the railroad companies in the operation of their roads, and which may fairly be called 'railroad property;' and, when the statute provides that such property shall be assessed at its 'true cash value,' it means to require that it shall be assessed at the value which it has, as used, and by reason of its use. When a road runs through two States, it is, as seen, helpful in determining the value of that part within one State to know the value of the road as a whole. It is not stated in this statute that, when the value of a road running in two States is ascertained, the value of that within the State of Indiana shall be determined absolutely by dividing the gross value upon a mileage basis, but only that the total amount of stock and indebtedness shall be presented for consideration by the State board. Nevertheless, it is ordinarily true, that, when a rail-

determined on a mileage basis, does not place a burden on interstate commerce, beyond the power of the State, simply because the value of the railroad as a whole is created partly by its interstate commerce.⁴⁷

road consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair. Thus, in *State Railroad Tax Cases*, 92 U. S. 608, 23 L. Ed. 671, it was said: "It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole." And again, on page 611: 'This court has expressly held in two cases, where the road of a corporation ran through different States, that a tax upon the income or franchise of the road was properly apportioned by taking the whole income or value of the franchise, and the length of the road within each State, as the basis of taxation. *Delaware Railroad Tax Cases*, 18 Wall. 206, 21 L. Ed. 888; *Erie Ry. Co. v. Pennsylvania*, 21 Wall. 492, 22 L. Ed. 595.' The mileage basis of apportionment was also sustained in *W. U. Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. Rep. 961, 31 L. Ed. 790; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. Rep. 876, 35 L. Ed. 613; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 Sup. Ct. Rep. 121, 163, 35 L. Ed. 994; *Charlotte, etc., Railroad Co. v. Gibbes*, 142 U.

S. 386, 12 Sup. Ct. Rep. 255, 35 L. Ed. 1051; *Columbus, etc., Railway Co. v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. Ed. 238. It is true, there may be exceptional cases, and the testimony offered on the trial of this case in the Circuit Court tends to show that this plaintiff's road is one of such exceptional cases, as, for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where, in certain localities, the company is engaged in a particular kind of business, requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the State board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the State, took into account the peculiar and large value of such facilities and such extra rolling stock. But whether, in any particular case, such matters are taken into consideration by the assessing board, does not make against the validity of the law, because it does not require that the valuation of the property within the State shall be absolutely determined upon a mileage basis. Our conclusion, therefore, is that this act is not obnoxious to any of the constitutional objections made to it."

47. *Cleveland, etc., R. Co. v. Backus*, 14 Sup. Ct. Rep. 1122, per

§ 1362. **Passage-ways under railroad crossings.**—A contract by a railroad company to maintain and keep open two existing passage-ways for stock under its road through a certain farm is sufficiently certain to entitle the owner of the farm to an injunction against its violation, although the size, nature, and location of the ways are not stated in the contract. And in such a case the purchaser of the railroad may be enjoined if upon all the facts and circumstances he is chargeable with notice of the farm owner's easement.⁴⁸ And an award, in proceedings to condemn lands for

Brewer, J.: "It has been again and again said by this court that, while no State could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce. See among many other cases, *Marye v. Railroad Co.*, 127 U. S. 117, 8 Sup. Ct. Rep. 1037, 32 L. Ed. 94; *Pullman Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Cup. Ct. Rep. 876, 35 L. Ed. 613. The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property makes, nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put, and varies with the profitability of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value, and, if property is taxed at its actual cash value, it is taxed upon something which is created by the use to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its

value, and determine how much is caused by one use to which it is put and how much by another. Take the case before us. It is impossible to disintegrate the value of that portion of the road within Indiana, and determine how much of that value springs from its use in doing interstate business, and how much from its use in doing business wholly within the State. An attempt to do so would be entering upon a mere field of uncertainty and speculation; and, because of this fact, it is something which an assessing board is not required to attempt. 33 N. E. 421, affirmed." And see, on the same point, *Evansville R. Co. v. West*, 138 Ind. 697, 37 N. E. 1012, where *Hackney, C. J.*, cited *Cleveland R. Co. v. Backus*, 133 Ind. 513, 33 N. E. 421; *Indianapolis R. Co. v. Backus*, 133 Ind. 609, 33 N. E. 443; and *Pittsburgh R. Co. v. Backus*, 133 Ind. 629, 33 N. E. 432, as deciding the same questions and as affirmed by the U. S. Supreme Court in 14 Sup. Ct. Rep. 1114, 1122.

48. *Rock Island, etc., R. Co. v. Dimick*, 144 Ill. 628, 32 N. E. 291, per *Shope, J.*: "If the facts and circumstances apparent were sufficient to put appellant or Cable through whom it purchased on inquiry appellant is chargeable with notice of all

railroad purposes, to the owner of a farm crossed by the track of the road, does not deprive the owner of his right to compel the railroad company to construct suitable crossings; and an award in such proceedings, in the absence of evidence showing that the damages awarded rested to any extent upon the farm or manner of constructing the crossings, is no defense to an action in equity brought to compel defendant to construct an underground crossing.⁴⁹

§ 1363. **Invalid ordinance in favor of company.**—In Illinois it has been decided that the fact that a city has passed an invalid ordinance, which attempts to vacate part of a street for the benefit of a railroad company, gives the owner of abutting property no right to an injunction restraining the company from laying tracks in such street, since the ordinance being invalid, does not cause the title to the street to revert to the lot owner.⁵⁰

such inquiry would have shown. In *Swan v. Burlington R. Co.*, 72 Iowa, 650, 34 N. W. 457, the plaintiff granted the right of way across his land to a railway company on condition that it would construct and maintain a passway for cattle and teams under its track. The company constructed a passage as contemplated and the plaintiff used it twenty years. The railroad passed to the defendant under foreclosure sale. In a proceeding to restrain defendant from closing the passage-way it was insisted that the agreement was not binding on the purchaser. The court said: 'That its occupancy by the plaintiff was sufficient to charge the defendant a purchaser at judicial sale with notice of the plaintiff's rights thereto arising from the agreement.' See, also, *McCann v. Day*, 57 Ill. 101. We are of opinion that the court had jurisdiction to protect appellee in the enjoyment of his rights under the con-

tract. *Deere v. Cole*, 118 Ill. 165, 8 N. E. 303; *Chicago, etc., R. Co. v. Hay*, 119 Ill. 493, 10 N. E. 29; *Morrison v. King*, 62 Ill. 30; *Green v. Green*, 34 Ill. 320."

49. *Beardsley v. Lehigh Val. R. Co.*, 142 N. Y. 173, 36 N. E. 877; affirming 65 Hun, 502; *Jones v. Seligman*, 81 N. Y. 190.

50. *Corcoran v. Chicago, etc., R. Co.*, 149 Ill. 291, 37 N. E. 68, per *Shope, J.*: "The bill in this case is predicated upon the assumption that the ordinance was, in effect, a vacation of the street; that the part vacated reverted to the original proprietor; and that appellant, under his lease, had an interest in the north half of the street, supposed, to be vacated, upon which said lots abutted. The frame of the bill and the relief sought would seem to indicate a misconception on the part of the pleader as to the power of the municipality to adopt the ordinances in question. The

§ 1364. **State regulation of U. S. railroad.**—A railway corporation created by act of Congress is subject to the control of a State, as to reasonable rates for transportation wholly within the State where nothing in the act creating it indicates an intent to remove it from such control, and the enforcement of such rates will not disable it from discharging all the duties and exercising all the powers conferred by Congress, and the enforcement of the railroad commission act as to such reasonable rates will not be restrained.⁵¹

ordinance, being void, was ineffectual to vacate the part of the street in question, and there could, therefore, be no revision; and the right of appellant to maintain the bill upon the theory upon which it is framed necessarily fails. If the ordinance permitting the laying of railroad tracks in Archer avenue could be regarded as not attempting to exclude the general public from the use thereof as one of the public streets of the city, but as subjecting it simply to an additional public use, it is well settled in this State that injunction will not be granted at the suit of an abutting lot owner to restrain such additional use. *Stetson v. Railroad Co.*, 75 Ill. 74; *Patterson v. Railroad Co.*, Id. 588; *Railroad Co. v. McGinnis*, 79 Ill. 269; *Truesdale v. Sugar Co.*, 101 Ill. 564; *Insurance Co. v. Heiss*, 141 Ill. 35, 31 N. E. 138. The abutting lot owner is remitted to his action at law to recover compensation for the consequential damages resulting to his property from the additional burden imposed upon the street. We have carefully examined the bill, and it discloses no wrong or damages suffered or threatened, for which appellant has not an adequate remedy at law."

51. Reagan v. Mercantile Trust

Co., 14 Sup. Ct. Rep. 1060, per Brewer, J.: "We are of the opinion that the contention of the railway and trust companies cannot be sustained, and that the reasoning in the cases of *Thomson v. Railroad Co.*, 9 Wall. 579, 19 L. Ed. 792, and *Railroad Co. v. Peniston*, 18 Wall. 5, 36, 21 L. Ed. 787, leads to this conclusion. In the first of those cases these facts appeared: The Union Pacific Railway Company (Eastern Division), a corporation created by the legislature of Kansas, received government aid in bonds and land, and, thus aided, constructed its road, to become one link in the transcontinental line known as the Union Pacific System. After its construction, the legislature of Kansas having enacted a law laying certain taxes upon its property, a bill was filed to restrain the collection of those taxes, on the ground that the property of the company was mortgaged to the United States, and that it, under the congressional grant, was bound to perform certain duties, and ultimately pay 5 per cent. of its net earnings to the United States,—an obligation which would be greatly hindered if the taxes imposed should be collected. But this contention was not sustained, and while it was said by the chief justice, delivering the

§ 1365. **Railroad on street; abutter's rights.**—As the owner of a lot abutting on a street has, as appurtenant to the lot, and independently of the ownership of the fee of street, an easement in the street, to its full width, in front of his lot, for purposes of access, light and air, which constitutes property, therefore the maintenance and operation of a railroad on any part of the street in front of his lot which operates to depreciate the rental value of the premises, constitutes a positive invasion of property rights, for which the owner may maintain a private action; and where his legal right is clear, and the nuisance or trespass a continuing one,

opinion of the court, that congress had the power to provide an exemption from State taxation in such a case, there was no exemption in the absence of legislation to that effect. This decision was followed by that in the other case, in which a like exemption was sought of the property belonging to the Union Pacific Railroad Company,—a corporation created, like the Texas and Pacific Railway Company, by an act of congress, and also, like the Kansas company, aided by the government in lands and bonds,—but here, too, by a majority of the court, the claim of exemption was denied. Mr. Justice Strong, in delivering the opinion of the court, said: 'It is therefore manifest that exemption of federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have

undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of federal powers. In this case the tax is laid upon the property of the railroad company, precisely as was the tax complained of in *Thomson v. Railroad Co.* It is not imposed upon the franchises, or the right of the company to exist and perform the functions for which it was brought into being, nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of the United States mails, or troops, or munitions of war, that is taxed, but it is, exclusively, the real and personal property of the agent, taxed in common with all other property in the State of a similar character. It is impossible to maintain that this is an interference with the exercise of any power belonging to the general government; and, if it is not, it is prohibited by no constitutional implication.' Similarly, we think it may be said that, conceding to congress the power to remove the corporation, in all its operations, from the control of the State, there is in the act creating this company nothing which indicates an intent on the part of congress to so remove it,

he may maintain an action to enjoin it.⁵² And the right of an abutting owner who has sustained a substantial injury from a wrongful invasion of his rights in such cases, to an injunction

and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by congress. By the act of incorporation, congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the State to other points also within the State, and that in so doing it would be engaged in a business, control of which is nowhere, by the federal constitution, given to congress. It must have been known that, in the nature of things the control of that business would be exercised by the State; and if it deemed that the interests of the nation, and the discharge of the duties required on behalf of the nation from this corporation, demanded exemption in all things from State control it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the State, it intended that it should be subjected to the ordinary control exercised by the State over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the State passed in 1873 in respect of it, we are of opinion that the Texas & Pacific Railway Company is, as to busi-

ness done wholly within the State, subject to the control of the State in all matters of taxation, rates, and other police regulations."

52. *Gustafson v. Hamm*, 56 Minn. 334, 57 N. W. 1054, per Mitchell, J.: "That the construction and operation of any ordinary commercial railroad on a street is the imposition of an additional servitude, and amounts to a perversion of the street to a use for which it was not intended, which the State or municipality cannot, as against private rights, authorize, the decisions of this court are explicit. *Carli v. Transfer Co.*, 28 Minn. 373, 10 N. W. 205; *Adams v. Railroad Co.*, 39 Minn. 286, 39 N. W. 629. If this is so as to a public railroad, it certainly must be so as to a purely private one. It is merely begging the question to say that defendant, as the owner of the fee of the north half of the street, has the right to use it for any purpose not inconsistent with the public easement. The private right is always subordinate to the public right, and subject to all the limitations and abridgements caused by the exercise of the latter; and hence cannot extend to any use which amounts to a perversion of the street from the uses for which it was intended. The right of an abutting owner, under certain municipal regulations, to use a part of the street for areas, for purposes of access to basements, for the temporary storage of building material, for laying underground pipes to connect with water and gas mains, stands on a different principle. These are all really included in the general

is generally recognized.⁵³ So it has been decided in Georgia that if the property of an abutting landowner will be damaged by the laying and use of a railroad track in a street, the company must first pay or tender to such owner just and adequate compensation for the damages consequential upon the construction of the track and the use to which it will be put, and upon failure to pay or tender the amount of such damages equity will enjoin the con-

right to use a street for purposes of access to the abutting premises, and have been long sanctioned as legitimate street uses. It is not necessary to consider here just what is the precise limit to the uses to which an abutting owner may put a street for purposes of access to his premises. It is at least certain that he cannot use the street in any way or for any purpose that amounts to a perversion of it, or to an invasion upon the private right of property of another in the part of the street so used; and this is as far as it is necessary to go for present purposes. It is the settled doctrine of this court that the owner of a lot abutting on a public street has, as appurtenant to the lot, and independently of the ownership of the fee in the street, an easement in the street, to its full width, in front of his lot, for the purposes of access, light and air, which constitutes property. *Adams v. Railroad Co.*, 39 Minn. 286, 39 N. W. 629; *Lamm v. Railway Co.*, 45 Minn. 71, 47 N. W. 455. The act of defendant in maintaining and operating this track on any part of the street, to its full width, in front of plaintiff's premises, so as to pollute the air, and depreciate their value, was, if not a trespass, at least a nuisance, which amounted to a positive invasion upon plaintiff's private property rights, and for which he may main-

tain a private action. The legal right being clear, and the trespass or nuisance, whichever it be, being a continuing one, he is not confined to successive actions for damages, but may maintain an action to enjoin the constantly recurring grievance."

A bill in which the complainant, an abutter, sought to restrain the defendant, a railroad company, from constructing an embankment in front of her lots, averred ownership in fee of the lots, and up to the middle of the street, the latter subject only to the public easement. One paragraph of the answer denied such ownership, on information and belief, and a subsequent one admitted, on information and belief, that the complainant had purchased the lots of the original owner who had platted the town. It was held, on motion to dissolve the injunction, that the denial was insufficient, and that the admission should prevail, and that an inference arose therefrom that the complainant's fee extended to the middle of the street, as claimed. *Columbus, etc., R. Co. v. Witherow*, 82 Ala. 190, 3 So. 23.

53. *United States.*—*Bass v. Metropolitan West Side Elev. R. Co.*, 82 Fed. 857, 27 C. C. A. 147, 53 U. S. App. 542, 39 L. R. A. 711.

Illinois.—*Bond v. Pennsylvania Co.*, 171 Ill. 508, 49 N. E. 545.

Mississippi.—*Illinois C. R. Co. v.*

struction of the track.⁵⁴ And an ordinance giving to a street railway company, which has been authorized to construct its lines upon certain streets, the right to construct such switches, curves, cross-overs and turn-outs as are necessary for the operation of the railway, is to be construed as meaning necessary to the operation of the railway in the street proper, between the curb lines, and the company may at the suit of an abutting owner be enjoined from laying tracks upon the portion of the highway set apart for a sidewalk in front of his premises.⁵⁵ And the unauthorized construction and use of a spur track in a public way in front of the plaintiff's premises is a nuisance which he may restrain by injunction.⁵⁶ But a railway company authorized to construct and operate its road upon a street in an incorporated city, by authority of the common council thereof, granted in accordance with the charter of the city, or upon a county road, under an agreement with the County Court of the county in which the road is situated, in

Thomas, 75 Miss. 54, 21 So. 601.

Missouri.—*Sherlock v. Kansas City* B. R. Co., 142 Mo. 172, 43 S. W. 629, 64 Am. St. R. 551.

New York.—*Jameson v. Kings County Elev. R. Co.*, 147 N. Y. 322, 41 N. E. 693; *Ottum v. Manhattan R. Co.*, 2 App. Div. 396, 37 N. Y. Supp. 982; *Wright v. Syracuse, O. & N. R. Co.*, 92 Hun, 32, 36 N. Y. Supp. 901.

Pennsylvania.—*Hopkins v. Cata-sauqua Mfg. Co.*, 180 Pa. St. 199, 36 Atl. 735.

Texas.—*Galveston H. & S. A. R. Co. v. Miller* (Civ. App. 1906), 93 S. W. 177.

Construction of elevated railroad may be enjoined. *Bass v. Metropolitan West Side Elev. R. Co.*, 82 Fed. 857, 27 C. C. A. 147, 53 U. S. App. 542, 39 L. R. A. 711; *Jamieson v. Kings County Elev. R. Co.*, 147 N. Y. 322, 41 N. E. 693. In Illinois, however, it has been decided that an abutting owner is not entitled to such relief, but must bring his action at

law for damages. *Lobenstine v. Union Elev. R. Co.*, 80 Fed. 9, 25 C. C. A. 304, 53 U. S. App. 1. And it is held that in that State this rule is not affected by the fact that the consent of the necessary abutting owners to its construction, as required by statute, has not been obtained. *Lobenstine v. Union Elev. R. Co.*, 80 Fed. 9, 25 C. C. A. 304, 53 U. S. App. 1, or by the fact of the alleged invalidity of the ordinance authorizing its construction. *Blodgett v. Northwestern Elev. R. Co.*, 80 Fed. 601, 53 U. S. App. 284, 26 C. C. A. 21; *Strong v. Northwestern Elev. R. Co.*, 64 Ill. App. 533; *Phelps v. Lake Street E. R. Co.*, 60 Ill. App. 471.

54. *Athens Terminal Co. v. Athens Foundry & M. Works*, 129 Ga. 393.

55. *Breen v. Pittsburg Harmony, B. & N. C. R. Co.* (Pa. 1908), 69 Atl. 1047.

56. *Bell v. Edwards*, 37 La. Ann. 475.

accordance with the statute, cannot be enjoined from proceeding to build it, at the suit of an owner of lands abutting upon the street and county road, whether the fee to lands to the center of the street and county road adjacent thereto is in such owner or not, without establishing, by allegations and proofs, that the construction and use of the railway will specially interfere with his ingress and egress to and from his premises.⁵⁷ And where an elevated railroad company has obtained the consent of the city and property owners, and constructed its road in the street beyond the plaintiff's property, equity, in its discretion, will not enjoin the further prosecution of the work on the ground that plaintiffs have not been paid for consequential damages.⁵⁸ And an injunction will not lie against the operation of a railroad company of its train upon a street of a city at the suit of an abutting owner who bought the land after the conditions existed or who waited an unreasonable time before invoking injunctive relief against injury to his property caused by the construction and operation of the railroad.⁵⁹ Under the West Virginia Code authorizing a railroad company, with the assent of the municipal authorities, to construct and operate its road along the public street of a city, the abutting lot owner is not entitled to enjoin the company from building a trestle in the street as an approach to a bridge, unless his injury therefrom will be such as to entirely destroy the value of his property, and so be equivalent to an actual taking of it by the company.⁶⁰

§ 1365a. **Same subject continued; qualifications.**—The mere fact of the construction of a railroad in the street is held not to create such an invasion of property rights as will of itself entitle an abutting owner to an injunction. There must be some actual injury sustained by him affecting his rights as abutting owner to

57. *Paquet v. Mt. Tabor St. R. Co.*, 18 Or. 233, 22 Pac. 906. Compare §§ 1016, 1025, *ante*, and see *Kingsley v. Gouldsborough Land Co.*, 86 Me. 279, 29 Atl. 1074, as to a grantee's way of necessity where the land granted is surrounded on three sides by the sea.

58. *Nutting v. Kings Co. El. R. Co.*, 1 N. Y. Supp. 383.

59. *Staton v. Atlantic Coast Line R. R. Co.*, 147 N. C. 428, 61 S. E. 455.

60. *Ohio River R. Co. v. Gibbens*, 35 W. Va. 57, 12 S. E. 1093.

entitle him to such relief.⁶¹ And a court of equity will not enjoin the maintenance of an elevated railroad in a street where it not only appears that no such injury has been sustained by the complainant but rather that his property has increased in value in proportion to, or in excess of, what other property in the same locality has increased.⁶² In such cases, also, the court, in determining the right to an injunction, will balance the equities and convenience, having in view the public convenience, and will refuse such relief where it appears not only that the granting of an injunction would cause greater injury to the railroad company than its refusal would to the complainant, but also that the granting of it would cause a serious inconvenience to the public.⁶³ And a municipality having the power to control and regulate the construction and maintenance of railroad tracks in its streets, it is decided that an abutting owner is not entitled to an injunction restraining the maintenance of a railroad switch in the street on the ground of the invalidity of the ordinance authorizing its construction as the validity of the ordinance must be questioned either by a proceeding in behalf of the city or the State.⁶⁴ Where land is reserved for "public uses" it is also decided that the construction of a railroad thereon cannot be enjoined at the suit of the owner of an adjoining lot.⁶⁵ Again, the vendor cannot, upon a sale of the property, reserve the right to obtain an injunction.⁶⁶ Nor can a vendee who purchased property with knowledge of the

61. *Dulaney v. Louisville & N. R. Co.*, 100 Ky. 628, 38 S. W. 1050, 18 Ky. Law Rep. 1088.

62. *Marsh v. Kings County Elev. R. Co.*, 86 Fed. 189, 29 C. C. A. 655, 57 U. S. App. 724; *O'Reilly v. New York Elev. R. Co.*, 148 N. Y. 347, 42 N. E. 1063, 31 L. R. A. 407. See, also, *Black v. Brooklyn Heights R. Co.*, 32 App. Div. (N. Y.) 468, 53 N. Y. Supp. 312; *Otten v. Manhattan R. Co.*, 2 App. Div. (N. Y.) 396, 37 N. Y. Supp. 982.

63. *Mobile & M. R. Co. v. Alabama M. R. Co.*, 116 Ala. 51, 23 So. 57. See as supporting the general proposition

in the text, *Becker v. Lebanon & M. S. R. Co.*, 188 Pa. St. 484, 41 Atl. 612; *Heilman v. Lebanon & A. S. R. Co.*, 180 Pa. St. 627, 37 Atl. 119; *Heilman v. Lebanon & A. S. R. Co.*, 175 Pa. St. 188, 200, 34 Atl. 647, 648.

64. *Coffeen v. Chicago, M. & St. P. R. Co.*, 84 Fed. 46, 28 C. C. A. 274, 53 U. S. App. 673.

65. *Burlington Gaslight Co. v. Burlington, C. R. & N. R. Co.*, 165 U. S. 370, 17 Sup. Ct. 359, 41 L. Ed. 749.

66. *Pegram v. New York Elev. R. Co.*, 147 N. Y. 135, 41 N. E. 424.

existence of a railroad and of the viaduct complained of, obtain such relief where the grantor consented to its construction and operation.⁶⁷

§ 1366. **Railway grantee's easements.**—A railway company sold a piece of their surplus land to plaintiff, together with a house which they had allowed him to erect thereon. The house was close to their line of railway which there ran over a series of arches, through two of which there was some access of light to two of the lower windows of plaintiff's house. Plaintiff's conveyance contained a recital that all the land acquired by the company other than that sold to the plaintiff would be required by the company for the construction of their railway, and it contained no express grant of right or covenant as to light. It was held that there was an implied obligation on the part of the company not to permit anything on the land retained by them which would interfere with plaintiff's reasonable enjoyment of the land he purchased, except what was required for the construction of their railway, and that an injunction would be granted against the erection on the land opposite plaintiff's house on the other side of the railroad of a building, and the blocking up of the arches so as to cut off plaintiff's light.⁶⁸

§ 1366a. **Electric street railways generally.**—The laying of tracks, the erection of poles, and the placing of wires thereon, and the running of cars over such tracks for the conveyance of passengers when done under proper authorization, is not in most jurisdictions regarded as constituting an additional burden upon the abutting owner, though he be the owner of the fee to the street. Such a use is one within the purpose for which the street was dedicated, and in the absence of some special injury sustained by the abutting owner, such as a material impairment of his right of ingress and egress in connection with the enjoyment of his property, he will not be entitled to an injunction against either the

67. *Canabeer v. New York C. & H. R. Co.*, 156 N. Y. 474, 51 N. E. 402.

Ch. D. 470. And see *Birmingham, etc., Banking Co. v. Ross*, L. R. 38 Ch. D. 295; *Allen v. Taylor*, L. R.

68. *Myers v. Catterson*, L. R. 43

16 Ch. D. 355.

construction or maintenance of such a line.⁶⁹ And in such a case a street railway company may obtain an injunction against any interference by an abutting owner with the construction or maintenance of the line.⁷⁰ So in a recent case it is declared that when it clearly appears that a street railway company is exercising powers conferred by its charter after having obtained municipal grants and the consents of township supervisors and abutting property owners, the general rule is that a court of equity will not intervene to restrain acts intended to carry out the corporate purpose.⁷¹ And equity will not enjoin, at the instance of one who has no legal right to the use, occupation or enjoyment of the property or thing about to be invaded, and where citizens as complainants have no right, legal or otherwise, to the use and occupation of the streets and highways covered by certain branches of a railway company they are held to have no right to ask a court of equity to enjoin the company from asserting its right to such use and occupation. Where, however, there has not been a compliance by the company with conditions precedent to the right to construct and maintain the line, such as obtaining consent of the local authorities or of abutting owners, it is generally decided that an abutting owner will be granted an injunction against the construction of such a line.⁷² And where the poles of an electric street railway are

69. *Alabama*.—*Baker v. Selma Street & S. R. Co.*, 135 Ala. 552, 33 So. 685, 93 Am. St. Rep. 42.

Illinois.—*Wilder v. Aurora, DeKalb & R. E. T. Co.*, 216 Ill. 493, 75 N. E. 194; *Stewart v. Chicago G. S. R. Co.*, 166 Ill. 61, 46 N. E. 765.

Maryland.—*Koch v. North Ave. R. Co.*, 75 Md. 222, 4 Am. Elec. Cas. 153, 23 Atl. 463.

New Jersey.—*Halsey v. Rapid Transit S. R. Co.*, 47 N. J. Eq. 380, 3 Am. Elec. Cas. 283, 20 Atl. 859.

Pennsylvania.—*Lockhart v. Craig Street R. Co.*, 139 Pa. St. 419, 3 Am. Elec. Cas. 314, 21 Atl. 26.

Rhode Island.—*Taggart v. Newport Street R. Co.*, 16 R. I. 668, 3 Am. Elec. Cas. 310, 19 Atl. 326.

But see *Clark v. Middletown-Goshen Tr. Co.*, 10 App. Div. (N. Y.) 354, 6 Am. Elec. Cas. 148, 41 N. Y. Supp. 1109.

70. *Detroit City Ry. v. Mills*, 85 Mich. 634, 3 Am. Elec. Cas. 333, 48 N. W. 1007.

71. *Myersdale & S. St. R. Co. v. Pennsylvania & M. St. R. Co.* (Pa. 1908), 69 Atl. 92. Per Elkin, J.

71a. *Andel v. Duquesne St. Ry. Co.* (Pa. 1908), 69 Atl. 278.

72. *United States*.—*Beeson v. Chicago*, 75 Fed. 880.

New Jersey.—*Grey v. New York & P. T. Co.*, 56 N. J. Eq. 403, 40 Atl. 21; *Stockton v. Atlantic Highlands R. B. & L. B. E. R. Co.*, 53 N. J. Eq. 418, 32 Atl. 680.

being placed in such a manner as to materially interfere with an abutting owner's access to his property, an injunction against their being so erected will be granted.⁷³ And an abutting owner may obtain an injunction against the construction of an electric street railway in front of his premises where the charter of the company does not authorize the location of the line in such street.⁷⁴ Again, where a railroad which has paid nothing for the grant, and made no investment on the faith thereof, abandons the same by a failure to construct the road within the time set and where the right to construct the road has so lapsed an abutting owner and taxpayer is entitled to the continuance of a preliminary injunction in an action to perpetually enjoin the construction of the road.⁷⁵

§ 1367. **Electric railroads; conflicting franchise; acquiescence; clean hands.**—Work under a city ordinance giving a street railway company the right to erect a trolley road will not be stayed pending certiorari, at the instance of abutting property owners, to review such ordinance, where they failed to prosecute the proceedings until the line was nearly ready for operation, and it is doubtful whether they have any right in the street which is violated, and the value of that right, if any, is small in comparison with the public convenience of having such an improved system of municipal transit

New York.—*Merriman v. Utica Belt L. St. R. Co.*, 18 Misc. R. (N. Y.) 269, 41 N. Y. Supp. 1019. See *Black v. Brooklyn H. R. Co.*, 32 App. Div. 468, 53 N. Y. Supp. 312.

Ohio.—*Varwig v. Cleveland, C., C. & St. L. R. Co.*, 54 Ohio St. 455, 44 N. E. 92.

Pennsylvania.—*Thomas v. Inter-County S. R. Co.*, 167 Pa. St. 120, 5 Am. Elec. Cas. 175, 31 Atl. 476. See *Pennsylvania R. Co. v. Turtle Creek V. E. R. Co.*, 179 Pa. St. 584, 36 Atl. 348.

73. *Dooley Block v. Salt Lake City R. T. Co.*, 9 Utah. 31, 4 Am. Elec. Cas. 189, 33 Pac. 229. Compare *Heilman v. Lebanon & A. S. R. Co.*,

180 Pa. St. 627, 37 Atl. 119, holding that though right of access was interfered with, yet the operation of a street railway would not be enjoined where such procedure would result in serious public inconveniences. And see *Becker v. Lebanon & M. S. R. Co.*, 188 Pa. St. 484, 41 Atl. 612; *Heilman v. Lebanon & A. S. R. Co.*, 175 Pa. St. 188, 200, 34 Atl. 647, 648.

73. *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146, 36 Atl. 1107; *Seecomb v. Wurster*, 83 Fed. 856.

75. *Manton v. South Shore Traction Co.*, 121 App. Div. (N. Y.) 410.

promptly adopted.⁷⁶ And the use of a street for an electric railway will not be enjoined because the construction of the track will prevent an abutting owner from loading his drays by standing them at right angles to the sidewalk, as such a method obstructs the use of the streets, and is in violation of a city ordinance.⁷⁷ An order restraining a railway company *pendente lite* from entering upon a road "for the purpose of constructing an electric railway track,

76. *State v. Trenton Public Works*, 29 Atl. 149. Plaintiff owns a vacant piece of ground lying along a street and extending across the square so as to front upon the cross streets. It is chiefly valuable for residence purposes, and he intended to build a residence thereon. Without objection from him, defendant company constructed and operated an electric railway, with an overhead wire, along one of the cross streets, and is about to put in operation a similar road upon the side street, upon a track long used for horse cars, fastening its cross wires to electric light poles already erected, so that no new poles or tracks are placed in front of the premises. Defendant has expended about \$70,000 in constructing its system of electric railways in the city. There was evidence that there would be some danger to men and animals from the electric current, and from the more rapid running of the cars, and that the current would interfere with telephone wires in the same street. It was held that no present injury is shown, the apprehended injury is too remote, and, under all the circumstances, plaintiff is not entitled to an injunction against the operation of the road. *Potter v. Saginaw Union St. Ry. Co.*, 83 Mich. 285, 47 N. W. 217. In a suit to enjoin the

construction and operation of an electric street railroad, it appeared that complainant owned premises on the corner of two streets; that, at the corner diagonally opposite said premises, the railroad turned from one street to the other, but that, assuming complainant's premises to extend to the middle of the streets, said railroad nowhere came within 10 feet thereof. The trolley wire curved with the track, and was over the center of it. When the suit commenced, a sustaining wire extended from the trolley wire at the curve, and was attached to a pole standing between the sidewalk and the paved street in front of complainant's lot. This pole was stayed with a wire running to a guy-post set in the ground in front of said lot. Thereafter defendant removed the wires and poles. It was held that a decree perpetually enjoining defendant from erecting, within the street limits, on and in front of complainants' premises, any poles, posts, or wires, for operating its cars by electricity, without complainant's consent, gave complainant all the relief she was entitled to. *Barber v. Saginaw Union St. Ry. Co.*, 83 Mich. 299, 47 N. W. 219.

77. *Louisville, etc., Mfg. Co. v. Central, etc., R. Co.* (Ky.), 23 S. W. 592.

or incumbrance of any kind upon said road, or in any way preparing to lay such track," is not violated by operating or repairing a track theretofore built and used, the temporary removal of which had been required by repairs in paving the street. And where an injunction order is not made a part of the record, it cannot be assumed that it was any broader than the prayer of the bill.⁷⁸ Where the franchise of plaintiff telephone company was granted on the express condition that the maintenance of its lines should not interfere with the enjoyment by defendant street railway company of its franchises, it was held that though the transmission of a strong current of electricity by defendant along its trolley wires creates an additional current in plaintiff's wires by induction, making the operation of the telephones difficult, and at times impracticable, and though the electricity discharged by defendant from the rails into the earth spreads by conduction to plaintiff's grounded wires, which form the return circuit, part of which wires are on private property, thereby also causing plaintiff serious loss, the operation of the railway will not be enjoined.⁷⁹ In Pennsylvania it is decided that a court of equity, under the authority of the act of 1871 will not grant an injunction unless a proper case in accordance with the principles and practice of equity is made. This act was not intended to do away with or change the general principles upon which equity relief is administered. So where a street railway company sought to restrain another company from laying tracks, erecting poles, placing equipment or doing any further construction work upon particular streets, it was decided that the complainant must establish a clear legal right, that the injury threatened must be of a permanent and irreparable character and that where the complainant's title is doubtful equity will not relieve by injunction.⁸⁰

§ 1368. Municipal control of tracks and gauge; franchise

78. *Detroit, etc., Road Co. v. Detroit, etc., R. Co.* (Mich.), 56 N. W. 940. *tervliet Turnpike & R. Co.*, 135 N. Y. 393, 32 N. E. 148.

80. *Myersdale & S. St. R. Co. v. Pennsylvania & M. St. Ry. Co.* (Pa. 1908), 69 Atl. 92.

protected.—Where a city has granted to a corporation the privilege to construct and maintain a street railway in the streets and alleys of the city, the grant providing that the track of the railway shall be made to conform to the established grade of the streets, but containing no provisions as to the rail which shall be used on the track, or the gauge upon which it shall be constructed, the city, under its ordinary powers, has power to regulate the manner in which the track shall be constructed, and equity will not interfere to restrain the street railway corporation, at the suit of the city, from constructing its line with a rail and gauge obnoxious to the city authorities.⁸¹ Where a city attempts to destroy an alleged franchise of a railroad whose validity depends on the construction of a grant from the city, authorized by the railroad's charter, the railroad need not establish its right at law before equity will afford protection, as, the construction of the grant being for the court, the right is not in law doubtful.⁸² And a preliminary injunction will be granted to restrain city authorities, in opening a street, from the removal of a fence, building, and tracks of a railroad from wharf property necessarily connected with the railroad system in its State and interstate business, since such removal constitutes a trespass which goes to the destruction of the property in the character in which it is enjoyed by the railroad company. But such injunction merely preserves matters *in statu quo*, and cannot direct the restoration of property to its condition before being disturbed.⁸³

81. City of Waterloo v. Waterloo Street Ry. Co., 71 Iowa, 193, 32 N. W. 329.

82. Port of Mobile v. Louisville R. Co., 84 Ala. 115, 4 So. 106, per Sonairville, J.: "The party aggrieved is not required to establish his right at law before he is permitted to invoke the aid of equity, if such right is clear and free from doubt. The verdict of a jury is only necessary where the right claimed is doubtful. The right here is determined by a municipal ordinance in the nature of both a grant and a contract which is in writing. Its con-

struction is for the court and not for the jury. Mayor v. Rodgers, 10 Ala. 37; Harrell v. Ellsworth, 17 Ala. 576; Commonwealth v. Pittsburgh R. Co., 24 Pa. St. 159; Attorney General v. Heishon, 18 N. J. Eq. 410; Newburgh Turnpike Co. v. Miller, 9 Am. Dec. 274.

83. Southern Pac. R. Co. v. Oakland, 58 Fed. 50, following Northern Pac. R. Co. v. Spokane, 52 Fed. 428. And see Murdock's Case, 2 Bland (Md.), 461; Farmers R. Co. v. Reno, 53 Pa. St. 224; Audenried v. Railroad Co., 68 Pa. St. 370.

§ 1369. **Trespass on railroad property; crossing tracks.**—The remedy against a party who encroaches upon the land of a railroad company, and proceeds to make excavations and erect permanent buildings thereon, is by suit in equity and injunction.⁸⁴ And where it is shown that the extension of a city street so as to cross the track and yards of a railroad company, would render them useless to the railroad company, the city will be enjoined, in the absence of an express statute conferring the right, from so extending the street.⁸⁵ But though the decision of the highest court of New Jersey as to the right of the one railroad company to cross the lands of another in the same State is conclusive, and cannot be reviewed by the United States Circuit Court, a motion to dismiss a bill for an injunction, filed by the proprietor company, will not be granted though the injunction be refused, since the bill may be available to complainant to regulate the mutual use of the premises by the parties.⁸⁶ On injunction by a railroad company to restrain another company from crossing plaintiff's track, plaintiff cannot show that defendant negligently allowed a third company to build its track over the part of defendant's route intended to be occupied by it after making said crossing.⁸⁷ The New York Code which prohibits the granting of an injunction without notice, where the general and ordinary business of a corporation would

84. *Chicago R. Co. v. Porter* (Iowa), 34 N. W. 286.

85. *City of Fort Wayne v. Lake Shore R. Co.*, 132 Ind. 558, 32 N. E. 215. On a petition by a railroad for an injunction to restrain a person from building a canal across land previously condemned for a railroad's use, for which damages have been assessed by a jury, where a projected highway of the city coincides with the intersection of the proposed canal and railroad in a marsh inaccessible to horses and vehicles, and defendant has procured the adoption of a resolution by the city council granting to defendant a contract for the erection of a

draw-bridge at that point, a preliminary injunction prayed by defendant against the construction of the railroad by a solid filling will not be granted unless he will stipulate to release the judgment for damages already awarded, and submit to a new award, and obtain the consent of the city council to allow the railroad to cross the street in question at grade, and not insist upon a draw-bridge. *Packard v. Bergen Neck R. Co.* (N. J.), 22 Atl. 227.

86. *Pennsylvania R. Co. v. National Docks & R. Co.*, 51 Fed. 858.

87. *Western Pennsylvania R. Co.'s Appeal*, 104 Pa. St. 399.

thus be suspended, has been held not to prohibit the granting, without notice, of a temporary injunction to prohibit a railroad corporation from intersecting the track of another corporation.⁸⁸ And injunction will not lie to restrain a street railroad company from laying a second track across the track of another, where it appears that the latter company has no exclusive right to occupy the street, and the answer of the former alleges that it owns the right of way over which the other's track is constructed, and it is not alleged that the former company is insolvent, or that the injury will be irreparable.⁸⁹

§ 1370. **Nuisance by railroad; service of injunction.**—Where a railroad company has begun the construction of an embankment across a natural stream, with a culvert insufficient to permit the passage of the water in times of rain or melting snow, an injunction will issue at the suit of a landowner whose land will be flooded from year to year, and who would otherwise be compelled to bring numerous suits for damages for the continuous injuries.⁹⁰ And where an elevated railway company, without right, erects a station opposite to a building, parallel to it, equal to it in height, and so close to it as to darken its interior to such an extent as to prevent its owner from carrying on his business in it as beneficially and profitably as before, such owner may maintain an action to perpetually enjoin the company from erecting and maintaining such station, and to compel its removal.⁹¹ But the erection by a

88. *Howlett v. New York, West Shore, etc., R. Co.*, 14 Abb. (N. Y.) N. Cas. 328. An interlocutory order permitting one railroad to construct a temporary grade crossing over the tracks of another, to be used only for construction purposes, limiting the number of trains permitted to cross to two per day, to be moved at such times as will not interfere with trains of the other company and enjoining such other company from interfering with the construction and use of the crossing, will not be reversed on appeal before final hearing on bill, an-

swer and proofs, as no irreparable mischief can result to such other company. *Pennsylvania S. V. R. Co. v. Philadelphia V. R. R. Co.*, 151 Pa. St. 402, 24 Atl. 1086.

89. *Highland Ave. R. Co. v. Birmingham Union R. Co.*, 93 Ala. 505, 9 So. 568.

90. *Lake Erie R. Co. v. Young*, 135 Ind. 426, 35 N. E. 177, distinguishing *Sherlock v. Railway Co.*, 115 Ind. 22, 17 N. E. 171.

91. *Mattlage v. New York El. R. Co.*, 14 Daly, 1.

railroad company of bridge abutments upon the sides of an unfrequented country road, which are not presently used or needed for use, but are overgrown with brush and weeds, will not inflict a serious public injury of the character which will induce a court of equity to interfere by preliminary injunction; but it will leave the public to its remedy by indictment to abate the nuisance.⁹² And a railroad company will not be enjoined from using its main tracks for the purpose of making up trains, and shifting cars, on the ground of inconvenience and annoyance thereby caused one living near its track, where no abuse or negligent use of its franchise is shown, though the statute, expressly provides for the condemnation of land for such purposes as part of the terminal business of a railroad company.⁹³ The superintendent of a division of a railroad, under whose orders and personal directions

92. *Raritan v. Port Reading R. Co.*, 49 N. J. Eq. 11, 23 Atl. 127. And see *Woodbridge v. Inslee*, 37 N. J. Eq. 397; *Attorney-General v. Delaware, etc., R. Co.*, 27 N. J. Eq. 631; *Attorney-General v. Brown*, 24 N. J. Eq. 90; *Attorney-General v. New Jersey, etc., R. Co.*, 3 N. J. Eq. 136. Under the Iowa code, which forbids a railway company to lay tracks in the streets of a city until the damages to the abutter has been ascertained and compensated, the occupation of a street prior to the ascertainment and payment of the damages is a nuisance, and the right of the abutter to enjoin the occupancy of the street by the purchaser of the railroad at a foreclosure sale is not merged in an unpaid judgment against the railroad company for damages. *Harbach v. Des Moines R. Co.* (Iowa), 44 N. W. 348.

93. *Beideman v. Atlantic City R. Co.* (N. J.), 19 Atl. 731. In a suit by the owner of property abutting on a street, and used by him as a livery stable, to enjoin a railroad company

from constructing its road along such street under authority granted by the city, and from running its cars thereon the bill alleged that, if defendant were allowed to so construct its road, it would not only deprive complainant of his easement in the street, but would render his building almost unfit for use as a livery stable, on account of the combustible matter contained and necessarily stored therein, and which would be easily ignited by sparks from some passing engine; that the running of trains would frighten the horses kept in the stable, and prevent his driving teams out of the door opening on the street; and that the property would be rendered "entirely worthless," as no one would come to the stable to hire teams. It was held that the bill warranted the granting of a preliminary injunction, as it showed not merely a damage to complainant's property but an injury totally destroying its value. *Ohio River R. Co. v. Ward* (W. Va.), 14 S. E. 142.

all the servants of the company engaged in the promotion of the work enjoined against are acting, is the "managing agent" of the railroad company, within the meaning of the New York Code of Procedure which prescribes the mode of service of an injunction on a corporation.⁹⁴

§ 1371. **Joinder of injunction and damages, etc.; elevated roads.**—Under the Iowa Code, providing for the joinder in one petition of different causes of action only "where each may be prosecuted by the same kind of proceedings," an action to restrain the laying of a railroad track in a street in front of plaintiff's premises cannot be joined with one asking damages for a track already laid there, and an injunction to prevent further use of the street by defendant till such damages are paid.⁹⁵ One having a cause of action which entitles him to an injunction against the unlawful maintenance and operation of a steam railroad in a highway because of its continuous interference with his rights of property may unite with the demand for equitable relief by injunction, and for damages for such interference, a claim for damages for a personal injury suffered while driving along the highway in consequence of his horses being frightened by the noise of a passing engine and train, and escaping beyond his control, since both claims arise from the same wrong,—the unlawful obstruction of the highway by the railroad company,—and are therefore "transactions connected with the same subject of action," within the New York Code of Procedure, permitting joinder of causes of action in such cases.⁹⁶ In an action to enjoin the operation of defendants' railroad in front of plaintiff's premises, where the evidence shows that plaintiff is entitled to an absolute injunction, defendants cannot complain of a judgment enjoining them, unless they tender to plaintiff a specified amount, the court having specifically found that this was a proper sum to be paid by defendants, if they wished to be freed from the obligation of discontinuing the illegal operation of their road.⁹⁷ But the erection of a

94. *Rochester R. Co. v. New York R. Co.*, 48 Hun (N. Y.), 190.

95. *Bowman v. Chicago, etc., R. Co.*, 86 Iowa, 490, 53 N. W. 327.

96. *Lamming v. Galusha*, 135 N. Y. 239; 31 N. E. 1024.

97. *Eno v. Metropolitan El. R. Co.*, 8 N. Y. Supp. 197, 56 N. Y. Super. Ct.

pillar or other obstruction by a railroad company which does not substantially interfere with the plaintiff's right to light, air or access to his premises, furnishes no ground for his invoking the equitable powers of the court by injunction, as a special injury to himself is an indispensable condition to the maintaining by a private person of an action to restrain a public nuisance.⁹⁸ In an action against an elevated railroad company to recover damages caused by the construction of defendants' road, a finding that the value of plaintiff's interest in the premises abutting on the street was lessened by the taking of the easements in a specified sum is not a commutation of future trespasses, but is simply a finding as to the present value of the easements taken, on payment of which defendants should be relieved from the operation of the injunction.⁹⁹ In an action brought to recover the damage to real estate caused by the construction, maintenance, and operation of an elevated railroad upon the street on which such real estate is situated, and to enjoin the further operation of the railroad, where one of the plaintiffs is an infant, who owns an undivided interest in the premises in question, it is an error requiring a reversal of the judgment, rendered in such action in favor of the plaintiffs, that such judgment awards an injunction unless the defendants pay a specified sum upon receiving a conveyance of certain easements of the plaintiffs appurtenant to such premises, appoints a special guardian of such infant, and authorizes and directs him to convey

313. In an action by an abutting landowner to restrain an elevated railway company from maintaining and operating its road in front of plaintiff's premises, a provision in a judgment for plaintiff for the payment by defendant of damages in avoidance of the injunction is a matter of favor, and, although evidence as to such damage has been erroneously admitted, if injury of a substantial character is shown, the court may, instead of granting a new trial, so modify the judgment as to restrain the defendants from main-

taining or operating their road, unless within a reasonable time after notice and entry of judgment they proceed to condemn the appurtenant easements, and acquire title thereto. *Blumenthal v. New York El. R. Co.* (Super. N. Y.), 17 N. Y. Supp. 481.

98. *Adler v. Metropolitan El. R. Co.*, 138 N. Y. 173, 33 N. E. 935; *Fort Plain Bridge Co. v. Smith*, 30 N. Y. 44; *Doolittle v. Supervisors*, 18 N. Y. 155; *Lansing v. Smith*, 8 Cow. 146.

99. *Suarez v. Manhattan R. Co.*, 15 N. Y. Supp. 222.

the interest of such infant in the premises to the defendant.¹ And in an action to enjoin the construction of an elevated railroad in front of plaintiff's premises, no damages can be recovered for the construction of the road after the action for the injunction was commenced, unless a supplemental complaint is served alleging such construction.²

§ 1372. **Appeals.**—Where a perpetual injunction is prayed for by one railroad company to restrain another company from building certain tracks, a judgment by the District Court, dissolving the temporary injunction, dismissing the suit, and ordering the plaintiff to pay costs, is a final judgment, within the meaning of Texas statute permitting appeals to the Supreme Court from every final judgment.³ And where a referee finds past damages in separate amounts caused to two lots, several squares apart, by the operation of an elevated railway, a judgment on his report enjoining the operation of the road in front of one lot only, but requiring payment of the damages to both as a means of avoiding the injunction, is erroneous, but the error may be corrected, on appeal, by simply modifying the judgment in respect to the amount to be so paid.⁴ A decree continuing an injunction restraining railroad companies

1. *Tucker v. Manhattan R. Co.*, 78 Hun (N. Y.), 439, per Follett, J.: "The part of the judgment awarding an injunction, unless the defendants pay \$7,500 upon receiving a conveyance of the easements, rests on the theory that the court had power to appoint in this action a special guardian for the infant plaintiff, and authorize the guardian to convey the ward's interest to the defendants. This is not a proceeding to sell an infant's real estate nor is it an action of partition, nor was it brought for the purpose of divesting the infant's title; no such relief is asked for in the complaint, nor are the allegations therein sufficient to warrant such relief, and the

Special Term erred in appointing a special guardian and directing her to convey the infant's title. Under such a conveyance the defendants would not acquire a legal title to the interest of the infant in the easements, and for this error the judgment should be reversed and a new trial granted, with costs to the appellants to abide the event."

2. *Third Ave. R. Co. v. New York El. R. Co.*, 19 Abb. N. C. 261.

3. *Gulf, etc., R. Co. v. Fort Worth, etc., R. Co.* (Tex.), 2 S. W. 199.

As to appeals generally, see chap. XI, herein.

4. *Sperb v. Metropolitan El. R. Co.*, 17 N. Y. Supp. 469.

from building a track along a certain strip of land until the hearing will not be reversed on appeal by defendant, where they have built their track, as originally intended, on another strip claimed by plaintiff, but on which the court finds defendants are not trespassers.⁵

5. *Town of Durham v. Richmond,*
etc., R. Co., 104 N. C. 261, 10 S. E.
208.

CHAPTER XLVIII.

RELATING TO PUBLIC OFFICERS

- SECTION 1372a. Acts in violation of law.
- 1372b. Acts in excess of authority—Pure food commissioner.
1373. Political and ministerial duties—State secretary.
1374. Courts versus county commissioners.
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- 1383b. Same subject continued.
1384. Federal restraint of State officers.
1385. Same subject—Where State is party.

Section 1372a. **Acts in violation of law.**—Injunction is a proper remedy to prevent public officers from acting in violation of law and in a mistaken view of their duties under the law.¹ So an injunction may be granted in proper cases to prevent public officers, under color of official power or duty, from doing some illegal act affecting injuriously individual rights or property.² “But the

1. *McConnell v. Arkansas Brick & Mfg. Co.*, 70 Ark. 568, 69 S. W. 559, holding that such remedy was proper to prevent the board of penitentiary commissioners from unlawfully rescinding a valid contract for the lease

of State convicts. See, also, *Kirwan v. Murphy*, 83 Fed. 275, 28 C. C. A. 348, 49 U. S. App. 648.

2. *Adirondack R. Co. v. Indian River Co.*, 27 App. Div. (N. Y.) 326, 50 N. Y. Supp. 245. Citing *People v.*

illegality of the proposed act and the rights of the persons seeking the injunction should both be made plainly to appear; and in determining an application for an injunction which, while in form against private persons only, yet, in effect, restrains or obstructs the action of public officers in the exercise of their powers and the discharge of their official duties, the same consideration, to some extent at least, should be given to the rights of the State, the powers and duties of the public officers, and as to whether their proposed action is illegal or not, as though the injunction applied for was to directly, instead of indirectly, restrain their action."³

§ 1372b. **Acts in excess of authority; pure food commissioner.**—The legality of the acts of the pure food commissioner of a State and the question whether he is exceeding the powers conferred upon him by the law giving him authority to act may be tested in an action to enjoin him from committing such acts. And where his acts in distributing circulars or bulletins condemning the goods of a certain manufacturer as harmful and deceptive to the public are in excess of his authority as conferred by law and will cause irreparable injury he may be restrained by injunction from so acting.⁴

§ 1373. **Political and ministerial duties; State secretary.**—It is not within the general powers of a court of equity to supervise the conduct of public officers in the performance of their official duties, or to prohibit such officers from acting, or to compel them to act, in matters which concern political and personal rights, as distinguished from rights of property and ministerial duties.⁵ So a court

Canal Board, 55 N. Y. 390; Flood v. Van Wormer, 147 N. Y. 284, 41 N. E. 569.

3. Adirondack R. Co. v. Indian River Co., 27 App. Div. (N. Y.) 326, 329, 50 N. Y. Supp. 245. Per Her-
rick, J.

4. State v. District Court (N. D. 1908), 115 N. W. 675.

5. Carlton v. Salem, 103 Mass. 141; Chandler v. Boston, 112 Mass.

200; Baldwin v. Wilbraham, 140 Mass. 459, 4 N. E. 829; Steele v. Signal Co., 160 Mass. 36, 35 N. E. 105.

Appointments by the governor of officers will not be enjoined on the ground of the alleged unconstitutionality of the statute under which they are made. Frost v. Thomas, 26 Colo. 222, 56 Pac. 899.

Where a discretion is con-

of equity has no power to issue an injunction to restrain the secretary of State from issuing a city charter on the ground that the statute authorizing such charter is unconstitutional.⁶ But in Wis-

ferred an injunction will not be granted. *Fergus v. Commonwealth*, 6 Ohio N. P. 82.

Water commissioners will not be enjoined from cutting off water supply. *Brass v. Rathbone*, 8 App. Div. (N. Y.) 78, 40 N. Y. Supp. 466.

A state commission, where duties are executive and governmental, will not be enjoined. *State v. Lord*, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473.

The entering into of a contract by a prison commission for the hiring of convicts will not be prevented by injunction. *Southern Min. Co. v. Lowe*, 105 Ga. 352, 31 S. E. 191.

Injunction refused against State board of education.—See *Duncan v. Heyward* (S. C. 1906), 54 S. E. 760.

State executive officers committing trespass against individual by carrying away his property under authority of statute alleged to be unconstitutional may be enjoined. *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648.

Commissioners appointed by the governor to make survey for a proposed new county may be enjoined at suit of citizens of a county from acting. *Lamar v. Croft*, 73 S. C. 407, 53 S. E. 540.

6. *Larcom v. Olin*, 160 Mass. 102, 35 N. E. 113, per Field, C. J.: "The Public Statutes, ch. 150, § 3, empowers this court to 'issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all other writs and processes, to courts of inferior ju-

risdiction, corporations and individuals, necessary to the furtherance of justice and the regular execution of the laws.' The duty of the secretary of the commonwealth, under the statute, if the statute were valid, seems to be ministerial, only; and, upon the refusal of a public officer to perform a ministerial duty, mandamus would lie. *Warren v. Mayor, etc.*, 2 Gray, 84; *Attorney-General v. Boston*, 123 Mass. 460; *Braconier v. Packard*, 136 Mass. 50; *United States v. Blaine*, 139 U. S. 306, 11 Sup. Ct. 607, 35 L. Ed. 183. Whether the petition should have been brought by the attorney-general, or may be brought by the inhabitants and taxpayers, is a question which, we understand, it is unnecessary to decide, because it is agreed that, if necessary, the attorney-general may be made the party petitioner, and the respondents, in their brief, make no objection to the petition for mandamus, in its present form. We therefore regard the objection that the writ was applied for by taxpayers and voters of the town, if there is anything in it, as waived. *Attorney-General v. Boston, supra*. It is suggested in the brief of the petitioners that courts, in some jurisdictions, have held that mandamus cannot be used as a preventive remedy; but this objection is not taken by the respondents, and if there is anything in it, and if it affects anything more than the form of the order to be issued by the court, it may, perhaps, be met by considering the petition as, in substance, a petition for a writ of prohibition.

consin the duty of the secretary of State to give notices of the election of members of the senate and assembly under an apportionment act is not political, but is purely ministerial, and, if the act is unconstitutional, he may be restrained by injunction from proceeding under it.⁷ And in a case in the United States Circuit Court it is decided that where a public officer is acting under a statute the constitutionality of which the court is in doubt as to, the court will grant a temporary injunction restraining further action thereunder, where it seems that justice can best be done by such a course.⁸ But in a later case in the United States Circuit Court it is declared that a court should seek rather to carry out than impede the legislative intention, and that only in a plain case of invalidity should an act of the Legislature be set aside in advance of a hearing on the merits, where that question is one of the important issues involved, and its correct determination can be

The result is that, in the opinion of a majority of the court, the petition for an injunction must be dismissed and the prayer of the petition for mandamus must be granted. So ordered."

7. *State v. Cunningham*, 82 Wis. 39, 51 N. W. 724; *State v. Cunningham*, 81 Wis. 440, 51 N. W. 724. And see the important case of *Blair v. Hinrichsen*, 151 Ill. 41, 37 N. E. 683. Under Laws 1817, ch. 262, giving the canal commissioners power to take possession of and use any waters in the State necessary for the construction and use of a canal, "but doing, nevertheless, no unnecessary damage," the State in 1858 appropriated a dam at the outlet of a lake, with the right to use and store the water for canal purposes. From 1868 the canal commissioners maintained flush-boards at the dam, but in times of high water they were to be removed. In 1884 defendant was appointed superintendent of

public works, who succeeded to the powers and duties of the canal commissioners, and had control of the dam, but instead of removing the flush-boards in times of high water, he allowed them to remain on the dam continuously, so as to cause the dam to overflow plaintiff's land, and refused to consider his complaints. It was held that plaintiff was entitled to a mandatory injunction directing defendants to cause the flush-boards to be raised from time to time, when in his (defendant's) judgment they should not be needed to store water for the use of the canals. *Wright v. Shanahan* (Sup.), 16 N. Y. Supp. 785. As the awarding of contracts is a ministerial act, the execution of an illegal contract by county commissioners may be enjoined. *Henry County Com'rs v. Gillies*, 138 Ind. 667, 38 N. E. 40.

8. *Fairfield Floral Co. v. Bradbury*, 87 Fed. 415.

definitely settled at the final trial.⁹

§ 1374. **Courts versus county commissioners.**—Courts are an integral part of the government, and entirely independent, deriving their powers directly from the Constitution, in so far as such powers are not inherent in the very nature of the judiciary. A court of general jurisdiction, whether named in the Constitution or established in pursuance of the provisions of the Constitution, cannot be directed, controlled, or impeded in its functions by any of the other departments of the government. The security of human rights and the safety of free institutions require the absolute integrity and freedom of action of courts.¹⁰ Though the custody and maintenance of the county buildings including the courthouse are committed to the county commissioners, yet if these officers exercise their ample powers in an arbitrary manner and in disregard of the trusts and purposes for which these powers were conferred, the courts may supply themselves with court rooms and with convenient access to them without interference from the county commissioners. Thus, where the elevator in a courthouse is the principal means of reaching the Circuit Court rooms, the court may order the person put in charge of the elevator by the county commissioners to run it during the sessions of the court, and on his refusal to obey the order, or on a refusal by the county commissioners to continue to run the elevator, the court may direct the sheriff to take charge of the elevator and operate it, and an

9. *Ryan v. Williams*, 100 Fed. 177. Per Woddill, J. See, also, *Balogh v. Lyman*, 6 App. Div. (N. Y.) 271, 39 N. Y. Supp. 780.

10. *Little v. State*, 90 Ind. 338; *Smythe v. Boswell*, 117 Ind. 365, 20 N. E. 263; *Ex parte Griffiths*, 118 Ind. 83, 20 N. E. 513; *State v. Noble*, 118 Ind. 350, 21 N. E. 244; *State v. Hyde*, 121 Ind. 20, 22 N. E. 644; *Langenberg v. Decker*, 131 Ind. 471, 31 N. E. 190. While the power of a court is essentially judicial, being the power to hear and adjudge causes, yet it has also such incidental powers as are necessary to the full and

free exercise of its purely judicial functions. The court may therefore make such rules and regulations as are necessary to secure its own freedom of action, and to carry on its business with dignity, decorum, order, due dispatch, and convenience. The statute (Ind. Rev. Stat. 1881, § 1317) recognizes and asserts such implied power of the court, in addition to its strictly judicial powers to make judgments, sentences, decrees, orders, injunctions, and to issue process, namely, the power "to do such other acts as may be proper to carry into effect the same."

injunction will not lie at the suit of the commissioners to prevent him from so doing.¹¹

§ 1375. **County officers; remedy at law.**—A bill in equity may be brought in the name of the taxpayers of a county to enjoin the county commissioners from the execution and delivery of a deed to real estate belonging to the county, where there is involved an unjust burden upon the taxpayers, or a squandering of the resources

11. *Vigo County Com'rs v. Stout*, 136 Ind. 53, 35 N. E. 683, per Howard, C. J.: "But while the powers and duties of the board of county commissioners within the county are thus ample and complete, as a constituent part of the administrative department of the State government, yet it must be kept in mind that these powers and duties are intrusted to the board for certain defined purposes, and that the commissioners are trustees for the carrying out of such purposes. The commissioners may not exercise their powers arbitrarily, and without regard to the trusts committed to their keeping. The treasurer's office should be suitable for the safe keeping of the funds of the county; the records of deeds showing title to the property of the people should not be exposed to needless hazard; the jail should be such as to provide for the humane and safe keeping of those confined therein charged with the violation of the laws; and so for other trusts committed to the board. Should any such trust be disregarded or abused, resort may be had to the courts by any aggrieved party, or by one authorized to act for the people at large. In case, however, the court itself is the party aggrieved, more delicate and important considerations are presented. The 'court-house,' as the term applies, is chiefly

for the use of the court, the remaining uses being subordinate. . . . When the order was served upon the man in charge of the elevator, and upon the board of county commissioners, it was but right and proper that they should have complied with it. It asked only that the chief purpose for which the courthouse had been built, and the elevator erected, should be carried out. It would appear, indeed, that the elevator was expressly built for the needs of the court. The second and third floors, to which the elevator runs, are devoted almost exclusively to the use of the court, jury, and court officers. The county officers, including the commissioners themselves, are located on the first floor; and it would seem that, but for the uses of the court, no elevator would have been needed in the building at all. Yet the board of commissioners went so far as to enter an order upon their record directing the total discontinuance of the elevator. The answer states that the Circuit Court, in the exercise of its best judgment, deemed it necessary and expedient, in carrying on the business of the courts, that the elevator should be operated. It is further expressly alleged that the operation and running of the elevator is necessary in carrying on the business of the Circuit Court. These averments alone would make the an-

of the county, to replace which taxation must be levied.¹² And where, under the State statutes a county officer cannot allow himself fees out of the sale of certain lands without a previous audit of his claim, an injunction will lie against him at the suit of a taxpayer of the town in which such lands are situated, to prevent the appropriation of such fees, under the statute authorizing a taxpayer to maintain an action for the prevention and restraint of "any illegal official act" on the part of the officers of any county.¹³ And where the defendants constituted the Albany penitentiary commission, and the law creating the commission did not make it a body corporate, nor in terms give any authority to sue it, and plaintiff could not compel the board of county supervisors to audit and allow his claim, as he could not present it as an itemized and verified claim, nor would an action lie against the supervisors for the breach of this contract, it was held that plaintiff was therefore entitled to an injunction.¹⁴ But an injunction will not generally be granted

answer good. The rule governing this case, to be deduced from what we have said and from the authorities cited, is that it was the right of the county commissioners, as it was their duty, to provide a suitable and convenient place for the holding of the courts of the county; but that, if they failed in the exercise of such right and the discharge of such duty, the court could not, by their failure to act, or by any unwarranted act of theirs, be impeded in its own freedom of action under the Constitution and laws of the State. It was the inherent right of the court, and it had the power, to provide a suitable court room, and, if that were already provided, to secure also fit and convenient means of using such court room, including facilities for access thereto, suitable and necessary for the court itself, and in keeping with the character and plan of the building. What we have said thus far would be also applicable if this were an appeal from the order of the court directing the

sheriff to take charge of the elevator. The suit, however, was one for injunction to restrain the officers of the court from carrying out the order of the court itself. We have here, then, not an appeal from an order of court, but a collateral attack upon such order. The court had undoubted jurisdiction of the subject matter—the approach to its own court room—and its action could be reviewed only by appealing from its order."

12. *McCord v. Pike*, 121 Ill. 288, 12 N. E. 259. Any taxpayer has a right to maintain an action to prevent the payment out of the county funds of a claim for services as an attorney rendered by a member of the board of supervisors on a contract made with the board. *Beebe v. Board Sup'rs Sullivan County (Sup.)*, 19 N. Y. Supp. 629.

13. *Warrin v. Baldwin*, 105 N. Y. 534, 12 N. E. 49.

14. *Bronk v. Riley*, 2 N. Y. Supp. 266.

against county officials where there is an adequate remedy at law,¹⁵ or by statute a mode of relief is provided.¹⁶ So an injunction will not lie to restrain county commissioners from ordering an election for the removal of a county seat, for the statute providing a mode for contesting elections furnishes a full remedy.¹⁷ And an injunction will not be granted at the suit of a taxpayer to restrain the county auditor from issuing a warrant for the payment of an alleged illegal claim allowed against the county by the board of supervisors, as the county may compel the auditor to refund the money in an action at law if the warrant is in fact illegally issued.¹⁸ Again, an injunction will not lie to restrain improper or unlawful conduct on the part of public officers at the suit of a resident of a county merely. It must be averred and shown that he is also a citizen and taxpayer, and that he will be greatly and irreparably injured by the acts which he seeks to enjoin.¹⁹ In California an injunction to restrain the anticipated action of the board of supervisors of a county, in paying certain alleged illegal claims, will not be granted, it not being clearly shown that there is an excess of jurisdiction on the part of the board.²⁰

§ 1376. **Same subject; official discretion.**—The Pennsylvania rule is that county commissioners cannot be enjoined from doing official acts, unless it appears that they are proceeding without authority. If they have authority their discretion will not be controlled by the court.²¹ So the issuance of bonds to fund the floating indebtedness of a county will not be enjoined where it does not appear that there has been an abuse of discretion on the part of the commissioners in issuing them.²² And a board of county

15. *Fort v. Thompson*, 49 Neb. 772, 69 N. W. 110. See *Franklin v. Appel*, 10 S. D. 391, 73 N. W. 259.

16. *Atlanta & W. P. R. Co. v. Redwine*, 123 Ga. 736, 51 S. E. 724; *Board of Comm'rs v. Wolff* (Ind. 1905), 76 N. E. 247.

17. *Weber v. Timlin*, 37 Minn. 274, 34 N. W. 29.

18. *Winn v. Shaw*, 87 Cal. 631, 25 Pac. 244.

19. *Caruthers v. Harnett*, 67 Tex. 127, 2 S. W. 523.

20. *Merriam v. County of Yuba* (Cal.), 14 Pac. 137.

21. *Appeal of Delaware County*, 119 Pa. St. 159; *Sharpless v. Philadelphia*, 21 Pa. St. 147. And see *Polly v. Hopkins*, 74 Tex. 145, 11 S. W. 1084.

22. *Snyder v. Rantner*, 190 Pa. St. 440, 42 Atl. 884.

commissioners cannot be prevented by an injunction from changing the depository of the public moneys of a county, when in the discretion of the board it is deemed best that a change should be made.²³ Again, the granting of permits to replace old electrical wires with new ones of larger size and conductivity, such replacement being matter of construction, is left within the discretion of the board of electrical control by the statute and an injunction will not lie against the refusal to grant such permits.²⁴ And the existence of facts giving a county board jurisdiction to entertain proceedings for an appropriation in aid of railroad reconstruction cannot be questioned by a petition to enjoin the collection of taxes levied for such appropriation, as reconstruction is but a form of construction.²⁵ The California civil code providing that an injunc-

23. *First Nat. Bank v. Stranathan*, 43 Kan. 648, 23 Pac. 1079.

24. *United States Illuminating Co. v. Grant*, 55 Hun, 222, 7 N. Y. Supp. 788. Under Laws 1817, ch. 262, giving the canal commissioners power to take possession of and use any waters in the State necessary for the construction and use of a canal, "but doing, nevertheless, no unnecessary damage," the State in 1857 appropriated a dam at the outlet of a lake, with the right to use and store the water for canal purposes. From 1868 the canal commissioners maintained flush-boards at the dam, but in times of high water they were to be removed. In 1884 defendant was appointed superintendent of public works, who succeeded to the powers and duties of the canal commissioners, and had control of the dam, but instead of removing the flush-boards in times of high water he allowed them to remain on the dam continuously, so as to cause the dam to overflow plaintiff's land, and refused to consider his complaints. It was held that plaintiff was entitled to a man-

datory injunction directing defendant to cause the flush-boards to be raised from time to time, when in his (defendant's) judgment they should not be needed to store water for the use of the canals. *Wright v. Shanahan* (Sup.), 16 N. Y. Supp. 785.

25 *Bell v. Maish*, 137 Ind. 226, 36 N. E. 358, 1118, per Howard, C. J.: "It has been held that when, in such a case as this, the county board offers an election, such order is a finding by the board that the necessary facts are shown to exist to give the board jurisdiction (*Brokaw v. Board*, 73 Ind. 543; *Goddard v. Stockman*, 74 Ind. 400); and whenever the board, in acting upon a petition, passes upon questions of fact, the decision of the board cannot be collaterally attacked, but the remedy is by appeal. *Faris v. Reynolds*, 70 Ind. 359; *Board v. Hall*, Id. 469; *Hilton v. Mason*, 92 Ind. 157; *Hill v. Probst*, 20 Ind. 528, 22 N. E. 664. Whatever question there might be, therefore, as to facts giving jurisdiction to the board under the statute referred to, has

tion shall not lie to prevent the execution of a public statute by officers of the law for the public benefit, does not prohibit an injunction against the erection of a wharf on plaintiff's land, as no public statute authorizes the taking of land without proceedings under eminent domain.²⁶

§ 1377. **Same subject; doubtful cases.**—Although an injunction may issue to restrain public officers from making corrupt appointments, such an injunction will not be granted on uncertain and indefinite allegations.²⁷ So it being an open question whether commissioners were or were not authorized to fence a certain territory, under the stock law, it was held that pending the determination of the question an injunction should not stop the work altogether, but only such portions of it as might afterwards be decided to be unwarranted.²⁸ And the performance of a public duty, such, for instance, as the construction of a county fence, will not be enjoined unless it clearly appears to be without legal warrant.²⁹ And mere threats by county commissioners to ignore and set aside a contract let by them for the county printing, in the absence of any official offer or attempt to carry out such threats, do not constitute grounds for an injunction against them.³⁰ But where the board of commissioners are about to let a contract for the building of a bridge without authority, a court of equity will enjoin the letting at the instance of a taxpayer, in order to avoid the complication arising from the levy of an illegal tax.³¹ Where, however, a county had no courthouse, and there was no place at the countyseat that could be procured for that purpose, and the commissioners advertised for bids for building a courthouse, and awarded the contract for a fair price, it was held that, assuming

been passed upon by the board in assuming jurisdiction; and, on appeal having been taken from that decision, such question is no longer open for consideration."

26. *Payne v. English*, 79 Cal. 540, 21 Pac. 952.

27. *Roosevelt v. Edson*, 51 N. Y. Super, Ct. 227.

28. *McNair v. Buncombe County Com'rs*, 93 N. C. 370.

29. *Busbee v. Wake County Com'rs* 93 N. C. 143.

30. *Anderson v. Stoufer* (Kan.), 27 Pac. 1000.

31. *Fones Hardware Co. v. Erb*, 54 Ark. 645, 17 S. W. 7.

that the commissioners exceeded their authority and that the contract was void because the question had not been submitted to a vote of the electors, it would be inequitable to enjoin the issue or payment of the warrants, and also that an injunction ought not to be granted, because the complaining taxpayer had his remedy under the statute by an appeal to the District Court.³²

§ 1377a. **License; power of official to revoke; limitation on; injunction; moving picture shows.**—Power conferred upon a mayor or other public official to revoke or suspend licenses is held to be a power given to him in trust to enable him to properly perform the duties of his office and is subject to the limitation that it must not be arbitrarily and unreasonably exercised, that is, that a license which has been paid for, granted and acted upon cannot be revoked without cause. These principles are sustained in a late decision in New York upon motions for temporary injunctions to protect the plaintiffs in the exercise of their alleged rights under certain common show licenses for moving picture exhibitions pending an action to rescind an order by the mayor revoking all such licenses. The mayor had express authority to revoke or suspend such licenses and upon representations of violations of the law at many of such places where these shows were conducted the mayor issued an order revoking and annulling each and every license issued by him for a moving picture show. The court held that there was an arbitrary exercise by the mayor of his power, and issued an injunction restraining the mayor and other defendants, their agents and employees, from acting under such order of revocation pending the action.³³

32. Wood v. Bangs (Dak.), 46 N. W. 586.

33. William Fox Amusement Co. v. George B. McClellan, New York Law Journal, Jan. 11, 1909, Vol. 40, No. 84, the following extract from the opinion by Blackman, J., is given in this connection: "The licenses in question are common show licenses issued under sections 300 to 309 of the

Revised Ordinances of the city, which were enacted pursuant to the authority of section 51 of the charter. The mayor has express authority to revoke or suspend these licenses (section 307 of the Revised Ordinances). In People ex rel. Lodes v. Board of Health (189 N. Y. 187) the court decided that a license granted by the board of health to sell milk was not

§ 1377b. **Against police officials generally.**—Equity will not interfere to prevent arrest or the execution and enforcement of the criminal law so long as the police authorities keep within the

property, that there existed an implied power of revocation and that such power could be exercised as an administrative or executive act without notice or a hearing. I assume that these principles there laid down as governing licenses to sell milk issued by the board of health under the Sanitary Code also apply to licenses for common shows issued by the mayor under the city ordinances. Certainly this assumption is favorable to the defendants, for the only alternative is that they are property and can only be revoked after a hearing. But it is said in the Lodes case that if the action (of revocation) is arbitrary, tyrannical or unreasonable or is based upon false information, the relator may have a remedy through mandamus to right the wrong. In the Lodes case the power of revocation was implied from the nature of the license. In this case the power is expressly conferred by section 307 of the ordinances. But this does not make any difference. The power is given to the mayor in trust for the purpose of enabling him to properly perform the executive duties of his office. It cannot be exercised arbitrarily (*The Tribune Ass'n v. The Sun*, 7 Hun, 175; *Davis v. The Mayor*, 1 Duer, 451). *Cushing v. The Board*, 13 St. Rep., 783; *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 51 N. E. 758.) There is, therefore, a limit to the exercise of the power of revocation. It must not be arbitrary, tyrannical or unreasonable. These words are exceedingly indefinite and present in themselves

no sure rule of conduct which can be applied in determining whether the power of revocation is well exercised. There may be a great difference of opinion as to the meaning of these words in their application to the question of the revocation of licenses. To my mind, after a license has been granted, paid for and acted upon, a revocation without cause is unreasonable and arbitrary. . . .

On reviewing the whole case I cannot find that there is any cause for the revocation of these licenses which is shown to be common to all these shows. The fact that the method adopted by the mayor is the most effective way of reaching the result of desirable regulations which he proposed does not justify the revocation of licenses in cases where no cause is shown. Except in that it weakens the moral fiber of the people, a benevolent despotism is probably the ideal government. But ours is a government of law. The right of citizens to carry on their respective vocations, whether under municipal licenses or not, does not depend on arbitrary administrative or executive action. When a vocation duly licensed is lawful, it cannot be made unlawful by executive decree unless a sufficient cause exists to revoke the license. For a revocation without such cause is arbitrary and not within the scope of executive power. Within certain limits the discretion of the mayor to determine when a license shall be revoked will not be controlled; within those limits the court will not substitute its judgment for that vested

lines of duty, nor will it on conflicting evidence determine whether or not a crime has been committed, or whether a business is un-

in the chief executive of the city, but a general order of revocation which is concededly based on an abuse of the privilege by a part only of the licensees is not a valid exercise of the power.

Neither can I examine each case to determine whether the revocation is valid as to some. This would be equivalent to the court exercising the power of revocation given by the ordinances to the mayor. I cannot tell which licenses the mayor would have revoked if he had discriminated.

It is claimed that the conditions disclosed were so bad that a general order was justified, and the Slocum disaster is cited as an example of the necessity for such course. I fail to see the force of this illustration. A revocation of every steamboat license in the port prior to the disaster would certainly have averted it. But this does not show that licenses may lawfully be revoked without cause. Whether under the circumstances an order suspending all licenses for moving pictures pending an examination was justified I am not deciding. But a general order finally revoking all licenses was not necessary. It is stated in the opposing affidavits that from twenty-five or thirty places a day can be examined. Therefore, in twenty days at the most, every case could have been investigated and the licenses sustained, revoked or suspended as each case required.

It seems to be conceded, or at least is not disputed, that an action in equity is the proper remedy. Usually the power of supervision of municipal corporations and officers is exercised by a court of law through the writ of

mandamus, and a resort to equity is justified only when the case falls within some recognized head of equity jurisdiction. But the courts will exercise whatever power is necessary to afford a remedy, and in the present case I think a resort to equity is proper. Mandamus involving a trial by jury under an alternative writ would afford inadequate relief.

The question whether one license can maintain an action for all is not discussed by the corporation counsel, and the argument of the plaintiff is confined to the citation of *Eickelberg v. Board of Health*, 47 Hun (N. Y.), 371. Such a procedure under circumstances very like the present seems to have been sustained in that case. The act of the mayor was a single act, and it affected all licenses alike. In popular phraseology the validity of the order is a matter of common and general interest. It has been held that where the wrongful act complained of affected alike several riparian owners an action could be maintained one for all. *Climax Specialty Co. v. Seneca Button Co.*, 54 Misc. 152; *Strobel v. Kerr Salt Co.*, 164 N. Y. 323, 58 N. E. 142. See, also, *Cicero Lumber Co. v. Town of Cicero*, 176 Ill. 9, 57 N. E. 758; *City of Chicago v. Collins*, 175 Ill. 445, 51 N. E. 907.

An injunction may therefore issue in all the actions restraining the defendants, their agents and employees from acting under such order of revocation pending the action. The order should plainly provide that it does not restrain the mayor from revoking any or all of the licenses for cause, and does not restrain any person

lawful.³⁴ So equity is held to be without jurisdiction to enjoin police officers from carrying out a threat to make arrests for an alleged desecration of Sunday by leasing ballrooms to private persons for social entertainment; the plaintiff's remedy being at law against the individual police officers or by indictment if property or business be interfered with.³⁵ And in New York it is decided that a court of equity is without jurisdiction to restrain police officers from carrying out a threat to arrest persons for violating section 265 of the penal code by holding a public exhibition of wax figures on Sunday, irrespective of whether the police were mistaken in their opinion that such act was a crime.³⁶ And equity has no jurisdiction to enjoin police officers from entering on Sundays a building where public exhibitions of moving pictures are held, or from interfering with such business on that day except for the purpose of preserving the peace or executing warrants.³⁷

whatsoever from proceeding against the plaintiff or any of the licenses for violating the law, except that they must not be disturbed for the alleged cause of maintaining a common show without a license on the theory that the license has been terminated by the general order of revocation mentioned in the pleadings and affidavits.

Motions granted as indicated, with costs.

Settle order on notice."

34. *Burns v. McAdoo*, 113 App. Div. (N. Y.) 165.

The seizure of machines on the ground that they are used for gambling purposes will not be enjoined. *Caille Co. v. Haager*, 20 Ky. Law Rep. 1889, 50 S. W. 244.

Alleged invalidity of an ordinance is not a ground for enjoining police officials from acting thereunder. *Coykendall v. Hood*, 36 App. Div. (N. Y.) 558, 55 N. Y. Supp. 718.

"It must be an extreme case which would justify a court of equity in in-

terfering by its process of injunction to restrain the regular and orderly attempt of public officers to enforce the criminal law, and the case must be one where such process is necessary to prevent grave injustice and irreparable injury." *Moore v. Owen* (N. Y. App. Div. 1908), 109 N. Y. Supp. 585, per Foote, J.

35. *Snesskind v. Bingham*, 125 App. Div. (N. Y.) 787, 110 N. Y. Supp. 213. Laughlin, J., wrote a dissenting opinion to the effect that equity has jurisdiction under proper circumstances, as where damage to private business would be irreparable, or the remedy at law is inadequate, or the threatened acts constitute a trespass upon private property.

36. *Eden Musee Amer. Co. v. Bingham*, 125 App. Div. (N. Y.) 780, 110 N. Y. Supp. 210.

37. *Shepard v. Bingham*, 125 App. Div. (N. Y.) 784; *Keith & Proctor Amusement Co. v. Bingham*, 125 App. Div. (N. Y.) 791.

§ 1377c. Against police officials continued; watching premises.

—Equity will not enjoin the police from watching premises where gambling is supposed to be carried on, when the police authorities show reasonable cause for believing that the law is being violated.³⁸ So a court of equity will not grant an injunction to restrain police officers from stationing patrolmen in front of premises where the occupant is suspected of conducting a poolroom in violation of the law.³⁹ And in New York it is determined that equity will not intervene to restrain the police authorities of the city of New York from stationing officers outside of a place having a liquor tax certificate, when such authorities suspect that place of being conducted as a disorderly house, and from notifying customers who are in the place and those who are about to enter the same that it is a disorderly house which is likely to be raided at any moment, and that those who are on the premises at the time of such raid are liable to arrest. In this State it is decided that the proprietor of the place if oppressed or injured by any unlawful act of the authorities may invoke the provision of the Penal Code,⁴⁰ or he may maintain an action at law for damages.⁴¹

§ 1377d. Against police officials concluded; trespass by.—

Police officers who go outside legitimate procedure and violate individual rights of person or property are common trespassers and lawbreakers and may be enjoined from continuing such a trespass.⁴² And when the courts are appealed to by a law-abiding citizen, conducting a lawful business which is injured by the police, who persist in remaining indefinitely on the premises and show no justification therefor, equity will issue an injunction in order to protect the individual rights guaranteed by the Constitution and in

38. *Cleary v. McAdoo*, 113 App. Div. (N. Y.) 178, holding that such reasonable ground for belief is shown by the fact that the police, after forcing an entrance, found the usual paraphernalia of a pool room on the premises, which were frequented by persons known to be engaged in pool selling.

39. *Stevens v. McAdoo*, 112 App. Div. (N. Y.) 458, holding that a temporary injunction issued in such a case will be vacated.

40. Section 556.

41. *Delaney v. Flood*, 183 N. Y. 323, *rev'g* 105 App. Div. 64.

42. *Hogan v. McAdoo*, 113 App. Div. (N. Y.) 506.

the interests of law and order.⁴³ And where police officers continue to trespass upon premises where a legitimate business is carried on, to its irreparable damage, and make no claim that anything illegal occurs on the premises, but merely answer that they suspect the place without justifying the suspicion, equity will enjoin them from continuing the trespass.⁴⁴ So where it is shown by the proprietor of a physical culture school that police officers trespass upon his premises and threaten his patrons under a charge that the place is used for gambling, to the ruin of his business, and the police authorities show no justification for such action save that before the plaintiff's occupancy the place was used for gambling, equity will entertain an action to restrain the trespass and will issue a temporary injunction.⁴⁵ And in a recent case in Colorado, where it was sought to enjoin public officers who by virtue of ordinances of a city, claimed the right of closing club rooms and excluding the members therefrom on the ground that there was a violation of such ordinances in respect to the sale of intoxicating liquors, the court granted an injunction restraining them from so doing. The important question in this case was said to be whether the defendants could determine for themselves that the club was violating the ordinances of the city and proceed summarily to enforce its *ex parte* orders against it, and it was declared that the question must be answered in the negative and that whether or not the acts of the members were a violation could not be determined by the city officials, but only by a court of competent jurisdiction, wherein the plaintiffs were afforded an opportunity to be heard so that the question whether they were violating the ordinances could be judicially determined.⁴⁶ But although the court will grant a temporary injunction restraining police officers from unlawfully trespassing on hotel property to the owner's damage, the plaintiff, after obtaining a temporary injunction, should bring the action to trial to obtain a permanent injunction, and if he fail to do so, the temporary injunction will not be continued.⁴⁷

43. *Burns v. McAdoo*, 113 App. Div. (N. Y.) 165.

44. *Hogan v. McAdoo*, 113 App. Div. (N. Y.) 506.

46. *Canon City v. Manning* (Colo. 1908), 95 Pac. 537.

45. *Burns v. McAdoo*, 113 App.

47. *Olms v. Bingham*, 116 App.

45. *Burns v. McAdoo*, 113 App. Div. (N. Y.) 804.

§ 1378. **School officers.**—Where directors of a school-district are about to make an unlawful and unauthorized disposition of the public school fund, injunction is the only proper remedy of an individual taxpayer, irrespective of the solvency of such directors.⁴⁸ But school directors will not be enjoined from re-districting the township because it has recently been re-districted, and the last re-districting has been approved by the county superintendent, because if their action is oppressive to any one in the district, it may be set aside on appeal to the superintendent.⁴⁹ And taxpayers having children of school age cannot enjoin the town from breaking a contract with a teacher, and giving possession of his schoolroom to another, their contract with the latter being valid, and plaintiffs not deprived of their right to instruction for their children.⁵⁰ But it has been decided that school directors who have

48. *Black v. Ross*, 37 Mo. App. 250. See, also, *Alexander v. Johnson*, 144 Ind. 82, 41 N. E. 811; *Rodgers v. Independent School Dist.*, 100 Iowa, 317, 69 N. W. 544. Compare *Wahl v. School Directors*, 78 Ill. App. 403.

Under the Indiana statute, providing that the trustee shall not employ any teacher whom a majority of those entitled to vote at school meetings have decided, at a regular meeting, they do not wish to employ; and section 4537, providing for appeal from the decision of the trustee to the county superintendent, and declaring his decision final of all local questions relating to the dismissal of teachers—the taxpayers are entitled to an injunction, the refusal of the trustee to act being equivalent to an adverse decision, from which appeal could be taken. *O'Brien v. Moss*, 131 Ind. 99, 30 N. E. 894.

A taxpayer may maintain an action to enjoin the board of education of the city and county of San Francisco, under the authority given it by Act Cal. April 1, 1872, to

employ teachers, from drawing drafts on the school fund in favor of inspecting teachers, whose appointment is not authorized by the act, without showing that he will sustain any special injury different from that of the public at large. *Barry v. Goad*, 89 Cal. 215, 26 Pac. 785.

49. *Morgan v. Wilfley*, 70 Iowa, 338, 30 N. W. 606.

50. *Schwieb v. Zitike*, 136 Ind. 210, 36 N. E. 30, per Coffey, J.: "The question, then, is presented for our consideration as to whether these appellants can, by the extraordinary remedy of injunction, compel the school board of the town of Batesville to eject Benham from room No. 1, and substitute Jackson as a teacher in his place. It does not appear what proportion these appellants bear to the other patrons of the school, nor does it appear that any of the other patrons desire any change. It is quite clear, we think, that Jackson could not maintain an action against the school board of the town of Batesville to enjoin it from discharging him and

tried arbitrarily, but without success, to dismiss a school teacher will not be granted an injunction restraining him from teaching.⁵¹

§ 1379. **Road officers.**—Road supervisors may be enjoined from removing or interfering with fences, hedges, or watercourses in the discharge of their official duties,⁵² or from entering upon lands outside of the highway limits.⁵³ And a road overseer and a township board may be enjoined from opening a road over plaintiff's land, although the injury will not necessarily be irreparable, and although there is no allegation of defendant's insolvency.⁵⁴ And the fact that supervisors of roads may be punished for contempt in disobeying a mandate to open up a highway established on a section line does not preclude a person from enjoining them from opening up the road across his land instead of along the

employing another. The Case of Clark, 1 Blackf. 122; 5 Lawson, Rights, Rem. & Pr., § 2595. In the authority last above cited it is said: 'Contracts for work or labor, or for personal services, or personal skill and attention will not be enforced; nor will the putting an end to such contracts, or dismissing a servant or employee, be restrained.' If Jackson, with whom the board made a contract, could not enjoin such board from dismissing him, and employing another in his stead to teach the schools in the town of Batesville, it is difficult, if not impossible, to perceive how these appellants can perform that feat for him. To permit them to do so would be to permit that to be done by indirection which could not be done directly. It is now so well settled that a person cannot be enjoined from violating a contract for personal services when such contract contains no negative stipulations that it seems not to be an open question. 10 Amer. & Eng. Enc. Law,

948; Columbus Baseball Club v. Reiley, 25 Wkly. Cin. Law Bul. 385; Harrisburg Baseball Club v. Athletic Ass'n, 8 Penn. C. Ct. Rep. 337; Lithographing Co. v. Crane (Sup.), 12 N. Y. Supp. 898; Manufacturing Co. v. Rogers, 58 Conn. 356, 20 Atl. 467. On the other hand, we think it is equally well settled that the employer cannot be enjoined from a violation of such a contract by discharging the employee. The purpose of this suit, as we understand it, is to enjoin the school board of the town of Batesville from violating its contract with Jackson for his personal services as a teacher. In our opinion, such an action cannot be maintained."

51. Thompson v. Gibbs, 97 Tenn. 489, 37 S. W. 277, 34 L. R. A. 548.

52. Bolton v. McShane, 67 Iowa, 207, 25 N. W. 135.

53. Webster v. White, 8 S. D. 479, 66 N. W. 1145.

54. Harris v. Board, 22 Mo. App. 462.

section line.⁵⁵ But an injunction to restrain town supervisors from issuing road orders, or incurring any expenses in anticipation of the levy and collection of a tax voted by the electors for highway purposes, in excess of the limit fixed by law, will not be granted at the instance of taxpayers. They would have an adequate remedy, if compelled to pay such taxes under protest, by action at law to recover them, or, if they should be extended against real estate, by suit in equity to remove the supposed lien and cloud from their title.⁵⁶ And where a railroad company had not obtained the necessary consent of the common council of a city to the construction of its tracks across a city street or an elevated structure, but had constructed the same in pursuance of a verbal arrangement with local officials, it was decided that an injunction restraining any interference with such structure, by the city or its street commissioners, would not be granted.⁵⁷ And an injunction will not be granted to prevent a merely theoretical wrong; as, for instance, the opening of a highway over the complainant's land, upon an invalid order, which the commissioners disclaim any intention to enforce.⁵⁸ And where plaintiff, in a suit to restrain the opening of a road through his property, has actual knowledge from the pleadings that the county treasurer has made a special deposit, subject to his order, of the amount of damages due him, as required by statute, he cannot prevail on the ground that the treasurer did not, as required by the statute, notify him of such deposit.⁵⁹

§ 1379a. Power of board of estimate and apportionment in New York city.—The board of estimate and apportionment of the

55. *Kern v. Isgrigg*, 132 Ind. 4, 31 N. E. 455.

56. *Sage v. Town of Fifield*, 68 Wis. 546, 32 N. W. 629. Where, after petition to county commissioners to vacate a public road without notice having been given, as required by Kan. Comp. L. 1879, ch. 89, § 3, injunction was brought against them before they had taken any action to restrain them from vacating. It was

held that the injunction was prematurely brought. *Troy v. Doniphan County Com'rs*, 32 Kan. 507.

57. *Delaware, L. & W. R. Co. v. Buffalo*, 158 N. Y. 266, 53 N. E. 44. Rehearing denied in 158 N. Y. 478, 53 N. E. 533.

58. *Newby v. Clay County Highway Com'rs*, 21 Ill. App. 245.

59. *Hopkins v. Cravey* (Tex.), 19 S. W. 1067.

city of New York has no authority to grant to the proprietors of a department store a permit to lay down private railroad tracts in front of their premises and operate express cars thereon for the conveyance of goods to their store from the street railroads and an adjoining owner whose property will be damaged thereby is entitled to an injunction restraining the taking of any steps under such permit.⁶⁰

§ 1380. **Protecting de facto officers; removal of officers.**—An injunction may be granted to protect the possession of officers *de facto* against the interference of claimants whose title is disputed, until the latter shall establish their title by the judicial proceeding provided by law.⁶² And injunction to prevent interference with the possession of a *de facto* officer lies at the instance of a member of a board where it appears that the adverse claimant may, otherwise than by a concurrent action with the other members of the board, induct himself extrajudicially in part into office, and to some extent oust the incumbent.⁶³ But claims to an office under conflicting commissions will not be considered and passed upon in an injunction proceeding, the sole object of which is to maintain the incumbent in possession provisionally until the pretensions of the adverse claimant, who threatens to induct himself into office, and thus oust the *de facto* officer without legal intervention, are

60. *Hatfield v. Straus*, 189 N. Y. 208, 82 N. E. 172, *aff'd* 117 App. Div. (N. Y.) 671, which held that such board is without authority to grant to private persons the right to construct a private railroad on or under the city streets for the sole purpose of transporting their own goods, and that when the right to construct such a railroad has been granted by such board an adjoining owner whose access to his property will be invaded by the tracks and whose property will be diminished in value thereby may sue for a permanent injunction. And in such a case it is decided that the

plaintiff is entitled to an injunction *pendente lite* and that the decision as to his right thereto should be made before the road is built and not afterwards.

62. *Guillotte v. Poincy*, 41 La. Ann. 333, 6 So. 507. See, also, *Parsons v. Durand*, 150 Ind. 203, 49 N. E. 1047; *State v. Swohomish County* Super. Ct., 17 Wash. 12, 48 Pac. 741, 61 Am. St. Rep. 892. But compare *Goldsworthy v. Boyle*, 175 Pa. St. 246, 34 Atl. 630.

63. *Goldman v. Gillespie*, 43 La. Ann. 83.

judicially determined.⁶⁴ And equity will not restrain the incumbent of an office from exercising its duties pending an action involving his title thereto.⁶⁵ And it is generally decided that equity will not exercise its injunctive jurisdiction for the purpose of trying title to office,⁶⁶ and will not interfere by injunction to restrain the removal of a public official from office.⁶⁷ But where a person is seeking to take possession of a municipal office and of public property and to exercise the functions and powers incident thereto under an appointment which is illegal and void, it is decided that a court of equity may, at the suit of the city, grant relief by injunction.⁶⁸

64. *Goldman v. Gillespie*, 43 La. Ann. 83.

65. *State v. Alexander*, 107 Iowa, 177, 77 N. W. 841; *Breslin v. Quinn*, 2 N. Y. Supp. 577; *Harding v. Eichinger*, 57 Ohio St. 371, 49 N. E. 306. See *State v. Herreid*, 10 S. D. 16, 71 N. W. 319.

Payment of salary to incumbent will not be enjoined at suit of claimant. *Lawrence v. Lehigh*, 58 Kan. 676, 50 Pac. 889. See *Keating v. Fitch*, 14 Misc. R. (N. Y.) 128, 35 N. Y. Supp. 641.

66. *Tupper v. Dart*, 104 Ga. 179, 30 S. E. 624; *Wilder v. Underwood*, 60 Kan. 859, 57 Pac. 965; *Melody v. Goodrich*, 67 App. Div. (N. Y.) 368, 73 N. Y. Supp. 741.

67. *United States v. White v. Berry*, 171 U. S. 366, 18 Sup. Ct. 917, 43 L. Ed. 199; *Morgan v. Munn*, 84 Fed. 551.

Illinois.—*Heffran v. Hutchins*, 160 Ill. 550, 43 N. E. 709.

Louisiana.—*Peters v. Bell*, 51 La. Ann. 1621, 26 So. 442.

Nebraska.—See *Cox v. Omaha Fire & P. Commis.*, 55 Neb. 34, 75 N. W. 35.

New York.—*People v. Howe*, 177 N. Y. 499, 69 N. E. 1114, 66 L. R. A.

664; *Palmer v. Board of Education*, 47 App. Div. 547, 62 N. Y. Supp. 485.

Washington.—*Mullen v. Tacoma*, 16 Wash. 82, 47 Pac. 215.

Wisconsin.—*Ward v. Sweeney*, 106 Wis. 44, 82 N. W. 169.

But see *Stahlbut v. Bauer*, 51 Neb. 64, 70 N. W. 496; *Callaghan v. Irvin* (Tex. Civ. App. 1905), 90 S. W. 335; *Callaghan v. Tobin* (Tex. Civ. App. 1905), 90 S. W. 328.

In Louisiana it has been decided that the "veterinary surgeon" mentioned in section 6 of the ordinance creating a paid fire department of the city of New Orleans is an officer of the department, and holds his office during good behavior, and that so long as he has not resigned or been impeached, he is entitled to an injunction in his favor, restraining the newly-elected surgeon, the board of commissioners, and the chief of the department, from interfering with him in the performance of his duties. *Wheeler v. Fire Com'rs*, 46 La. 731, 15 So. 179.

68. *Huntington v. Cast*, 149 Ind. 255, 48 N. E. 1025. Compare *State v. Judge of Eleventh Judicial District*, 48 La. Ann. 1501, 21 So. 94, holding that an injunction against the exer-

§ 1381. **Quo warranto instead of injunction; mandamus.**—The title to a public office and the right to exercise its functions cannot be determined in an action for an injunction to restrain the exercise of such functions, but in proceedings in the nature of a writ of *quo warranto* only.⁶⁹ or in an election contest as prescribed by statute.⁷⁰ And a court of chancery will not enjoin the commissioners of a drainage district from exercising jurisdiction over certain land on the ground that such land has not been legally annexed to the district, since the landowner has an adequate remedy at law by *quo warranto*.⁷¹ And equity will not restrain the payment of salary to a *de facto* officer who has discharged the duties of the office, since there is an ample remedy at law by proceedings of *quo warranto* for any unlawful holding of office.⁷² The New York rule is that a suit to restrain a claimant of a municipal office from attempting to exercise its powers and duties cannot be maintained, as the question of title to such office is involved, and can only be tried in an action of *quo warranto* brought by the people.⁷³ And an in-

cise of the power of an official will not be granted on the ground of an illegal appointment where he has not qualified.

See, as to county officials. *Segars v. Parrott*, 54 S. C. 1, 30 S. E. 273.

69. *Coleman v. Glenn*, 103 Ga. 458, 30 S. E. 297; *Burke v. Leland*, 51 Minn. 355, 53 N. W. 716; *Cozart v. Fleming*, 123 N. C. 547, 31 S. E. 822. Compare *School District v. Weise*, 77 Minn. 167, 79 N. W. 668.

70. *People v. District Court of Lake County*, 29 Colo. 277, 68 Pac. 224, 93 Am. St. Rep. 61.

71. *Bodman v. Drainage Com'rs*, 132 Ill. 439, 24 N. E. 630.

72. *Burgess v. Davis*, 138 Ill. 578, 28 N. E. 817; *Lawrence v. Leidigh*, 58 Kan. 676, 50 Pac. 889. See *Keating v. Fitch*, 14 Misc. R. (N. Y.) 128, 35 N. Y. Supp. 641.

Where two sets of officers are attempting to hold the county offices—one set at S., as the county

seat, and the other set at K., as the county seat—and each set claims to be legally entitled to hold such offices, and it is not shown clearly which set is so entitled, nor which set is *de facto* the officers, injunction will not lie to restrain either set from acting, but the proper remedy is *quo warranto*. *Neeland v. State*, 39 Kan. 154, 18 Pac. 165. One who has been duly elected and has qualified as collector of taxes under Act Pa. June 25, 1885, making the collectorship an elective office, need not resort to a writ of *quo warranto* to determine the title of one subsequently appointed by the town council, but equity will enjoin the town authorities from delivering the tax duplicates to the appointee. *Appeal of Town Council (Pa.)*, 15 Atl. 730.

73. *Johnston v. Carside* (Sup.), 20 N. Y. Supp. 327, following *Morris v. Whelan*, 11 Abb. N. C. 64.

junction will not lie against a public officer where *mandamus* is the remedy prescribed by statute.⁷⁴

§ 1382. **Restraining waste of public funds.**—The power of a court of equity to restrain a waste, misappropriation, or illegal payment of public funds by the officials in charge thereof is generally recognized.⁷⁵ So in Illinois a bill will lie at the suit of any taxpayer to enjoin action by public officers which will lead to the misapplication of public money or its payment on illegal contracts or without authority of law; and the fact that the governor's approval of their acts is also necessary to the payment of public money is not a sufficient reason against enjoining their illegal action.⁷⁶ And in a recent case in Illinois it is said that the law is established beyond doubt or controversy; that a bill to enjoin public officers so situated from misappropriating the fund in their charge is a proper remedy for a taxpayer, and that courts of chancery will interfere to restrain such authorities from a misuse of the fund entrusted to them or its appropriation to a purpose not warranted by law.⁷⁷ The District Court of Texas has power to issue an injunction to restrain the illegal seizure or use of the books and papers pertaining to any public office, and it has power also to restrain the illegal expenditure of the funds of a county, or to restrain the illegal issue and delivery of the bonds of a county evidencing a county indebtedness.⁷⁸ But in New York it is decided that where there is no claim that railroad aid bonds were issued fraudulently or collusively, the town supervisors will not be enjoined from paying the interest thereon out of

74. Hager v. New South Brew. Co., 28 Ky. Law Rep. 895, 90 S. W. 608; United States, etc., Co. v. Hess, 3 N. Y. Supp. 777. See, also, Lindblad v. Board of Education, 221 Ill. 261, 77 N. E. 450, *rev'g* 122 Ill. App. 617.

75. Attorney-General v. Detroit, 113 Mich. 494, 71 N. W. 870; Terry v. Gleason, 21 Misc. R. (N. Y.) 368, 47 N. Y. Supp. 741; State v. Lord, 28 Oreg. 498, 43 Pac. 471, 31 L. R. A. 473. See, also, §§ 1299, 1300 herein.

76. Littler v. Jayne, 124 Ill. 123, 16 N. E. 374; Springfield v. Edwards, 84 Ill. 626; Beauchamp v. Kankakee County, 45 Ill. 274; Perry v. Kinneer, 42 Ill. 160.

77. Adams v. Brenan, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, 69 Am. St. Rep. 222. Per Cartwright, J.

78. Caruthers v. Harnett (Tex.), 2 S. W. 523. In an action to enjoin town supervisors from issuing certain bonds, an allegation in the complaint

money collected for that purpose in the usual course of taxation, before the validity of the bonds was questioned. Such payment is neither an "illegal act," nor does it constitute "waste," within the meaning of the New York statute, which authorizes the prosecution of actions by the taxpayers of a town to prevent any illegal act of its officers or to prevent waste or injury to its property or funds.⁷⁹

§ 1383. **United States officers.**—The officers or agents of the interior department may be enjoined from unlawfully ejecting a person having a vested right to the possession of lands.⁸⁰ And a

that notice of the town meeting voting for their issuance was not posted in three of the most public places in the town was sufficient to withstand a demurrer. *McVichie v. Town of Knight* (Wis.), 51 N. W. 1094.

79. *Calhoun v. Delhi R. Co.*, 121 N. Y. 69, 24 N. E. 27. In an action by a taxpayer under Laws N. Y. 1881, ch. 531, permitting taxpayers to sue to restrain unlawful official acts, against a town supervisor, to restrain the payment of certain bills presented by the highway commissioners, an injunction will not be granted when plaintiff fails to prove that the bills were not audited by the board of auditors, or that there was no legally constituted board, or that the audit was illegal, or that the bills were unjust, or that the commissioners had failed to make their reports to the board, or that the payment of the bills would injure the plaintiff. *Warren v. Van Nostrand*, 3 N. Y. Supp. 151. Defendant presented to the county court, for examination, county warrants to the amount of \$65,000; and, the court having ordered the cancellation of certain of the warrants, defendant appealed to the Circuit Court from the order. The warrants had come into defendant's hands in payment of taxes

collected by him while sheriff of the county. He had never rendered any account of the taxes collected by him; or made any settlement with the County Court. The court thereupon adjusted the account, and found a balance due the county of \$118,000. From this judgment defendant also appealed. Defendant was insolvent, and his official bond was lost. It was held that an action in equity would lie to restrain the collection and re-issue of a warrant and to declare such warrants as were valid a set-off against the balance found to be due the county for taxes collected by the defendant. *Pride v. State*, 52 Ark. 502, 13 S. W. 135.

80. *Caldwell v. Robinson*, 59 Fed. 653, per Beatty, J.: "The defendant is the agent of the secretary of the interior. The power of the court to enjoin his agents has not been discussed. Generally the officers of the departments cannot be controlled by injunctions or mandamus while acting in a judicial capacity, in which their judgments are to be based upon a consideration of facts; but in this case the action of the land department involved a construction of law, which is not subject to the same rule. It is held in *Noble v. Railroad*

court of equity may entertain jurisdiction of a suit to enjoin a postmaster from refusing to deliver a person's mail and an injunction to this effect is held not to be a mandatory injunction.⁸¹ But a bill for a mandatory injunction requiring a collector to accept an export bond for certain spirits in a bonded warehouse after the bonded period has expired, and allow their withdrawal for export without requiring payment of the tax thereon, has been held to be in effect a bill to restrain the collection of internal revenue taxes, which the court is forbidden to entertain by the revised statutes of the United States.⁸²

§ 1383a. State railroad commission; rates; jurisdiction of Federal court to enjoin.—The sufficiency of rates with reference to the Federal Constitution as fixed by a State railroad commission is a judicial question and one over which the Federal courts have jurisdiction by reason of its Federal nature, the question being whether

Co., 147 U. S. 165, 13 Sup. Ct. Rep. 271, 37 L. Ed. 123, that such officers may be enjoined from the performance of an unlawful act. If the complainant is lawfully in the possession of the premises, it would be unlawful for defendant to forcibly eject him, and he may be restrained from so doing. The injunction granted by the State court will be continued as prayed by complainant." For the rule applying to departmental, see sections 54, 55, *ante*.

Interference with possession may be enjoined. *Smith v. Reynolds*, 9 App. D. C. 261, 24 Wash. Law R. 630.

81. *Fairfield Floral Co. v. Bradbury*, 87 Fed. 415. As to such injunctions see, also, *Enterprise Saving Ass'n v. Zumstein*, 67 Fed. 1000, 15 C. C. A. 153; *New Orleans Nat. Bank v. Merchant*, 18 Fed. 841.

82. *Miles v. Johnson*, 59 Fed. 38, per Barr, J.: "The supreme court, in *Snyder v. Marks*, 109 U. S.

189, 3 Sup. Ct. Rep. 157, 27 L. Ed. 901, had occasion to construe section 3224, Rev. St., and it was held that the word 'tax' included taxes which had been illegally and wrongfully levied, as well as those which were regular and valid. See, also, *Kennett v. Stivers*, 18 Blatchf. 398; 10 Fed. 517, where the cases are reviewed. Here the taxes have been regularly levied, and are in every respect valid and lawful, so far as assessment and manner of levy can make them so; and the only contention of the complainant is that the collection of the tax after he had expressed a determination to export the whisky, and tendered a good export bond to the defendant, would be unconstitutional and invalid. This section 3224, Rev. St., was originally an amendment to what is now section 3221, and should be construed with it; and being so construed, it seems evident that the court is prohibited from granting the relief sought."

the orders of such a commission if enforced would take property without due process of law. And where such a question is raised the Federal courts have jurisdiction of a bill in equity to restrain the enforcement of such an order or law.⁸³ Therefore individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected, an unconstitutional act as to railroad rates, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action.⁸⁴ And a Federal court has power to inquire whether rates permitted by legislative acts or orders of a railroad commission are too low and therefore confiscatory, and if it finds that the rates established therefore so operate it then has jurisdiction at the suit of a stockholder to permanently enjoin the railroad company from putting them in force and also has the power while the inquiry is pending to grant a temporary injunction to the same effect.⁸⁵

§ 1383b. **Same subject continued.**—The doctrine stated in the preceding section is affirmed in a late case in the United States Supreme Court, in which it is decided that railroad companies may maintain a bill in equity in the United States Courts to restrain a State railroad commission, which is established, and whose powers are defined by the constitution of the State in respect to the making and enforcing of railroad rates, from attempting to enforce rates which it is alleged are confiscatory. It was decided in this case that although the commission was clothed with legislative, judicial and executive powers, yet that the establishment of a rate was the making of a rule for the future and was therefore an act legislative and not judicial in kind, and that proceedings legislative in nature are not proceedings in a court within the meaning of the United States Revised Statutes⁸⁶ forbidding United States courts to

83. *Ex parte Young*, 209 U. S. 123; *Hawley v. Kansas City Southern Ry. Co.*, 187 U. S. 617, 23 Sup. Ct. 42, 47 L. Ed. 333; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 214, 418, 42 L. Ed. 819.
84. *Ex parte Young*, 209 U. S. 123.
85. *Ex parte Young*, 209 U. S. 123.
86. § 720.

enjoin proceedings in a State court. The court also decided that when the rate is fixed a bill against the commission to restrain the members from enforcing it is not bad as an attempt to enjoin legislation or as a suit against a State, and is the proper form of remedy but it should not be pursued until the rate is irrevocably fixed by the State by the body having the last word. The court further determined that the bills in the present case should be retained for the present to await the result of the appeals provided for by the State constitution if the companies should see fit to take them; that if the appeals were dismissed as brought too late the companies would be entitled to decrees, and that if they were entertained and the orders of the commission affirmed, the bills might be dismissed without prejudice and filed again.⁸⁷ The court distinguished this case from that of *McNeill v. Southern Railway Company*,⁸⁸ on the ground while the statutory provisions as to appeal were somewhat similar in both cases, yet that in the earlier case, apart from other differences the ground of the decree was that the State commission was dealing with a subject-matter beyond its power and that no regulation would have been valid. In the case referred to it was determined that the order was invalid as an unlawful interference with interstate commerce but the court decided that the decree of the Circuit Court and the writ of perpetual injunction issued thereon were much broader than the necessities of the case required and should be limited so as to adjudge the invalidity of the order complained of, restrain the institution by the defendant of suits or actions for the recovery of penalties or damages founded upon the disobedience of the order and forbid interferences under like circumstances and conditions with the interstate business of the railway company.

§ 1384. **Federal restraint of State officers.**—A suit against railroad commissioners of a State, to restrain enforcement of their regulations, as unjust and unreasonable—the State having no direct pecuniary interest therein—is not within the eleventh amendment to the Constitution, providing that the judicial power of the United

⁸⁷. *Prentis v. Atlantic Coast Line*. ⁸⁸. 202 U. S. 543. 50 L. Ed. 1142. 211 U. S. 210.

States shall not extend to any suit against a State by citizens of another State.⁸⁹ And a State is not a party to a suit to enjoin the

89. *Reagan v. Farmers' Trust Co.*, 154 U. S. 420, 14 Sup. Ct. Rep. 1047, 38 L. Ed. 1031, per Brewer, J.: "We are met at the threshold with an objection that this is, in effect, a suit against the State of Texas, brought by a citizen of another State, and therefore, under the eleventh amendment to the constitution, beyond the jurisdiction of the federal court. The question as to when an action against officers of a State is to be treated as an action against the State has been, of late, several times carefully considered by this court, especially in the cases of *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 31 L. Ed. 268, by Mr. Justice Matthews, and *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. Rep. 699, 35 L. Ed. 363, by Mr. Justice Lamar. In the former of these cases it was said (page 505, 123 U. S., and page 164, 8 Sup. Ct. Rep.): 'To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit, it must be held to cover, not only suits brought against a State by name, but those, also, against its officers, agents, and representatives, where the State, though not named as such, is nevertheless the only real party against which alone, in fact, the relief is asked, and against which the judgment or decree effectively operates.' And in the latter (page 9, 140 U. S., and page 699, 11 Sup. Ct. Rep.): 'It is well settled that no

action can be maintained in any federal court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides that no State shall pass any law impairing the obligation of contracts. This immunity of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself. In the application of this latter principle, two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented. The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, and thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. In *re Ayres*, 123 U. S. 443, 8 Sup. Ct. Rep. 164, 27 L. Ed. 268; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. Rep. 128, 27 L. Ed. 448; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. Rep. 91, 27 L. Ed. 468; *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. Rep. 292, 609, 27 L. Ed. 992; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. Rep. 608, 29 L. Ed. 791. The other class

enforcement of a rate so established by a railroad commission from the fact that the commission is a party to the suit.⁹⁰ And that a State statute, under which railroad commissioners assume to act, is constitutional, does not oust a Federal court of jurisdiction to restrain their excessive and illegal acts, for a valid law may be wrongfully administered by State officers so as to operate as an illegal burden and exaction upon the individual aggrieved.⁹¹ While it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of the property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property.⁹² In connection with the right of a Federal court to ex-

is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the State. *Osborn v. Bank*, 9 Wheat. 738; *Davis v. Gray*, 16 Wall. 203; *Tomlinson v. Branch*, 15 Wall. 460; *Litchfield v. Webster Co.*, 101 U. S. 773, 25 L. Ed. 925; *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. Rep. 925, 926, 29 L. Ed. 200; *Board v. McComb*, 92 U. S. 531, 23 L. Ed. 628; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. Ed. 185.”

90. *Ex parte Young*, 209 U. S. 123; *Mississippi Railroad Commission v. Illinois Cent. R. R. Co.*, 203 U. S. 335, 51 L. Ed. 209; *Smyth v. Ames*, 169 U. S. 466, 42 L. Ed. 819; *Reagan v. Farmer's Loan & T. Co.*, 154 U. S. 362, 38 L. Ed. 1014, 14 Sup. Ct. 1047.

91. *Cunningham v. Railroad Co.*, 109 U. S. 446, 452, 27 L. Ed. 992, 3 Sup. Ct. 292, 609. In these cases the officer is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense, he must show that his authority was sufficient in law to protect him. See *Mitchell v. Harmony*, 13 How. 115; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471; *Meigs v. McClung*, 9 Cranch, 11; *Wilcox v. Jackson*, 13 Pet. 498; *Brown v. Huger*, 21 How. 305; *Grisar v. McDowell*, 6 Wall. 364.

92. *Reagan v. Farmers' Trust Co.*, 109 U. S. 446, 27 L. Ed. 992, 14 Sup. Ct. 1047, per *Brewer, J.*: It may be laid down, as a gen-

ercise injunctive jurisdiction over State officers it has been decided that where a State superintendent of insurance has no jurisdiction in respect to the granting of a license to a foreign company to do business within the State where it has complied with the laws of such State he may be compelled by mandatory injunction to perform the duty imposed upon him.⁹³

§ 1385. **Same subject; where State is party.**—Where complainants, as soliciting agents within the State of Louisiana, of an Illinois manufacturer of a fertilizer, were in the habit of sending orders to their principal, and the fertilizer was shipped direct to the purchaser in Louisiana by such principal, and was never in complainants' possession or control, it was held that complainants were engaged in interstate commerce, and that the Louisiana act requiring a license for the sale of such fertilizer within the State under penalties, as applied to them, was an interference with such commerce, and hence the Federal courts will restrain proceedings against them for non-compliance with such act. And the fact that such proceedings against complainants were taken in the name of the State will not affect the right of the Federal Circuit Court to restrain the proceedings; for the injunction will go against the board of agriculture and its officers, at whose instance the proceedings were had, and not against the State. And whether or not the Federal Circuit Court has jurisdiction to restrain the law officers of the State from instituting the criminal proceeding provided for by the act in the event of failure to comply with it, it can clearly re-

eral proposition, that, whenever a citizen of a State can go into the courts of the State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the federal courts to maintain a like defense. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.

Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the federal courts. *Cowles v. Mercer Co.*, 7 Wall. 118; *Lincoln Co. v. Luning*, 133 U. S. 529, 10 Sup. Ct. Rep. 363, 33 L. Ed. 776; *Chicot Co. v. Sherwood*, 148 U. S. 529, 13 Sup. Ct. Rep. 695, 37 L. Ed. 546."

93. *Mutual Life Ins. Co. v. Boyle*, 82 Fed. 705.

strain the board of agriculture, its agents and officers, from instigating any such prosecutions.⁹⁴ A suit to enjoin a State officer from assessing or enforcing a tax for which there is no authority or warrant under the State laws is not in substance a suit against the State, within the prohibition of the eleventh amendment to the

94. *Louisiana et al. v. Lagarde*, 60 Fed. 186, per Pardee, J.: "The business of complainants is interstate commerce, and it is beyond the regulation of the State of Louisiana. Nor can the State of Louisiana levy any tax upon it. *Robbins v. Taxing Dist.*, 120 U. S. 492, 7 Sup. Ct. Rep. 592, 30 L. Ed. 695; *Leloup v. Port of Mobile*, 127 U. S. 640-648, 8 Sup. Ct. Rep. 1380, 32 L. Ed. 311; *Asher v. Texas*, 128 U. S. 129, 9 Sup. Ct. Rep. 1, 32 L. Ed. 368; *Stoutenburgh v. Hennick*, 129 U. S. 141-148, 9 Sup. Ct. Rep. 256, 32 L. Ed. 637. Even if the act in question could be construed as an inspection law, or as an exercise of the police power of the State, the complainants' business cannot be affected thereby, as complainants do not deal with, nor handle, nor bring to the State, fertilizers; and, even if the complainants were to import into the State original packages of fertilizers, and the act in question could be properly construed as an inspection law within and under the police power of the State, still the interference with complainants' business would be in violation of clause 3, § 8, art. 1, of the constitution of the United States. *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. Ed. 128; *In re Sanders*, 52 Fed. 802. The case, then, is one within the jurisdiction of this court, and warrants relief according to equity principles and practice. An injunction is the usual relief in such cases, and it is asked

for in this case. The respondents say that it cannot be issued because the suit is one against the State, and the State cannot be enjoined, nor can it be issued against the law officers of the State, to restrain them from instituting criminal proceedings under the said law, nor can it issue against State officers or State boards, because such an injunction would be equivalent to an injunction against the State. The State of Louisiana was a party to the suit under which complainants' bill, as a cross bill, was originally filed; and when, by consent of parties and an order of court, the cross bill was permitted to stand as an original bill, the State of Louisiana was not dismissed but remained as, practically, a nominal party. The objection that the suit is one against the State, so far as it has merit, can be eliminated from the case by the formal dismissal of the bill as to the State of Louisiana. The board or bureau of agriculture, or any of the individual members thereof, and some other persons who cannot be classed as agents, attorneys or employees of said board, against whom complainants desire relief, should be made parties. Leave will be given to the complainants to amend their bill in these respects. The State being out of the case, there is only one serious question as to the scope of the injunction that ought to be issued, and that is whether a court of equity can enjoin the law officers of the State from instituting and prosecuting

Constitution of the United States. And while the Federal courts are extremely cautious about interfering with the collection of current State revenues, they will not decline to enjoin a settlement of illegal back taxes, which threatens to create a cloud on real estate.⁹⁵

criminal suits of proceedings under a void or unconstitutional law. Many cases on each side of this question have been cited and examined, but I do not think it necessary to review them at this time, for the purposes of this case, nor to determine the yet unsettled question of how far proceedings criminal in their character, taken by individuals or organized

bodies of men, tending, if carried out, to despoil one of his property or other rights, may be enjoined by a court of equity. *In re Sawyer*, 124 U. S. 200; 8 Sup. Ct. Rep. 482, 31 L. Ed. 409; *Lottery Co. v. Fitzpatrick*, 3 Woods, 222; *Bottling Co. v. Welch*, 42 Fed. 561; *Texas Railroad Commission Case*, 51 Fed. 529."

95. *Sanford v. Gregg*, 58 Fed. 620.

CHAPTER XLIX.

RELATING TO ELECTIONS.

SECTION 1386. Enjoining notices of elections—Political considerations.

1386a. Holding of election.

1386b. Canvassing returns and declaring result.

1386c. Matters in connection with election generally.

1387. Election returns, etc.—Political matters.

1388. Enjoining issuance of certificates.

1389. Adequate remedy—No injury—Contents.

1390. County seat—Election to remove—Conflict—Annexation of territory to municipality.

Section 1386. Enjoining notices of election; political considerations.—A court of equity has no jurisdiction to enjoin issuing notices of an election, and certifying the candidates thereat, under a law alleged to be unconstitutional; since that is a matter involving political, and not civil rights.¹ So in a bill praying for such an

1. *Blair v. Hinrichsen*, 151 Ill. 41, 37 N. E. 683. The court said, in part: "As defined by Anderson, a civil right is 'a right accorded to every member of a district, community or nation,' while a political right is a 'right exercisable in the administration of government.' And. Law Dict. 905. Says Bouvier: 'Political rights consist in the power to participate, directly or indirectly, in the establishment or management of the government. These political rights are fixed by the Constitution. Every citizen has the right of voting for public officers, and of being elected. These are the political rights which the humblest citizen possesses. Civil rights are those which have no relation to the establishment, support or management of the government. They consist in the power of acquiring and enjoying property, or exercising the

paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by sentence of civil death, is in the enjoyment of the civil rights, which is not the case with political rights; for an alien, for example, has no political, although in full enjoyment of the civil, rights.' 2 Bouv. Law Dict. 597. 'The question, then, is whether the assertion and protection of political rights, as judicial power is apportioned in this State between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think they do not come within the proper cognizance of

injunction, allegations that the complainant is a taxpayer, and that holding the election will cause expenditure of public money, are not sufficient to give the court jurisdiction, where the bill does not pray

courts of equity. In *Sheridan v. Colvin*, 78 Ill. 237, this court, adopting, in substance, the language of Kerr on Injunctions, said: 'It is elementary law that the subject of the jurisdiction of the court of chancery is civil property. The court is conversant only with the questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right of property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of the government, except under special circumstances, and where necessary for the protection of rights of property.' In that case the police commissioners of the city of Chicago filed their bill in chancery against the mayor, the members of the common council, and certain officers of the city to restrain the enforcement of the city ordinance reorganizing the police force of the city, and depriving the complainants of their functions as police commissioners, it being claimed that the common council had no power to pass the ordinance, and that it was consequently void. It was held that the rights which were thus sought to be protected and enforced were purely political, and that a court of chancery, therefore, had no jurisdiction to interfere with the passage or enforcement of the ordinance. In *Dickey v. Reed*,

78 Ill. 261, a bill in chancery was filed by the State's attorney of Cook county, and by taxpayers of the city of Chicago, to restrain the members of the common council of the city and the city clerk from canvassing the returns of the election held in the city April 23, 1875, upon the question whether the city would become incorporated under the general incorporation act. It was claimed that the election, for certain reasons, was void, and also that gross frauds had been perpetrated at the election, by depositing a large number of ballots in the ballot boxes which had not been cast by the voters, and that a large number of the illegal and fraudulent votes in favor of organization had been cast, and that various other irregularities, having the effect of invalidating the election, had intervened. A preliminary injunction having been awarded, it was disregarded by the city officers, who proceeded, notwithstanding, to canvass the vote and declare the result. Various of the city officers and their advisers were attached and fined for contempt, and, on appeal to this court from the judgment for contempt, it was held that the matter presented by the bill was a matter over which a court of chancery had no jurisdiction, and that the injunction was void, so that its violation was not an act which subjected the violators to proceedings for contempt. In *Harris v. Schryock*, 82 Ill. 119, it was held that the power to hold an election is political, and not judicial, and that a court of equity has no jurisdiction to restrain officers from the exercise of such powers; and

that the election itself be enjoined, and it is not alleged that the acts of issuing notice and certifying candidates will cause any expense. A court of equity will take notice that an election for

it was said that this was in accordance with repeated decisions of this court, and in support of that statement. *People v. City of Galesburg*, 48 Ill. 485; *Walton v. Develing*, 61 Ill. 201; *Darst v. People*, 62 Ill. 306; and *Dickey v. Reed*, *supra*, are cited. So, in *Delahanty v. Warner*, 75 Ill. 185, it was held that a court of equity has no jurisdiction to entertain a bill to enjoin the mayor and aldermen of a city from removing a party from office and appointing a successor, and from preventing the party from discharging his duties after removal by them, as the party's remedy at law is complete by *quo warranto* against the successor, or by mandamus against the mayor and councilmen. In *State v. Stanton*, 6 Wall. 50, 18 L. Ed. 721, a bill was filed by the State of Georgia against the Secretary of War and other officers representing the executive authority of the United States, to restrain them in the execution of the acts of Congress known as the 'Reconstruction Acts,' on the ground that the enforcement of those acts would annul and totally abolish the existing State government of the State, and establish another and different one in its place, and would, in effect, overthrow and destroy the corporate existence of the State, by depriving it of all means and instrumentalities whereby its existence might and otherwise would be maintained; and it was held that the bill called for a judgment upon a political question, and that it would not, therefore, be entertained by a court of chancery; and it was further held

that the character of the bill was not changed by the fact that, in setting forth the political rights sought to be protected, it averred that the State had real and personal property, such, for example, as public buildings, etc., of the enjoyment of which, by the destruction of its corporate existence, the State would be deprived, such averment not being the substantial ground of the relief sought. In *re Sawyer*, 124 U. S. 200, 8 Sup. Ct. Rep. 482, 31 L. Ed. 402, it was held that the Circuit Court of the United States had no jurisdiction to entertain a bill in equity to restrain the mayor and committee of a city in Nebraska from removing a city officer upon charges filed against him for misfeasance in office, and that an injunction issued on such bill, as well as an order committing certain persons for contempt in disregarding the injunction, was absolutely void. In that case the court says: 'The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property. It has no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers. To assume such jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses, or for the removal of public officers, is to invade the domain of the courts of common law, or of executive and administrative department of the government.' In support of its decision the court cites, among vari-

the relocation of a county-seat would, if unauthorized, be a waste of public money, and will enjoin the calling of such unauthorized election at the suit of a taxpayer.² And no injunction to restrain the holding of an election will issue when the date fixed for the election has passed before the determination of the suit to restrain.³

§ 1386a. **Holding of election.**—The power to hold an election is political and not judicial and a court of equity has no jurisdiction to restrain officers from the exercise of such power.⁴ It has, however, been held otherwise where it is clear that no vacancy

ous other cases, the decisions of this court in *Delahanty v. Warner*, *Sheridan v. Colvin*, and *Dickey v. Reed*, above referred to, and quotes with approval the passage in the opinion in *Sheridan v. Colvin* above set forth, taken, in substance, from *Kerr on Injunctions*. Other authorities of similar import might be referred to, but the foregoing are amply sufficient to show that whenever the established distinctions between equitable and common law jurisdiction are observed, as they are in this State, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases the remedy, if there is one, may be sought in a court of law. The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office; nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in

themselves no property rights, but pertains solely to the political administration of government. If a public officer, charged with political administration, has disobeyed or threatens to disobey the mandate of the law, whether in respect to calling or conducting an election or otherwise, the party injured or threatened with injury in his political rights is not without remedy; but this remedy must be sought in a court of law, and not in a court of chancery."

2. *Solomon v. Fleming*, 34 Neb. 40, 51 N. W. 304, per Post, J.: "Since the county board were acting without authority of law in calling the election, we can see no reason why a complaining taxpayer should remain idle until the election had been held and the rights of innocent parties intervened. The remedy by contest provided by statute is not exclusive. *State v. Stearns*, 11 Neb. 104, 7 N. W. 743; *State v. Frazier*, 28 Neb. 438, 44 N. W. 471."

3. *McKinney v. County Com'rs* (Fla.), 3 So. 887.

4. *Harris v. Schryock*, 82 Ill. 119; *Walton v. Develing*, 61 Ill. 201; *Conner v. Gray*, 88 Miss. 489, 41 So. 186; *Morgan v. County Court*, 53 W. Va. 372, 44 S. E. 182.

exists in the office, to fill which the election is desired.⁵ This restriction on the power of a court of chancery to grant an injunction to prevent the holding of an election is held to extend to those cases where the alleged ground is want of authority to hold it, as it is decided that the remedy therefor is complete at law by the writ of *quo warranto*.⁶ And likewise an injunction in such a case has been refused where the only ground alleged was the unconstitutionality of the act under which it was to be held.⁷ But while the courts will not interfere to enjoin the proper municipal authorities from ordering an election in pursuance of a law to select officers, or to determine any question made dependent upon such election, nevertheless where it is apparent that such election will be of no possible use to anyone, but may work irreparable injury to some, it has been decided that an injunction until the final hearing may be granted, particularly if the acts complained of have a tendency to prevent the construction of a railroad, or some other enterprise in which the public have an interest.⁸

§ 1386b. **Canvassing returns and declaring result.**—A court of equity will not grant an injunction restraining the proper board from proceeding to canvass and from certifying and announcing the result of an election,⁹ especially where by statute this is re-

5. *Kearney v. Flannery*, 8 Kulp. (Pa.) 219.

6. *People v. Galesburg*, 48 Ill. 485. See, also, *Weber v. Timlin*, 37 Minn. 274, 34 N. W. 29; *Smith v. McCarthy*, 56 Pa. St. 359. But see *Conner v. Gray*, 88 Miss. 489, 41 So. 186.

Registration of voters will not be enjoined.—*Green v. Mills*, 69 Fed. 852, 30 L. R. A. 90, 16 C. C. A. 516, *aff'd* in 159 U. S. 651, 40 L. Ed. 293.

7. *Fesler v. Brayton*, 145 Ind. 71, 44 N. E. 37, 32 L. R. A. 578. Compare *Williams v. Boynton*, 147 N. Y. 426, 42 N. E. 184, holding that where a county clerk is required by statute to order the holding of an election

upon the direction of the board of supervisors to that effect, if the act of such board is illegal a threat to order the election by the county clerk is not essential to sustain an injunction against such election, as the action of such official, being commanded by statute, it will be presumed that he will comply with the order.

8. *Murfreesboro R. R. Co. v. Board of Commissioners*, 108 N. C. 56, 12 S. E. 952.

9. *Mendenhall v. Dunham*, 35 Fla. 250, 17 So. 561; *Ogborne v. Elmore*, 121 Ga. 72, 48 S. E. 702; *Alderson v. Commissioners*, 32 W. Va. 640, 8 S. E. 274, 5 L. R. A. 334, 25 Am. St. Rep. 840.

quired to be done before a certain date,¹⁰ as such a duty is a political one, with the performance of which a court of equity will not interfere.¹¹ And this is held to be true though the alleged ground on which such relief is sought is that the election was illegally ordered.¹² So in a case in Louisiana, where a police jury had ordered an election to be held under a statute authorizing local option elections, and an injunction to prevent the police jury from promulgating the returns was sought by one who urged in effect that no election had been held, and that all the election proceedings were the merest nullity, it was held that the promulgation of the returns was necessary before suit and that it therefore followed that the suit was premature.¹³

§ 1386c. **Matters in connection with election; generally.**—

Where county commissioners are authorized by statute to issue instructions to voters a court of equity will not assume jurisdiction to direct what form of instructions shall be given.¹⁴ And a court of equity has no jurisdiction in Pennsylvania to restrain the chairman of the county committee of a political party from filling vacancies in violation of the rules of the party where no property rights are involved.¹⁵ And an injunction does not lie to restrain ballot commissioners from putting on the ballots to be used at a general election the question of the relocation of a county seat, when the County Court has made an order submitting such question to vote.¹⁶

§ 1387. **Election returns, etc.; political matters.**—The Georgia local option law provides that the ordinary shall consolidate the returns and hear all contests arising from elections held under the

10. *State v. Gibbs*, 13 Fla. 55, 7 Am. Rep. 233.

11. *State v. Carlson*, 72 Neb. 837, 101 N. W. 1004.

12. *People v. Board of Supervisors*, 75 Cal. 179, 16 Pac. 776.

13. *Pouchatoula v. Police Jury*, 120 La. 1040, 46 So. 16.

14. *Commonwealth v. Mercer*, 190 Pa. St. 134, 42 Atl. 525.

15. *Kearns v. Hawley*, 188 Pa. St. 116, 41 Atl. 273, 42 L. R. A. 235.

16. *Morgan v. County Court*, 53 W. Va. 372, 44 S. E. 182, holding that such an injunction is null and void and does not render invalid a vote upon such question.

act, and provides a remedy in case of his refusal to do so. It is held that this act relates to police and political matters, with which the courts have no jurisdiction to interfere unless it is conferred by the act itself, and hence injunction will not lie against consolidating the returns, and declaring the result of the election as provided by the act.¹⁷ Under the provisions of the constitution and statutes of Indiana, certified copies of the returns of the votes cast for lieutenant-governor are required to be transmitted to the speaker of the house of representatives, in the care of the secretary of State, and the courts have no authority to stop, by injunction, these certified returns in the hands of the secretary of State, as he is the mere custodian thereof, and is bound by positive law to deliver them to the speaker of the house of representatives, whose duty it is to open them in the presence of both houses of the general assembly.¹⁸ Again, an injunction will not lie at the instance of a voter to restrain a supervisor of registration from turning his registration book over to the manager of elections, on the ground that the laws requiring voters to register are unconstitutional.¹⁹ And an application for a writ to enjoin the secretary of State from publishing notices of an election of members of the Legislature under an apportionment act alleged to be unconstitutional cannot be objected to on the ground that it is a political action to effect a political object, as it presents a judicial question—the constitutionality of the act—though its determination may have a political effect.²⁰

17. Clayton v. Calhoun, 76 Ga. 270.

The charter of the city of Kingston provides that the common council shall convene on the Monday following an election for city officers, examine the certificate of the inspectors of election filed with the clerk, and forthwith determine, declare and certify who were duly elected at said election. It was held that the duties of the common council under this provision are judicial, and not ministerial, and that an injunction will not lie to restrain them from inquiring into the validity of the election, and

awarding their certificate of election to a person other than the one whose election has been certified by the inspectors of election in the first instance. *Halloran v. Carter*, 13 N. Y. Supp. 214; *People v. City of Kingston*, 13 N. Y. Supp. 214; *People v. City of Kingston*, 13 N. Y. Supp. 216; *Brennan v. Beck*, 13 N. Y. Supp. 216.

18. Smith v. Myers, 109 Ind. 1, 9 N. E. 692.

19. Ex parte Lumsden, 41 S. C. 553, 19 S. E. 749.

20. State v. Cunningham, 82 Wis. 39, 53 N. W. 35.

A suit to restrain the secretary of State from giving notice of the election of Senators under the last senatorial apportionment act, and to compel him to give notice under a former act, on the ground that the last act is in violation of the Constitution, may be brought on the relation of a private citizen, where it is apparent by the appearance of the attorney-general for respondent that he would not have instituted the proceedings if applied to by relator.²¹

§ 1388. **Enjoining issuance of certificate.**—Equity will not enjoin the issuance of a certificate of election where the question in controversy is that of title to public office between individual claimants.²² So a court of equity has no jurisdiction to enjoin the issuing of a certificate of election to, and the assumption of office by, a newly-electer city marshal, on petition of the present marshal, alleging disqualification of the newly-elected officer under the city charter.²³ And equity has no jurisdiction to enjoin commissioners of a County Court from certifying to the governor the result of their canvass of the vote in their county for a representative in the Congress of the United States, which the law makes it their duty to do.²⁴

§ 1389. **Adequate remedy; no injury; contests.**—As a defeated candidate may dispute the result of an election and proceed by *quo warranto* to have it set aside and the office declared vacant he is not

21. *Giddings v. Blacker*, 93 Mich. 1, 52 N. W. 944. And see *People v. State Auditors*, 42 Mich. 422, 4 N. W. 274.

22. *People v. McClees*, 20 Colo. 403, 38 Pac. 468, 26 L. R. A. 646; *Smith v. Doyle*, 25 Ky. Law Rep. 958, 76 S. W. 519; *Halloran v. Carter*, 13 N. Y. Supp. 214.

23. *Neiser v. Thomas*, 99 Mo. 224, 12 S. W. 725. Under Const. Tenn. Art. 3, prescribing the duties of the governor, and Code Mill & V. §§ 1094, 1146, providing that it shall be his duty to issue a commission or certi-

ficat of election to each person elected representative to congress, a court of chancery has no jurisdiction of a bill to enjoin the governor from issuing a certificate of election to congress to an applicant, and to compel him to deliver a certificate already issued to complainant, as the official action of the executive can neither be restrained nor coerced by the courts. *Bates v. Taylor (Tenn.)*, 3 Pickle, 319, 11 S. W. 266.

24. *Alderson v. Commissioners*, 32 W. Va. 640, 9 S. E. 868.

entitled to an injunction for that purpose.²⁵ And the fact that a common council, which was not the judge of the election of mayor, had, over the veto of the mayor, ordered an investigation as to whether he had been duly elected, did not entitle him to a preliminary injunction restraining it from declaring and certifying a result of the investigation adverse to his rights, as such investigation could not be made the basis of any valid resolution to oust him from office.²⁶ And where a contestant for an office has been adjudged entitled to the office, a court of equity has no authority to enjoin him from taking possession of the office, and an appeal from an order dissolving the temporary injunction will not lie.²⁷ But when a suit has been brought in the name of the State to test the validity of the election of a person as mayor of a town; and the council have authorized him to employ counsel to defend such suit at the expense of the corporation, an injunction will lie, at the suit of a taxpayer against such appropriation of the corporate funds.²⁸

§ 1390. County seat; election to remove; conflict; annexation of territory to municipality.—In the absence of statutory authority, equity cannot inquire into the legality of an election held to determine the question of the removal of a county seat, and to enjoin such removal, at the instance of a taxpayer, because of fraud in canvassing the votes and declaring the result.²⁹ And in a recent case in

25. *Davis v. Dawson City Council*, 90 Ga. 817, 17 S. E. 110.

26. *Garside v. City of Cohoes*, 12 N. Y. Supp. 192. A Kansas statute provides that any elector aggrieved by the result of an election may, whenever the board of canvassers shall declare any question or proposition voted on adopted, commence an action to enjoin and restrain the proper officers from executing, issuing or delivering bonds, etc., in accordance with alleged determination of the question voted on. It is held that under this act, a person who had

no greater interest than that of a resident, elector, and taxpayer, could not maintain an injunction to restrain the proper officers from canvassing the votes cast. *State v. County of Wabaunsee*, 36 Kan. 180, 12 Pac. 942.

27. *State v. City of Kearney*, 28 Neb. 103, 44 N. W. 90.

28. *Peck v. Spencer*, 26 Fla. 23, 7 So. 642.

29. *Parmeter v. Bourne*, 8 Wash. 45, 35 Pac. 586, 757, per Dunbar, C. J.: "In the absence of statutory authorization, the courts are without

Georgia it is decided that when the general assembly provides for an election to determine the question whether the territory of one municipality shall be annexed to the territory of another municipality and no provision is made in the law for judicial interference, and there is no general law authorizing such interference, and the

jurisdiction, *ratione materiae*, to entertain the case of the contested election, and the consent of parties cannot give them jurisdiction. *State v. Judge Second Judicial Dist. Court*, 13 La. Ann. 89. This is not a county seat case, but involves the question of judicial jurisdiction. In that case the court said: 'The contesting of votes is not a judicial function, only so far as made such by special statutes. Indeed, some may have gone so far as to question whether this is not wholly a matter of administration, which cannot with propriety be referred to the judicial tribunals at all. At any rate, it is clear that such tribunals cannot usurp any greater control over this business than is specially imposed upon them by law. In the absence of a statutory authorization, they are without jurisdiction of the matter *ratione materiae*. The consent of parties cannot give jurisdiction, and all courts before whom such an unauthorized controversy is brought must decline, *ex officio*, to render any order which would recognize a right to sustain the case.' In *State v. Police Jury*, 41 La. Ann. 850, 6 So. 777, the doctrine announced in the case of *State v. Judge supra*, was approved. And see *Skrine v. Jackson*, 73 Ga. 377. In *Freeman v. State*, 72 Ga. 812, it was decided that the legislature could provide a tribunal for the determination of contested elections, and that such determination was final and conclusive. *Clarke v. Jack*, 60 Ala. 271, was a county-

seat case, and it was decided that an act to authorize the people of a particular county to vote on the question of removing the county site, and to permanently locate the same according to their vote, is not a special or local law for the benefit of individuals or a corporation, and that the provisions of the general election law regulating contested elections did not apply to county seat elections, and did not amount to a statutory provision for a contest of such election. In *Harrell v. Lynch*, 65 Tex. 146, it was decided that voters in a county have, in the location of a county seat, no such interest as will form the basis of a suit. Said the court: 'As no man has a property right in the location of the county seat, its unlawful removal (no more than trespass upon the court yard) gives him no cause of action. Being deprived of no right, the depreciation in the value of his property is not a wrong for which a court of equity, in the absence of a legal remedy, would invent the means of redress. A valid law authorized the election. The election has been held. The agents appointed to ascertain and declare the result have performed their duty. This accomplishes the fact, and the law here ends the controversy. If a wrong has been done, the usurpation of the power to prescribe a remedy would be a still greater wrong.' *Sanders v. Metcalf*, 1 Tenn. Ch. 419, is a case involving the removal of a county seat. The court said: 'It is clear to my mind

authority to interfere cannot be derived from the common law, a court of equity has no power or jurisdiction over the matter, and

that the legislature has by this language intrusted to the county court, at this quarterly session, as the proper organ of the county, as a *quasi* corporation, the right to count the votes and declare the result. . . .

As soon as the result was declared, the county seat was, *eo instanti*, changed, as if it had been by an act of the legislature. The county court were commissioners appointed by the legislature to make the removal by declaring the result of the election; and their act, not being judicial, but legislative, is conclusive, and the courts have no power to inquire into its validity.' In *McWhirter v. Brainard*, 5 Or. 426, it was held that, upon a submission of the question of the location of a county seat to an election the question of fact, as to whether the canvass of the vote was correct, and as to what the true vote was, and subordinate questions, cannot be tried in equity. In *Attorney General v. Board of Sup'rs of Lake County*, 33 Mich. 289, it was decided that the question of the removal of a county seat is purely a political question, and does not in any way legally involve the rights of private parties. There is no distinction made in the cases between cases where fraud is alleged and where it is not alleged. In fact, there are but three States that have held the opposite doctrine. In *Boren v. Smith*, 47 Ill. 482, it was held that in a county-seat case, where fraud was alleged, a court of chancery would take jurisdiction. The court in that case admitted the general doctrine, but made an exception as to the county-seat case, for which we see no reason whatever.

They further based their decision on the fact that the constitution has declared that such a vote should be taken before a county seat can be removed, and the court says: 'And, in making that provision, it is manifest that it was designed that the will of the majority of the legal voters of the county should control. It would defeat that object, and render this fundamental provision inoperative, if the sense of the majority of the legal voters, constitutionally expressed, might be overcome by illegal voters, or other fraudulent means. . . .

As there is no law in England similar to this provision of our constitution, and the organic laws of other States are believed to have no such provision, it is not to be expected that precedents may be found upon which to base the jurisdiction of a court of equity. But if our courts of equity were, in the absence of legislative action, to refuse relief, the constitutional provision could, by fraud, be rendered inoperative, and wholly defeated.' This argument is squarely against the decision in *State v. Jones*, 6 Wash. 452, 34 Pac. 201, where this court held that, where an act of the legislature had been properly certified, courts had no authority to inquire into any prior proceedings." When a county board have acted in good faith in ordering a county-seat election under the California County Government Act approved March 14, 1883, they cannot be enjoined from publishing the result, whether the election was in fact legal or not. Civil Code, § 3423, subd. 4, providing that no injunction shall issue against "the execution of a public statute by

all questions arising out of the election must be determined by the tribunal constituted by the general assembly for that purpose.³⁰

officers of the law for the public benefit." People v. Board Sup'rs, 75 Cal. 179, 16 Pac. 776.

30. Ivey v. City of Rome, 129 Ga. 286. Compare Layton v. Monroe, 50 La. Ann. 137, 23 So. 99.

CHAPTER L.

PLEADING AND PRACTICE—MISCELLANEOUS.¹

- SECTION** 1391. Jurisdiction.
 1392. The modern mandatory injunction.
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Section 1391. Jurisdiction.—The jurisdiction of the Supreme Court of New York, under the provisions of section 603 of the Code of Civil Procedure, is made dependent upon the presentation to the court or judge of a complaint setting forth facts, under

1. Nearly all the sections in this chapter treat of matters considered in the earlier part of the work to which cross-references are given. The editor originally planned to distribute these sections to the parts referred to, but subsequently decided it would probably be advisable to retain them as they are, owing to the fact that some of them have undoubtedly been referred to by the courts in opinions and that it would be an aid to the user of this work to retain them with proper cross references.

which the plaintiff claims to be entitled to, and upon which he demands, equitable relief; but it is not dependent upon the conclusion at which the judge arrives upon the facts stated in the complaint. Whether they constitute an equitable cause of action, or create a case within equitable cognizance, is a judicial question to be decided by the judge to whom the application is made, and his power to decide does not depend upon the correctness of his decision. And where an injunction order was granted by a justice of the Supreme Court, in an action over the subject-matter of which such court had jurisdiction, upon a verified complaint in which the plaintiff demanded equitable relief, and which set forth the facts upon which such relief was claimed and granted, upon the presentation of such complaint, it was held that it became the duty of such justice to consider and decide whether or not to grant the order asked for; that he had the power to consider the case and decide the application, and his determination upon the facts before him, and the order which he issued could not be said to be void, although it might be erroneous, and that it could not be reviewed or questioned in any collateral proceeding, but must be respected and obeyed until vacated or set aside in the same suit in which it was granted.² Jurisdiction, in the strict meaning of the term, as applied to judicial officers and tribunals, means no more than the power lawfully existing to hear and determine a cause. It does not depend upon the ultimate existence of a good cause of action in the plaintiff in the particular case before the court. It is the power to adjudge concerning the general question involved and is not dependent upon the state of facts which may appear in a particular case.³

§ 1392. **The modern mandatory injunction.**—In support of the modern view before noticed that a mandatory remedial injunction

2. *People ex rel. Gaynor v. McKane*, 78 Hun (N. Y.), 154, 28 N. Y. S. 981.

As to jurisdiction generally, see Chap. II herein.

3. *Hunt v. Hunt*, 72 N. Y. 217.

And see *People v. Sturtevant*, 9 N. Y. 263. As to the jurisdiction of federal courts to interpose by injunction where strikers are interfering with the mails or interstate commerce, see the decision in *United States v. El-*

should be granted in a proper case as readily as in a preventive one;⁴ and as a further illustration of the plasticity of the injunctive process, when required to be used in a new and unfamiliar environment,⁵ the Supreme Court of Oklahoma has held that on proceedings by a homestead claimant to enjoin one claiming adversely to him from interfering with his possession, the court may, on defendant's answer and cross complaint, enjoin plaintiff from interfering with defendant's possession; and that in such case the court may give its mandatory injunction the force and effect of a writ of possession, as there is no adequate remedy at law, and as defendant should not be compelled to wait for possession pending the settlement of title in the land department.⁶ Mandatory injunc-

liott, rendered Oct. 25, 1894, and reported in *The Press* (N. Y.) of Oct. 26, 1894.

4. Sections 101-103, *ante*.

As to mandatory injunctions, see §§ 97-104 herein.

5. Section 2, *ante*.

6. *Sproat v. Durland*, 2 Okla. 24, 35 Pac. 682, 886, per Dale, C. J.: "As a general rule, it may be said that injunction is a preventive remedy, and will only be used to prevent future injury, rather than to afford redress for wrongs already committed, and is, therefore, to be regarded more as a preventive, than as a remedial, remedy. But, while the jurisdiction of a court of equity, by way of mandatory injunction, is rarely exercised, it is, nevertheless, too well established to admit of a doubt. *Corning v. Nail Factory*, 40 N. Y. 191; *Webb v. Manufacturing Co.*, 3 Sumn. 190; *Webster v. Cooke*, 23 Kan. 637; 3 Pom. Eq. Jur. § 1359; *Cooke v. Boynton*, 135 Pa. St. 110, 19 Atl. 944; *Black Lick Mfg. Co. v. Saltsburg Gas Co.*, 139 Pa. St. 448, 21 Atl. 432. And we entirely approve of the principle laid down in *Tucker v. Carpenter, Hemp*, 441, wherein the

court says: 'A writ of injunction may be said to be a process capable of more modifications than any other in law. It is so malleable that it may be moulded to suit the various circumstances and occasions presented to a court of equity. It is an instrument in its hands capable of various applications, for the purpose of dispensing complete justice between the parties. It may be special, preliminary, temporary, or perpetual, and it may be dissolved, reviewed, continued, extended, or contracted; in short, it is adapted and used by courts of equity as a process for preventing wrong between, and preserving the rights of, the parties before them.' It will be found, upon examination, that the English authorities are almost uniform in supporting the doctrine of mandatory injunctions, and that where an application for such injunction is denied, such refusal is based upon the fact that an adequate remedy may be found in the law, and while, in this country, the courts, generally speaking, refuse mandatory injunctions, yet, where it clearly appears that no relief can be had under the law, we

tions which require of a party the performance of some act, always to some extent anticipate the judgment of the court, and therefore should be granted with caution and only when the necessity is great. But not only is the power to grant them undoubted, but the

know of no reason, sound in principle, which will justify a court in withholding its aid, by mandatory injunction, in favor of a person who seeks protection from a trespasser, or to be restored to possession of property which is wrongfully withheld from him. . . . A mere assertion of right is insufficient to deprive the rightful occupant of the quiet use of land, and, as between settlers upon the public domain, the courts should inquire into the status of the land far enough to determine whether or not a person asserting a claim of possession, has a color of right to such possession, under the homestead law, and, if it be found that he is a mere trespasser, or that the law will not, under any fair construction, warrant his claim, it is the clear duty of the courts to issue a mandatory order in injunction, restraining him from the further unlawful occupancy. This question is one of vital importance in Oklahoma. All our lands are entered, and title procured therefor, under the homestead laws of the United States. The questions arising out of adverse possession, as between homestead claimants, daily confront our courts. To say that no relief can be granted, or that our courts are powerless to do justice between litigants in this class of cases, pending the settlement of title in the land department, would be the announcement of a doctrine abhorrent to a sense of common justice. It would encourage the strong to override the weak, would

place a premium upon greed and the use of force, and, in many instances, lead to bloodshed and crime. Such a state of affairs is to be avoided, and the courts should not hesitate to invoke the powers inherent in them, and lend their aid, in every way possible, to prevent injustice, by preventing encroachments upon the possessory rights of settlers, or by equitably adjusting their differences. In the case under consideration, no adequate remedy at law is provided for relief. Ejectment will not lie. *Adams v. Couch*, 1 Okla. 17, 26 Pac. 1009. And, at the time this proceeding was instituted, the forcible entry and detainer act was insufficient in its provisions to afford a remedy. The appellee was entitled to speedy relief, and ought not to be compelled to await the final and tedious result of the litigation in the interior department, before obtaining that which he clearly shows himself entitled to have. As to the right of the court to compel appellant to remove his stock from the pasture, it follows that, if the court had the power to issue a mandatory injunction, he could by order, compel appellant to remove his stock. Such removal was a necessary incident to a compliance with the order. And appellant, being at all times a mere trespasser upon the possession of appellee, the court could very properly compel him to undo all acts done in furtherance of such trespass."

remedial and restraining power of a court of equity would be greatly impaired if such was not the rule.⁷

§ 1393. **Temporary injunctions in Minnesota.**—The Minnesota rule is that it is not necessary, in all cases where a temporary injunction is sought in an action, that the plaintiff should ask for a permanent injunction in his complaint. Other equivalent relief may be sought, appropriate to the nature of the case, and it is enough that it be made to appear that the defendant is threatening to do some act in violation of the plaintiff's rights, in respect to the subject of the action, and tending to render the judgment ineffectual. It is the general, but not inflexible, rule to refuse to allow or continue an injunction, after answer denying all the equities of the complaint. There is room for the exercise of a sound judicial discretion in such cases.⁸

§ 1394. **Abolishing distinction between law and equity actions; effect.**—Since the abolishment of the distinction between actions at law and suits in equity, the rule that the statute of limitations does not begin to run against the right to relief on the ground of fraud until the discovery of the fraud applies to suits in equity for such relief, as well as to actions at law. Thus where a judgment creditor has sued out an execution of a judgment fraudulently procured nearly ten years before, of which

7. *People ex rel. Gaynor v. McKane*, 27 Hun (N. Y.), 154, 28 N. Y. S. 981.

8. *Hamilton v. Wood*, 55 Minn. 482, 57 N. W. 208, per *Curiam*: "While it will be conceded that the general rule is as the plaintiff contends, yet it is not inflexible, but it is a matter largely in the sound judicial discretion of the court whether it will retain or set aside an injunction upon the hearing, depending upon the nature of the case, and the attendant circumstances, especially in cases of

this kind, where the delay of the sale until the hearing would work comparatively little injury to the substantial rights of the defendant, as compared with the inconvenience and embarrassment it might cause to the plaintiff. *Stees v. Kranz*, 32 Minn. 313, 20 N. W. 241; *O'Brien v. Oswald*, 45 Minn. 59, 47 N. W. 316." And see *Knoblauch v. Minneapolis*, 56 Minn. 321, 57 N. W. 928.

As to temporary injunctions, see §§ 109-112 herein.

defendant had no knowledge until six years later, defendant is not barred by laches from enjoining its collection.⁹

§ 1395. Injunction and prohibition compared.—Transferred to § 9a herein.

9. *Brake v. Payne*, 137 Ind. 479, 37 N. E. 140, per Dailey, J.: "Another point is that Brake did not cause the execution to issue without notice from appellee that the fraudulent character of the judgment was asserted. As stated, it appears from the complaint that, several years before the issuing of the execution, Brake filed a cross-complaint against Payne to enforce this judgment, and Payne set up the fraud complained of in defense. This challenge the appellant Brake did not see fit to accept, but suffered his action to drop from the docket untried, and without order of court. In such a case, we think the only bar to the action is the statute of limitations. The facts alleged show an absolute concealment of the fact of the procurement of such judgment from May 2, 1879, to January 12, 1885, and the action was brought February 11, 1889; bringing the case within the provisions of section 300, Rev. St. 1881 (*Burns' Rev. St. 1894*, § 301), stipulating that the statute does not begin to run till the discovery of the cause of action. *Pate v. Tait*, 72 Ind. 454; *Runyon v. Snell*, 116 Ind. 168, 18 N. E. 522. Since the distinction 'between actions at law and suits in equity' was abolished (section 249, Rev. St. 1881; *Burns' Rev. St. 1894*, same section), this court has held that the statute of limitations applies equally to both classes of actions, and that litigants, in the absence of matter in estoppel, have in all cases the full time given by the statute in

which to bring actions. *Potter v. Smith*, 36 Ind. 235, 236; *Harper v. Terry*, 70 Ind. 269. 'There may be cases of statutory proceedings, or cases of purely equitable cognizance, where the laches of a party may be of such a character, and under such circumstances as will bar his right to prosecute his action in less time than fixed by the statute of limitations. But that is only in cases where the laches are of such a character, and under such circumstances, as to work an equitable estoppel.' *Scherer v. Ingerman*, 110 Ind. 433, 11 N. E. 8, and 12 N. E. 304. The suing out of an execution upon a fraudulent and unconscionable judgment was a new wrong, or at least a renewal of the original wrong. If the issuance of the execution in consummation of the original wrong was not, independently, an injury for which an injunction might be had, it was a resort to the process of the court to complete the original injury; and it is clearly the duty of a court of equity to forbid such an abuse of its process, although, in other respects, it might be disposed to leave the parties where it found them. In this case the circumstances shown by the record are all such as appeal to a court of conscience for aid. *Deputy v. Tobias*, 1 Blackf. 311; *Carrington v. Holabird*, 17 Conn. 530; *Hoskins v. Hattenback*, 14 Iowa, 314; *How v. Mortell*, 28 Ill. 478. We find no error in the record. The judgment of the lower court is affirmed."

See § 49 herein as to equity juris-

§ 1396. **Demurrable bills.**—Where, without fraud on plaintiff's part, a defendant permits judgment to go against him by reason of his mistake as to the amount claimed, caused by his own negligence, he cannot have an injunction to prevent the enforcement of the judgment, on showing that he has a meritorious defense to a part of the claim for which it was rendered, and his bill for an injunction on such facts is demurrable for want of equity.¹⁰ And a bill or petition for an injunction is demurrable for want of equity which shows that the complainant stood by for a long time and acquiesced in the acts complained of in the performance of which defendant was acting under claim of right and incurring great expense.¹¹ And a complaint for an injunction is barren of equity and as such demurrable, if it appears on its face that the plaintiff has an adequate remedy at law.¹² A general demurrer to an injunction bill, complaint or petition, will be sustained where it appears that complainant had a legal remedy for the wrong set forth.¹³ Where an injunction is sought to restrain an action upon a note, the bill is demurrable for want of equity, if it discloses a defense which would be available in the action on the

diction not extended by combining law and equity.

10. *Slappey v. Hodge*, 99 Ala. 300, 13 So. 256; *Hall v. Pegram*, 85 Ala. 522, 5 So. 209, 6 So. 612; *Watts v. Frazer*, 80 Ala. 186; *Noble v. Moses*, 74 Ala. 604. A demurrer will lie if the petition or bill for an injunction against a judgment does not state the character of the defense which the plaintiff in injunction has against the judgment, and state it so fully that the court may determine for itself the conclusion of law as to whether or not it is a good defense and would produce a different result if established in another trial; the plaintiff's verifying oath is not sufficient to such a conclusion. *Sharp v. Schmidt*, 62 Tex. 263.

The subject of demurrable bill will be found throughout the work.

11. *Planet, etc., Co. v. St. Louis, etc., R. Co.*, 115 Mo. 613, 22 S. W. 616.

12. *Avery v. Ryan*, 74 Wis. 591, 601, 43 N. W. 317.

13. *Gulf, etc., R. Co. v. Bacon* (Tex.), 21 S. W. 783. A bill for injunction should contain a distinct averment of irreparable injury, and the facts must appear on which the allegation is predicated. *Farland v. Wood*, 35 W. Va. 458, 14 S. E. 140. The omission to allege in a petition for injunction that defendant is insolvent, or the injury irreparable, being ground for demurrer, is waived by failing to demur. *Price v. Baldauf*, 82 Iowa, 669, 46 N. W. 983.

note.¹⁴ Again, a bill for an injunction to restrain the prosecution of an ejectment suit is demurrable if it does not show title in the complainant, either by record or adverse possession, or if it sets forth the pendency of an ejectment suit, and thus affords an opportunity for testing complainant's title.¹⁵

§ 1397. **Bills not demurrable.**—A bill or complaint for injunction is not demurrable for not stating facts which show that the acts sought to be restrained will inevitably cause injury to the complainant; it is enough if facts are alleged from which the court can conclude in the use of its judicial knowledge that the injury is probable.¹⁶ And a bill to enjoin an adjoining tenant or

14. *Saucier v. Rouse* (Miss.), 12 So. 481.

15. *Normant v. Eureka Co.*, 98 Ala. 181, 12 So. 454.

16. *Nicholson v. Getchell*, 96 Cal. 394, 31 Pac. 265, Temple, J.: "This appeal is from a judgment entered upon demurrer to the complaint, the plaintiff having declined to amend. The action is for a mandatory injunction to prevent defendant from maintaining a certain breakwater, which had already been built. Practically the action is to abate the breakwater as a nuisance. The demurrer is general, on the ground that the complaint does not state a cause of action. It is claimed that the complaint does not state facts which show probable damage, but only an opinion of the pleader that damage will ensue. It is averred that the parties own land on opposite sides of Jacoby creek, which is their common boundary; that the channel of the stream is about 60 feet wide, and makes a sharp curve into the land of plaintiff, and away from the land of defendant. On plaintiff's side of the stream, on the curve, the bank is abrupt, and the soil loose; while on the other side the

bank slopes gently. The breakwater, or bulkhead, it is averred, consists of posts driven firmly into the ground three feet apart, and planked to the height of about four feet from the ground; the upper end resting against defendant's land, and extending down stream and out towards the center towards plaintiff's land, a distance of 100 feet, and is continued down the creek by a fence in the bed of the creek for about 10 rods, so that in the event of a rise in the waters of the creek the water will necessarily be turned against plaintiff's land. Jacoby creek is a mountain stream, carrying little water in the summer, but subject to sudden freshets, when it rises in a short time to a great height, falling rapidly when the storm abates. The breakwater is located on the inside of the sharp curve, and will inevitably throw the water, in case of freshet, with great force to the concave bank, and damage will inevitably ensue. The universal tendency is for a stream to wash from the bank on the outside of a curve, and to fill in the inside; and the effect of the breakwater described in the complaint must inevitably be greatly to

owner from carrying on his business in such a manner as to injure complainant's property is not demurrable because it does not allege in terms that defendant's business is unsuitable to be carried on in the place where carried on, or that there is negligence in the mode of carrying it on, or that complainant has used due care; it is enough for complainant to show by his allegations that his property was where he had a right to have it, and that defendant knowingly injured it by the manner in which he carried on his business.¹⁷ A complaint, also, is not demurrable on the ground

increase this natural tendency. The fact being as alleged, there was no excuse for a bulkhead on defendant's bank. I think the complaint states facts showing that danger was probable and imminent, and therefore the demurrer should have been overruled. A preventive injunction was not asked, and perhaps, as to some extent the effect of the breakwater must be matter of opinion, and the necessity for immediate relief not urgent, the facts would not have justified such interposition. The court would not interfere until after trial, but it is not necessary to show that injury is inevitable to enable the plaintiff to maintain an action. Such a rule as that proposed would prevent relief in a large class of cases where the interposition of a court is absolutely necessary to prevent great and irreparable injury. Even in plain cases it would seldom be possible to know that the injury was certain to occur. That it is very probable should be made to appear by the statement of facts from which the court will be able to conclude the injury probable. It seems to me that was done in this case. I think, therefore, the judgment should be reversed, and the cause remanded, with directions to the lower court to overrule the demurrer." See

Van Hoozer v. Van Hoozer, 18 Mo. App. 19. In an action to enjoin a city from paying for lighting by electricity, a statement in the petition that plaintiff is a taxpayer on property subject to assessment, under an ordinance providing for such expenditure out of the general fund, instead of by special taxation on property benefited, is a sufficient averment of injury to entitle plaintiff to maintain his action, if the grounds thereof are well founded. Hanson v. Hunter, 86 Iowa, 722, 53 N. W. 84, *aff'd* 48 N. W. 1005. A bill sought to enjoin an inspection of flour, on the ground that the statute was unconstitutional because the inspection provided for was confined to flour coming to New Orleans "for sale;" thus discriminating in favor of those who bought for their own use, and in favor of resident merchants, as against merchants residing in other States, contrary to the interstate commerce clause of the Federal Constitution. It was held that as the question was a doubtful one, and it seemed probable that the court would be aided by proof of the manner in which the statute operated, a demurrer to the bill would be overruled. Glover v. Board of Flour Inspectors, 48 Fed. 348.

17. Boston Ferrule Co. v. Hills,

of misjoinder of causes of action, in alleging a cause of action for damages for a trespass, and a cause of action for an injunction to restrain a threatened additional trespass to be committed upon the same property.¹⁸

§ 1398. **General or joint demurrers, etc.**—A general or joint demurrer to a complaint in an action for an injunction containing several paragraphs will be overruled if either paragraph is good.¹⁹ And while an action brought to enjoin one from obtaining an injunction is demurrable, if facts are stated which would justify the cancellation of the contract out of which the litigation arises, the demurrer should be overruled.²⁰ Where, on filing his bill, the complainant moves for a preliminary injunction thereon, and on affidavits supporting in detail its charges and allegations of fact,

159 Mass. 147, 34 N. E. 85. A demurrer to a bill for an injunction to restrain the enforcement of a peremptory mandamus issued by a State court was overruled *pro forma* by the U. S. Circuit Court, where it appeared that the same questions were in issue on a writ of error from the Supreme Court of the United States to the Supreme Court of the State, with an indorsement of a *supersedeas* of the proceedings which the bill sought to enjoin. N. Y. & N. E. R. Co. v. Woodruff, 42 Fed. 468.

18. Jacob v. Lorenz, 98 Cal. 332, 33 Pac. 119. The sufficiency of a complaint is not involved where a mere temporary injunction is asked, but the court will grant relief where it appears that the case is a proper one for investigation. People's Gas Co. v. Tyner, 131 Ind. 277, 31 N. E. 59.

19. Brake v. Payne, 137 Ind. 479, 37 N. E. 140, per Dailey, J.: "This was an action by the appellee against the appellants to enjoin an execution and judgment for fraud in the procurement of the judgment. Seven er-

rors were assigned, all of which present but one and the same question, namely, does the complaint state facts sufficient to constitute a cause of action? The complaint is in two paragraphs, but the demurrer is addressed to the entire complaint, and is a joint demurrer. Hanover School Twp. v. Gant, 125 Ind. 557, 25 N. E. 872. The demurrer is not well taken if either paragraph is good. Redelsheimer v. Miller, 107 Ind. 485, 8 N. E. 447." In a petition to enjoin the county officers from locating the county seat on the ground of the invalidity of the election fixing it, an averment that the majority of the votes cast for a certain place as a county seat were improperly influenced "as plaintiffs are informed and believe," by lots at that place being deeded to the voters, is insufficient, on general demurrer, as the averment should be positive, not on information and belief. Ewing v. Duncan, 81 Tex. 230, 16 S. W. 1000.

20. Cowper v. Theall, 40 Hun (N. Y.), 520.

and the defendant demurs to the bill generally, the contest on the demurrer and injunction motion may be heard at the same time, and both disposed of by the same interlocutory decree.²¹ Again, where a demurrer to a complaint for an injunction and a motion to dissolve a temporary injunction were pending at the same time, it was held that it was entirely discretionary with the court on which it would first rule.²²

§ 1399. **Amending pleadings; Federal practice.**—When a party brings an action at law in a Federal Circuit Court upon a cause of action which is maintainable only in equity, the court, on sustaining a demurrer, cannot allow him to reform his pleadings so as to proceed in equity, but may dismiss the action without prejudice. But where suits have been properly brought in a State court in which the jurisdictions of law and chancery are blended, and these cases, affecting the same plaintiff and same subject matter, have been properly removed to the Federal Circuit Court, that court will take the orders and so adjust the parties and pleadings as to give all parties the adequate relief.²³ Failure of a bill for an injunction against collection of a tax to aver that plaintiffs have property within the distraining process authorized therefor may be supplied by amendment, after submission of the cause, where the averments of the original bill were a sufficient basis for the temporary injunction which was allowed, and the facts are manifestly incontestable.²⁴ Where a temporary injunction is granted on a complaint subsequently held insufficient on appeal, an amended complaint operates to continue the injunction obtained previously.²⁵

§ 1400. **Damages as incidental to injunction; specifications.**—A complaint seeking to enjoin the maintenance of an elevated

21. *Heaton, etc., Button-Fastener Co. v. Dick*, 52 Fed. 667, where the interlocutory decree entered in July, 1892, was as follows: "An order will be entered overruling the demurrer and requiring an answer by the first Monday of August. An order will also be entered allowing an injunc-

tion *pendente lite* to issue pursuant to the prayer of the bill."

22. *Clark v. Shaw*, 101 Ind. 563.

23. *Hirsh v. Jones*, 56 Fed. 137.

24. *Meyers v. Shields*, 61 Fed. 713.

25. *Shipman v. Superior Court* (Cal.), 12 Pac. 787.

road in front of plaintiff's property, and for damages caused by its maintenance, contains but one cause of action; the recovery of damages being incident to the relief by injunction.²⁶ And in a suit for injunction and damages, the waiver of the claim for damages does not affect the right to an injunction.²⁷ Where several specifications of cause for injunction are assigned in a complaint, each specification is considered a separate paragraph, and one specification cannot aid another.²⁸ Again, where there is no material difference between the specifications of cause for an injunction stated in two separate paragraphs of a complaint, the sustaining of a demurrer to one paragraph is not ground for an assignment of error, when a demurrer to the other has been overruled.²⁹ A complaint which alleges an injury to several parcels of property as a whole, consequent upon the operation of an elevated railroad, does not entitle the owner to an injunction upon a showing merely of injury to the separate parcels, but only upon a showing that their collective value is affected.³⁰

§ 1401. Dismissal of bill; plaintiff's right to.—The bill may be dismissed for want of jurisdiction, on the hearing of the order to show cause why a temporary injunction should not issue.³¹ The bill may also be dismissed for want of equity;³² and for want of prosecution.³³ Though a demurrer be filed and considered, the grant of a preliminary injunction does not adjudicate the de-

26. *Shepard v. Manhattan R. Co.*, 117 N. Y. 442, 23 N. E. 30.

As to damages generally, see chap. II, herein.

27. *Cooley v. Cummings*, 1 N. Y. Supp. 631.

28. *Hill v. Probst*, 120 Ind. 528, 22 N. E. 664.

29. *Hill v. Probst*, 120 Ind. 528, 22 N. E. 664.

30. *Rich v. Manhattan R. Co.*, 19 N. Y. Supp. 543.

31. *Byam v. Cashman*, 78 Cal. 525, 21 Pac. 113. Where, in order to sustain a bill of injunction, a jurisdictional fact is necessary to be estab-

lished, such fact must be not only alleged in the bill, but it must be established by sufficient evidence to at least make a *prima facie* case before the court proceeds to refer the cause to a commissioner, or to order an issue out of Chancery. *Ward v. Ohio River R. Co.*, 35 W. Va. 481, 14 S. E. 142.

As to pleadings, etc., see chap. IV, herein.

32. *Tobey Furniture Co. v. Colby*, 35 Fed. 592.

33. *Kane v. Casgrain*, 69 Wis. 430, 34 N. W. 241.

murrer nor bar a motion at the final hearing, to dismiss the bill.³⁴ After a full hearing on an application for a temporary injunction, and after the judge has announced his purpose to deny the injunction, plaintiff still has the right to dismiss his bill.³⁵ But when a suit for an injunction has been fully tried, submitted, and virtually determined in favor of the defendant, a motion to withdraw without prejudice should be refused.³⁶

§ 1402. **Dismissing bill on dissolving injunction; answer as affidavit.**—Where the equity of a bill of injunction is not denied, but a new equity is set up by the answer, to repel or avoid it, such answer, read as an affidavit on a motion to dissolve, is not sufficient, of itself, to support the motion; and where the bill is not merely a bill of injunction, but is filed for other objects, to which the injunction is auxiliary, the bill should not be dismissed, as a matter of course, on the dissolution of the injunction.³⁷

34. *Jenkins v. Nolan*, 79 Ga. 295, 5 S. E. 34.

35. *Bryant v. Jones*, 87 Ga. 451, 13 S. E. 636.

36. *Chicago, etc., R. Co. v. Estes*, 71 Iowa, 603, 33 N. W. 124.

37. *Noyes v. Vickers*, 39 W. Va. 30, 19 S. E. 429, per Holt, J.: "The frame of this bill, its scheme, and prayer for relief, give it a standing place in court; show cause against its dismissal, and for its retention, with a distinctness that nothing extraneous could intensify. It is not a pure bill of injunction, but an ordinary bill seeking to enforce a judgment lien, and the injunction was a mere incident auxiliary to that end; and section 13, ch. 143, of the Code, does not apply to such cases. *Pulliam v. Winston*, 5 Leigh (Va.), 324; 1 Bart. Ch. Pr. 464. Still, the general practice is to suggest that the cause is one proper to be retained, because the bill is sometimes dismissed, the better to bring to the test of appeal the order

of dissolution, although such order itself has long been appealable. See Code, § 1, cl. 7 ch. 135. Defendant Betts, in his answer, concedes the allegation of plaintiffs' bill that he claims the timber under an unrecorded deed and written contract, but that the same was executed in discharge of a trust in his favor impressed thereon by the facts of the purchase by Vickers from Connell, to wit, that defendant Betts furnished to Vickers the \$1,000 cash payment on the agreement with Vickers that Betts was to be the owner of the timber, and that Vickers was, in making said purchase, and taking to himself a conveyance of said land, a trustee for defendant Betts; that the judgment debtor, Vickers, never was the true owner of the timber; but that the naked legal title was thus, *in transiu*, vested in him, and on it the lien of plaintiffs' judgment did not and could not attach. If the facts thus set up in defendant's answer are well found-

§ 1403. **Supplemental bills.**—Permission to file a supplemental bill or complaint is in the discretion of the court.³⁸ This discretion is not, however, an arbitrary one. It is not allowable to substitute a new and independent cause of action by way of supplemental complaint, but only matters are to be therein alleged which are consistent with and in aid of the case made by the original complaint.³⁹ But it is no objection to a supplemental complaint that different or additional relief is asked for.⁴⁰ Thus where subsequent to the commencement of an action for an injunction the defendant defiantly continues the acts complained of and alleges their commission in his answer there is no doubt of the propriety of allow-

ed, the legal conclusion thus drawn is correct, and defendant Betts has thereby successfully repelled and avoided plaintiff's claim of a judgment lien; and to this equity, set up in avoidance, the doctrine of *Snyder v. Martin* does apply. See, also, 2 Lomax, Dig. 200, and 1 Perry, Trusts (4th Ed.), 126 *et seq.* But the burden of proving this new equity thus set up to repel or avoid plaintiff's claim, is on the defendant, he being put to such proof by the general replication to his answer. And, although his answer may be read as an affidavit on the motion to dissolve, it cannot be read as sufficient on the motion to establish such new matter in avoidance, and not in denial of any allegation in the bill. See *Vreeland v. Stone Co.*, 25 N. J. Eq. 140; *Wooten v. Smith*, 27 Ga. 216, *Armstrong v. Grafton*, 23 W. Va. 50, 55; *Kerr v. Hill*, 27 W. Va. 576, 605. This rule seems reasonable, for otherwise plaintiffs could not, by cross-examination of defendant, meet this affirmative defense, of which they now hear for the first time, and the duty of furnishing full proof on the point is on the defendant; and in this instance its application is also called for by reason

of the fact that nothing appears in confirmation of this part of the answer, for the deed exhibited with it has, to some extent, the features of a purchase from Vickers. But I see nothing in it so far inconsistent with the claim of defendant Betts as to prevent his proving that it was in execution of the pre-existing trust. For the foregoing reasons, we are of opinion that the bill should not have been dismissed, and that the dissolution of the injunction, if to be made at all, was premature. Therefore, the decree complained of is reversed, and the cause remanded."

See further on this subject § 321 herein.

38. *Greenwood v. Adams*, 80 Cal. 77, 21 Pac. 1134; *Harding v. Minear*, 54 Cal. 504. Cal. Code Civ. Pro. § 464.

39. *Gleason v. Gleason*, 54 Cal. 135. It is irregular to issue a general injunction *ex parte*, upon a supplemental bill where it will affect the rights of a defendant who has appeared in the original suit by a solicitor. *Snediker v. Pearson*, 2 Barb. (N. Y.) Ch. 107.

40. *Baker v. Bartol*, 6 Cal. 483.

ing a supplemental complaint in which damages is asked for as additional relief.⁴¹

§ 1404. **Answers; modifying injunction on; oath waived.**—An allegation in the answer of damage by the preliminary injunction is immaterial, and should be stricken out.⁴² One against whom an injunction is prayed may in his answer set up that he did the acts complained of as agent for another, and this is no cause for striking out his answer.⁴³ Where the answer denied that the ultimate fee to the center of the street was owned by the complainant and alleged simply that it remained in the original owner who made the plat, it was held that the answer contained, upon this point, nothing more than a naked denial of a legal conclusion, unsupported by facts, and could not be considered.⁴⁴ Where an answer so far denies the equity presented by a bill for injunction to restrain the foreclosure of a mortgage as to justify the modification of the injunction, so as to allow defendant to proceed with his suit until the further order of the court, he should be permitted to do so, as he proceeds at his own peril as to costs, and his proceedings may be contracted or stayed at any stage, should it appear equitable to interfere.⁴⁵ An injunction against the breach of a

41. *Jacob v. Lorenz*, 98 Cal. 332, 33 Pac. 119.

42. *Wheeler v. West*, 78 Cal. 95, 20 Pac. 45.

See in this connection Chap. IV and more particularly §§ 143-a, 144 herein.

43. *Cobb v. Hogue*, 87 Ga. 450, 13 S. E. 633.

44. *Columbus & W. R. Co. v. Witherow*, 82 Ala. 190, 3 So. 23. In an action to restrain defendant from draining the waters of a certain lake into the ocean the complaint averred that plaintiff was engaged in the manufacturing, transportation, and sale of lumber; that its mills were located on the banks of said lake, and that a certain depth of water which

now exists, was essential to the conduct of plaintiff's business; and that a decrease of its depth, or destruction of its navigability, would result in irreparable injury to plaintiff. The answer denied that plaintiff owned or possessed the mill mentioned in the complaint; that the mill was situate upon the said lake; that the lake was navigable; or that the destruction of its navigability would injure plaintiff; or that the defendant intended to obstruct or impair plaintiff's alleged rights therein. It was held a sufficient answer. *Crescent City Mill & Transp. Co. v. Hayes* (Cal.), 11 Pac. 319.

45. *Grey v. Bowman* (N. J.), 13 Atl. 226. If the bill indicates that

covenant cannot be granted where the bill does not allege that defendant intends to violate it, and defendant alleges that he intends to observe it.⁴⁶ Where an answer under oath is waived by a bill for an injunction, exceptions cannot be taken to the answer since it is a mere pleading; and sustaining exceptions to an unverified answer is harmless error where the allegations excepted to if proved could not have affected the result.⁴⁷

§ 1405. **Cross bill; supplemental cross bill.**—A cross bill in a suit for an injunction is considered as an auxiliary suit, or as a dependency upon the original bill, and can be sustained only on matter growing out of the original bill. While the cross bill may set up new matter arising subsequently, still the new matter must constitute part of the same defense, or relate to the same subject matter. Without such restriction, new matter might be introduced into litigation by cross bills without end. As a complete defense to the original suit, a cross bill may become proper and necessary, but it cannot be converted into a separate and distinct suit relative to other and different matters, or become the foundation of a decree concerning matters not embraced in the original suit.⁴⁸ A cross

there was a jurisdictional defect in the calling of a former election, the injunction should be denied, though the answer may make a contrary showing. Complainant cannot avail himself of such showing made by the answer without first amending his bill. *McKinney v. Board of Com'rs (Fla.)*, 4 So. 855.

46. *Buck v. Backarack*, 45 N. J. Eq. 123, 557, 17 Atl. 548.

See as to covenants generally Chap. XV herein.

47. *Smith v. McDowell*, 148 Ill. 51, 35 N. E. 141, per Shope, J.: "Before proceeding further, it will be proper to notice the contention that the court erred in sustaining exceptions to portions of the answer. The practice in chancery in his State in respect of exceptions to answers,

which are mere pleadings (the verification having been waived in the bill), has been so repeatedly determined that no discussion will be necessary. *Board of Sup'rs v. Mississippi & W. R. Co.*, 21 Ill. 338; *Brown v. Mortgage Co.*, 110 Ill. 235; *Mix v. People*, 116 Ill. 265, 4 N. E. 783. Conceding, in view of these authorities that the court erred in this respect, it is manifest that defendants were not prejudiced thereby. A careful examination of the answer will fail to disclose a single averment of fact to which exception was sustained which, if retained and proved in the most ample manner, would have changed the result."

As to verification, see §§ 145-149 herein.

48. *Ledwith v. Jacksonville*, 32 Fla.

bill loses its character as such, if it seeks to bring before the court other matters and rights distinct from those embraced in the original suit. Without this restriction, new matter without end might be introduced into litigation by cross suits. Thus, in a suit to restrain execution of a judgment, and to establish as a set-off a legal claim, a cross bill seeking a settlement of a partnership alleged to have formerly existed between the parties was properly stricken

1, 13 So. 454, per Mabry, J.: "A cross bill cannot be converted into a separate and distinct suit, etc. *Slason v. Wright*, 14 Vt. 208; *Town of Rutland v. Paige*, 24 Vt. 171; *May v. Armstrong*, 3 J. J. Marsh. 260; *Daniel v. Morrison's Ex'r*, 6 Dana, 182; *Galatin v. Erwin*, 1 Hopk. Ch. 58; *Field v. Schieffelin*, 7 Johns. (N. Y.) Ch. 250; *Pindall v. Trevor*, 30 Ark. 249; *Cross v. De Valle*, 1 Wall. 5, 19 L. Ed. 515; *Canant v. Mappin*, 20 Ga. 730; *Griffin v. Fries*, 23 Fla. 173, 2 So. 266. In *Rubber Co. v. Goodyear*, 9 Wall. 807, 19 L. Ed. 587, the rule stated by the Supreme Court of the United States is as follows, viz.: 'A cross bill is brought to obtain a discovery in aid of a defense to the original suit, or to obtain complete relief to all the parties as to the matters charged in the original bill. It should not introduce any distinct matter. It is auxiliary to the original suit, and a graft and dependency upon it. If its purpose be different from this, it is not a cross bill, though it may have a connection with the same general subject.' In *Pindall v. Trevor*, *supra*, it was ruled that where the allegations of a cross bill are foreign to the subject-matter of the original bill, it should not be allowed to be filed, or, if filed, should be stricken out. It is said that a cross bill may

be filed to answer the purpose of a plea *puis darrein continuance* at the common law,—as where, pending a suit, and after replication and issue joined, the defendant obtains a release. The release not being in issue, he will not be permitted to prove it, and hence the necessity of making such an issue in the pleadings. *Mitf. Pl. 124*. But, while this is true, it is essential that the new matter brought forward in the cross bill be so related to the subject-matter of the original suit as to be in defense of it. This is the rule sustained by the authorities. The introduction of the new matter in this case by what is designated a 'supplemental cross bill' does not change the rule as to the nature of the matter to be brought into controversy in the case. A supplemental bill is considered merely as an addition to the original bill, and while it is often permissible and proper to introduce matter that has occurred after the institution of the suit, and of such a nature as cannot be properly the subject of an amendment, yet such new matter must not be such as to change the rights and interests of the parties before the court. *Story, Eq. Pl. §§ 332, 336*; *Honor v. Hanks*, 22 Ark. 572. Calling the pleading here a 'supplemental cross bill' does not alter the case."

out as foreign to the subject matter of the original bill.⁴⁹ In an action of ejectment, where defendant files a cross complaint, and seeks to enjoin plaintiff from asserting any title to the property, pending the decision of a demurrer to the cross complaint, defendant cannot, upon motion on affidavits, obtain a perpetual injunction, but must await the result of the proceedings.⁵⁰

§ 1406. **Answer as cross bill.**—If matters which should be included in a cross bill are set up in the answer, and no objection is made until the issues are determined upon evidence introduced by both parties, this is a waiver of the technical objection, and the court may grant affirmative relief upon the answer, as if it were a cross bill.⁵¹

49. *O'Neill v. Perryman*, 102 Ala. 552, 14 So. 898, per Haralson, J.: "In this instance it does not appear that the proposed cross bill was necessary to do complete justice between the parties, and to administer the equities between them as connected with the subject-matter of the original bill. There is no allegation in it, that complainant is insolvent, and unwilling to settle the alleged copartnership between him and defendant, if any existed, and was unable to pay any sum that might be found to be due and owing by him to defendant, on settlement thereof. The demurrer to it was properly sustained. *Story, Eq. Pl.*, §§ 630, 631; *Insurance Co. v. Webb*, 54 Ala. 688; *Davis v. Cook*, 65 Ala. 617; *Whitfield v. Riddle*, 78 Ala. 104."

50. *Petersen v. Weissbein* (Cal.), 12 Pac. 415.

51. *Book v. Justice Min. Co.*, 58 Fed. 827. But complainants claim that defendant, not having filed a cross bill, is not entitled to any affirmative relief. If this position was conceded to be correct, and applicable to

the facts of this case, it would only result in a modification of the decree so as simply to dismiss the complainant's bill, and enter judgment for defendant for its costs. The contention of counsel is that when the court came to the conclusion that complainants were not in the legal possession of the mining ground in controversy, and were mere trespassers thereon, the right of action could not be maintained, and the court should have dismissed the bill, and remitted the defendant to its right of action at law, by ejectment, to remove complainants from the premises, and that the court had no jurisdiction to render a decree in favor of defendant, as prayed for in its answer. In *Chamberlain v. Marshall*, 8 Fed. 398, which is the principal case relied upon by complainants, it appeared from the bill itself that the complainants did not have the legal title. If it had appeared from the bill itself that the complainants were not in possession of the Peerless claim, the court might have dismissed the bill, without deciding the case upon its merits, on

§ 1407. Where sufficient equity appears at the hearing.—

Where a preliminary injunction is improperly granted because the requisite facts are not alleged in the bill, and it is permitted to stand until the hearing, at which time sufficient equity appears on the proofs presented, the injunction will be perpetuated.⁵² A

the ground that the complainants, not being in possession, could not maintain the suit. But the facts in this case are that it appeared from the allegations in the bill, and from the evidence, that the complainants were in the actual possession of the Peerless ground, claiming title thereto, and their right of possession and title could not be determined until after all the evidence taken on behalf of both parties was submitted, and the case heard and determined; and the case having been tried upon its merits, without objection being made as to the regularity of the procedure, or the sufficiency of the pleadings, it is now too late for the complainants to make the objection that the defendant is not entitled to any relief because a cross bill was not filed. *Coburn v. Cattle Co.*, 138 U. S. 221, 11 Sup. Ct. 258, 34 L. Ed. 886. A cross bill may be brought by a defendant in a suit against the plaintiff, in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. It is brought either to obtain a discovery of facts in aid of the defense to the original bill, or to obtain full and complete relief to all parties as to the matters charged in the original bill. *Shields v. Barrow*, 17 How. 145; *Ayres v. Carver*, Id. 595, 3 Daniell, Ch. Pr., § 1742; 1 Fost. Fed. Pr., § 170. Matters which regularly should be included in a cross bill may, if no objection is

made, be set up in an answer, and relief granted as if a cross bill had been filed. *Kelsey v. Hobby*, 16 Pet. 277; *Coburn v. Cattle Co.*, *supra*. This being true, was there any necessity for a cross bill in this case? Does not the answer set up every fact that could have been set up in a cross bill? Is not the relief asked for in the answer the same as would have been prayed for in a cross bill? Is it not within the province of this court to treat the answer as a cross bill, if such a bill was necessary in this case? Is not this court authorized by the course of proceeding in chancery cases to dispense with the cross bill, and make the same decree upon the answer to complainant's bill that could not have been made if a regular cross bill had been filed? The practice suggested by these questions has been frequently adopted by courts of equity as being convenient, safe, and proper for the purpose of avoiding a multiplicity of suits. *Bradford v. Bank*, 13 How. 69. And I shall adhere to this practice in the disposition of this case, as it will tend to save further expense and unnecessary litigation.

52. *Smith v. Blake*, 96 Mich. 542, 55 N. W. 978, per Hooker, C. J.: "A point is made that an injunction cannot properly be granted when the bill fails to allege the requisite facts upon the oath of the complainant. That is true where the injunction sought is preliminary, but we see no reason why relief by injunction cannot be based

hearing upon an injunction bill cannot be had after the act has been done which it is the sole purpose of the bill to restrain; the remedy for any consequent injury is to be had, if at all, at law.⁵³

§ 1408. **Referring questions of fact to a jury in injunction suits.**—In Indiana it is decided that in a suit for injunction, the court may, in its discretion and for its information, refer any question of fact to a jury, but the ultimate finding must be by the court, and until that is made, a motion for a new trial is premature and cannot be granted. And the court's discretion as to what questions it will submit to a jury is not subject to control by the Supreme Court.⁵⁴ Before the Code, an action for a perpetual injunction in Indiana was triable before a jury, unless a jury trial was waived.⁵⁵

§ 1409. **Findings; costs.**—Where, at the trial of an action for an injunction, there is a finding that the defendant did not threaten to do the acts sought to be enjoined, the complaint should be dismissed on the ground that the plaintiff has made no case for injunctive relief.⁵⁶ An injunction should restrain only the unlawful acts alleged in the complaint and found.⁵⁷ In an action to enjoin defendant from destroying a levee alleged to have been

upon proof presented upon the hearing. In this case, while the injunction should not have been allowed, it was permitted to stand until the hearing, and, 'sufficient equity appearing,' it should be perpetuated. *Clark v. Young*, 2 B. Mon. 57. The record may be remanded with directions that complainant be allowed to amend her bill, whereupon the decree may stand affirmed. Complainant will recover costs of both courts. The other justices concurred."

53. *East Saginaw Street R. Co. v. Wildman*, 58 Mich. 286.

54. *Pence v. Garrison*, 93 Ind. 345, per Black, C.: "The rule in this regard is the same in such cases as in actions at law in this State. Upon the subject of trial by jury of questions of fact in suits in equity, see

Waterman v. Dutton, 5 Wis. 413; *Lake Erie R. Co. v. Griffin*, 92 Ind. 487; *Ketcham v. Brazil Coal Co.*, 88 Ind. 515; *Evans v. Nealis*, 87 Ind. 262; *Brinkley v. Brinkley*, 56 N. Y. 192; *Moore v. Metropolitan Bank*, 55 N. Y. 41; *Vermilyea v. Palmer*, 52 N. Y. 471; *Birdsall v. Patterson*, 51 N. Y. 43; *Farmers' Bank v. Joslyn*, 37 N. Y. 353; *Forrest v. Forrest*, 25 N. Y. 501; *O'Brien v. Bowes*, 4 Bosw. 657."

55. *Hopkins v. Greenburg Co.*, 46 Ind. 187.

56. *Loeser v. Liebmann*, 137 N. Y. 163, 33 N. E. 147.

See, as to costs and counsel fees, §§ 203-211, herein.

57. *Loomis v. Thirty-fourth Street R. Co.*, 38 Hun (N. Y.), 517.

built by plaintiff on land belonging to her, a finding that "said levee is upon the line dividing the lands of plaintiff and defendant, and is built partly upon the lands of each," is a sufficient finding that said levee was built upon land owned by plaintiff to sustain a judgment for her.⁵⁸ Where an application is made to restrain a plank road from collecting toll while the road is out of repair, and the injunction is refused because the road was repaired pending the hearing, the discretion of the chancellor in directing that the costs be paid by the defendant will not be interfered with on appeal.⁵⁹

§ 1410. **Appeals.**—In New York, an order denying a temporary injunction in an action in which there are no controverted facts, and the complaint presents merely a question of law, is reviewable by the Court of Appeals.⁶⁰ On an appeal from an order granting a preliminary injunction, the appellate court considers only whether there was a clear and palpable error on the part of the court of original jurisdiction, and carefully abstains from any expression of opinion as to the merits, as premature and calculated to be misleading on the final hearing in the court below.⁶¹ An order dissolving a preliminary injunction will be reversed by the Supreme Court, and the injunction restored, without regard to the

58. *Belcher v. Murphy*, 81 Cal. 39, 22 Pac. 264. In an action to restrain defendants from diverting certain water, plaintiff alleged an appropriation thereof to the extent of a canal six feet wide and three feet deep. The court found an appropriation to the extent of a canal five feet wide and eighteen inches deep. It was held that the finding was responsive to the issue, and relief to that extent was properly allowed. *Hill v. Lenormand*, 2 Ariz. 354, 16 Pac. 266.

59. *People v. Grand Rapids, etc., Plank Road Co.*, 67 Mich. 5, 34 N. W. 250.

60. *White v. Inebriates' Home*, 141

N. Y. 123, 35 N. E. 1092, per Gray, J.: "The complaint presented but a question of law, which was in fact determined adversely by the denial of the motion for an injunction. The form of the order below, by adjudging upon that question and disposing of the issues, raises a question of law which we can review here. *Birge v. Berlin Bridge Co.*, 133 N. Y. 477, 31 N. E. 609."

As to appeals in New York, see § 405 herein, and as to appeals generally, see chap. XI herein.

61. *Young v. Emery*, 155 Pa. St. 273, 26 Atl. 424.

merits, where, on a dispute between the owners and lessees of a mine, it appears that the former have taken the law into their own hands, and three times torn up the tramway of the latter,—the last time just in season to avoid the injunction.⁶² The appellate court should not exercise its power to reverse an order granting an injunction in a doubtful case, when, if the judgment is vacated, the defendant may do acts which will render a final judgment for plaintiff ineffectual.⁶³ In New York, the rule was established that the discretion of the court of original jurisdiction would be reviewed only by the general term; and the Court of Appeals has adhered to this rule, even where it had grave doubts as to the sufficiency of plaintiff's cause of action.⁶⁴

§ 1411. **Appeals; practice.**—A formal defect in a complaint for an injunction which was not attacked by a demurrer is no ground on appeal for reversing a judgment for plaintiff.⁶⁵ In the Federal courts an injunction may be suspended pending an appeal, but such a suspension is unusual.⁶⁶

62. Appeal of Cooke, 132 Pa. St. 533, 19 Atl. 944, 26 W. N. C. 135.

63. Gloversville v. Johnstown, etc., R. Co., 21 N. Y. Supp. 146, 49 N. Y. St. Rep. 315.

64. Hudson River Tel. Co. v. Watterliet, etc., R. Co., 121 N. Y. 397, 24 N. E. 832, where Andrews, J., said: "We entertain very grave doubts whether upon the facts stated in the complaint and affidavits any cause of action exists in favor of the plaintiff. . . . But we think we ought not to dispose of the case upon its merits in this proceeding. The questions are new and difficult, and courts elsewhere have differed upon them. The trial of the case upon the merits is now proceeding, wherein the facts will be judicially ascertained, and in case an appeal shall be taken upon the final judgment rendered to this

court, we shall then be better able than now to determine the ultimate rights of the parties."

65. Ades v. Levi, 137 Ind. 506, 37 N. E. 388, per Dailey, J.: "There is solid reason for the general rule that a party who litigates questions without presenting objections to the pleadings . . . shall not be heard, on appeal, to urge . . . that they were not sufficient, and a departure from this rule would cause almost endless confusion. . . . It is required by the general doctrine that the court of last resort should not be required to decide a question that has not been passed upon by the trial court, since any other holding would, in effect, make the appellate court one of original jurisdiction."

As to appeals, see chap. XI, herein.

66. Wakelee v. Davis, 48 Fed. 612.

§ 1412. **Discharging irregular injunction; appeal.**—In Alabama, as before observed, a motion to dissolve an injunction cannot be founded on a mere irregularity in procedure which does not affect the merits of the cause; the proper practice in such a case being a motion to discharge the injunction.⁶⁷ And it has been held that the Alabama Code authorizing appeals from all interlocutory orders sustaining or dissolving injunctions, does not authorize an appeal from an order made on motion to discharge an injunction; the remedy is by mandamus.⁶⁸

§ 1413. **Supreme Court injunctions; mandamus.**—An order of a judge of the Supreme Court granting an injunction which had been refused by the lower court is, when returned to the corporation court, and recorded there, in effect, an order of that court; and the judge of that court may act upon it as an order of his own court, and increase the bond fixed by the Supreme Court. But this cannot be done at rules, when the court is not in term; but the case must be matured as any other case, and regularly proceeded with. It was error, however, to order an increase of injunction bond where the adverse party was fully protected by collateral for his claim.⁶⁹ In Michigan the Supreme Court will not by mandamus compel the Circuit Court to vacate its injunction except where there is an emergency which requires a more speedy remedy than appeal,⁷⁰ but will issue mandamus to that court where its action in granting an injunction was beyond any proper discretionary power or was an abuse of discretion which could not be justified on any principle of equity jurisprudence, and when the occasion is so urgent as to require an immediate remedy.⁷¹

§ 1414. **Liability on bond for counsel fees; parties to action.**—Where defendant recovers final judgment in an injunction suit,

67. See §§ 292, 293, *ante*.

68. *Ex parte Fehheimer*, 15 So. 647.

69. *Ruffin v. Commercial Bank* (Va.), 19 S. E. 790.

70. *Plank Road Co. v. Circuit Judge*, 98 Mich. 141, 56 N. W. 1109.

71. *Detroit v. Hosmer*, 79 Mich. 384, 44 N. W. 622. And see *Port Huron v. Circuit Judge*, 31 Mich. 456; *Tawas R. Co. v. Circuit Judge*, 44 Mich. 479, 7 N. W. 65; *Maclean v. Circuit Judge*, 52 Mich. 257, 18 N. W. 396; *Barnum Iron Works v. Speed*,

and thus dissolves a preliminary injunction which plaintiff had obtained by giving bond, defendant can not recover his attorney's fees in an action against the sureties on the bond, since they were incurred in the suit, and not in an attempt to dissolve the preliminary injunction.⁷² On the breach of an injunction bond, of which

59 Mich. 272; *Van Norman v. Circuit Judge*, 45 Mich. 204.

72. *San Diego Co. v. Pacific Steamship Co.* (Cal.), 35 Pac. 651, per Temple, C.: "I proceed, therefore, to the main question discussed by counsel, which is whether, conceding that a preliminary injunction was issued, and the undertaking sued on was given in consideration of the injunction, plaintiff can recover his attorney's fees. It is admitted that no effort was ever made to dissolve the injunction, except that the case was tried on its merits and the court, having found against the right of the plaintiff in the injunction suit, dissolved the preliminary injunction. Counsel were simply employed to try the case, and were paid for that service, and for no other. The cost was no greater than it would have been had no preliminary injunction been issued. Appellant's counsel concedes that, ordinarily, such damages cannot be recovered under such circumstances, but he contends that the rule is different where as here, injunction is the only relief sought in the action, and where it appears that the same questions would arise on a motion to dissolve which are determined by the final judgment. In *Buford v. Packet Co.*, 3 Mo. App. 159, it is said: 'The principle upon which counsel fees are allowed, upon dissolution of an injunction, does not rest upon a supposed increase of the trial expenses, created by the injunction. It is based upon the fact that defendant

has been compelled to employ aid in getting rid of an unjust restriction, forced upon him by the act of the plaintiff.' If the sureties could be held responsible, without reference to the terms of their contract, for a conspiracy to aid the plaintiff in the imposition of an illegal restraint upon the defendant, there would be some show of reason in such a rule, but, if the sureties are to be held only on their contract, the admission that the expenditures were not caused by the injunction is fatal to the argument. The sureties did not agree to pay the expenses of getting rid of the restraint. Ordinarily, such expense would be caused by the injunction; but it is not always so, and is not when a preliminary injunction is ended by a final judgment for defendant. Here the expenditure was caused by the suit, and not by the injunction. The sureties are liable for expenditures caused by the injunction, and not for those caused by the suit. This whole matter was elaborately discussed in *Thurston v. Haskell*, 81 Me. 303, 17 Atl. 73, which was a case in all respects like the present. It was there held that counsel fees could not be recovered in such a case. But it is not true that, in any sense, the counsel fees were expended to get rid of the restraint imposed by the preliminary injunction. The fee was, of course, paid to prevent the permanent injunction. But in such case, the defendant has not been relieved of the restraint imposed by the preliminary

the condition is to pay all damages "any person" may sustain by the injunction if it is dissolved, any one of those against whom the injunction was granted, who has been damaged thereby, may sue.⁷³

§ 1415. **Damages where motion to dissolve heard at trial, etc.**

—Where the defendant in an injunction suit moved to dissolve the injunction, but the motion was not acted on until the hearing on the merits when it was granted and the injunction dissolved, it was held that all the expense incurred by defendants in the injunction suit in preparing for the final hearing should be included in the assessment of damages.⁷⁴ An order vacating an injunction and

injunction. It was a restraint, in terms, during the pendency of the suit only. It continued unchanged during the whole of that period. Its purpose was to hold the defendant until the rights of the plaintiff could be determined. It did so, and then ceased by original limitation. The attorneys were not employed to get rid of it, and never attempted to do so. The defendant acquiesced, and submitted to all the restraint it assumed to impose. It is true we sometimes speak of making the preliminary injunction perpetual. But while the injunction, by the judgment, may be the same in scope and effect, it is a restraint imposed by a new and distinct command. It is a new injunction, which may be, and often is, different in its effect and terms. This was determined in *Lambert v. Haskell*, 80 Cal. 611, 22 Pac. 327. But I think the question was practically decided by this court in *Mitchell v. Hawley*, 79 Cal. 301, 21 Pac. 833. Council distinguishes that case from the one in hand, on the ground that there injunction was not the sole relief sought. If the foregoing reasoning be correct, that is not a circumstance of any importance. But that case was upon a bond, given in an action brought to enjoin the defend-

ant from violating an alleged patent right, claimed by the plaintiff, and to recover damage for infringing the right. The issue was as to the validity of the claim. Upon that depended the right to the injunction, and to the damage. Nothing else was tried. The claim having been adjudged invalid, the bill was dismissed, and the injunction fell with the claim. The issue would have been the same on a motion to dissolve. This court refused to allow counsel fees, and remarked that the allowance of counsel fees on injunction bonds is exceptional, 'and should not be carried beyond the point to which former decisions have taken it.' Former decisions have carried the doctrine to the extent that reasonable counsel fees, paid for the sole purpose of procuring a dissolution of an injunction, may be recovered."

As to recovery of counsel fees, see §§ 203-210-b herein.

73. *Smith v. Mutual Loan Co.*, 102 Ala. 282, 14 So. 625. And see *Sprowl v. Lawrence*, 33 Ala. 674; *Masterson v. Phinizy*, 56 Ala. 336; *Morrow v. Wood*, 56 Ala. 1.

74. *Jackson v. Millspaugh*, 100 Ala. 285, 14 So. 44, per Stone, C. J.: "Bills in equity have come to occupy a very large field in judicial administration,

discontinuing an action, whether entered voluntarily by the plaintiff, or after leave granted by the court upon his application, is in

and injunctions, as a means of making their remedial powers effective, have a very wide and varied scope. Sometimes they are mere incidental aids,—temporary adjuncts to equitable relief; while in other cases their permanent restraining power is the object,—the end sought to be accomplished by them. Hence it is exceedingly difficult to declare the extent of liability incurred by unauthorized and unsuccessful resort to their restraining powers. Reason and authority concur in asserting that the makers of an injunction bond are liable for the damage done to another by the wrongful resort to this extraordinary process, as it is styled; but they are liable no further. They are in no sense liable for injury and expense of the suit, unless such injury and expense were caused by the injunction itself. The one must sustain the relation of cause to the other as its effect, to fix a liability therefor. *Robertson v. Robertson*, 58 Ala. 68; *Randall v. Carpenter*, 88 N. Y. 293; *Hovey v. Pencil Co.*, 50 N. Y. 335; *Holmes v. Weaver*, 52 Ala. 516. In *Bolling v. Tate*, 65 Ala. 417-426, we said: 'It would seem that all necessary and proper expenses incurred to procure the dissolution [of an injunction], or to prevent its reinstatement, in the court below, are the natural and proximate result of the wrongful suing out of the injunction, and are recoverable as damages.' Quoting from *Chancellor Walworth* (*Edwards v. Bodine*, 11 Paige (N. Y.), 223), we said: 'The necessity of paying such counsel fees is an actual damage which the defendants have sustained by reason of the injunction. . . . It is not a mere matter of discretion,

as the condition of the bond is imperative that the obligors in the bond shall pay to the parties enjoined such damages as they may sustain by reason of the injunction.' We further said in the same case, quoting many authorities in support of it, that 'the fees recoverable are not necessarily for the defense of the whole action. They are limited to that part of the defense, or the whole, as the case may be, that may be rendered necessary by the writ of seizure, or injunction complained of.' In *Andrews v. Woolen Co.*, 50 N. Y. 282, the court said: 'Expenses properly incurred on the part of the defendant for the purpose of dissolving an injunction were legally allowable as damages.' *Jackson and another*, by conveyance in writing, sold to *Millspaugh and others* certain goods and choses in action, at a stipulated price paid. The writing expressed what things were sold. *Millspaugh and associates* brought suit for damages, alleging that *Jackson* and his associate had failed and refused to deliver certain of the things purchased. Thereupon *Jackson* and his copartner filed a bill, charging that a mistake had been made in the draught of the writing, and that it mentioned and conveyed several things which were not in fact sold, and were not intended to be included in the conveyance. It prayed for a reformation of the contract, and that the suit at law, to the extent it sought to recover the disputed items, be enjoined. A temporary injunction was obtained, and the statutory bond in such cases was required and given. *Millspaugh and others*, the parties enjoined, filed sworn answers denying

effect a determination that the plaintiff was not entitled to the injunction granted.⁷⁵

§ 1416. **Violation of injunction as contempt.**—Where a court has jurisdiction of the subject matter of an action, and a justice thereof has jurisdiction to consider and decide an application for a temporary injunction made therein, it is the duty of the person enjoined by such order to obey it; and his disobedience or resistance to its mandate is an offense punishable as a criminal contempt; and upon an application to punish a person for criminal contempt arising out of his disobedience of a temporary injunction made in an action, the question whether the complaint contained facts calling for the equitable interference of the court, or whether it

the mistake charged, and thus denied the ground on which the equity of the bill and the injunction depended. They thereupon moved to dissolve the injunction on the sworn denials in the answers. This motion was not acted on until the final hearing, when the injunction was dissolved and the bill dismissed. Testimony had been taken, and the case was tried on its merits. The present suit was brought on the injunction bond to recover damages for the wrongful suing out of the injunction. The question raised is whether the bondsmen are liable for the expense of attorney's fees in preparing the case for a final hearing and decision, which dissolved the injunction and dismissed the bill, or whether their liability is limited to the expense of dissolving the temporary injunction, had the motion therefor been pressed. It was testified by a witness for Millspaugh and others, and not objected to nor denied, that the motion to dissolve the temporary injunction 'was continued from time to time by consent at the instance of the solicitors of complainants [Jackson and associate], and it

was finally agreed that it should be heard at the same time that the case should be heard finally.' The controlling purpose of Jackson's bill was an injunction of the suit at law, to the extent it was charged there was a mistake in the written contract. Without the injunction, there must be a recovery at law for all that was claimed, for the writing on which it was founded precluded all defense at law, based on the alleged mistake. And the necessity for getting rid of the temporary injunction did not end the trouble. If dissolved on motion, and afterwards reinstated on proof, this would have left Millspaugh and his associates equally without right to recover, to the extent relief should be obtained under the bill. So, the expense the injunction imposed on them was not limited to getting relief from the temporary injunction. It extended further, and embraced all the outlay that would become necessary to prevent a reinstatement of the injunction."

As to damages, see Chap. VI herein.

75. New York City Suburban Wa-

set forth a valid cause of action in the plaintiff, cannot arise. It is essential to sustain the conviction of a person for a civil contempt of court that there shall exist not only jurisdiction in the court or officer granting the injunction which has been disobeyed, but also a valid cause of action in the aggrieved party; it is otherwise in a case of criminal contempt, and in proceedings to prosecute such an act the court will look only to the question of power, and if there was jurisdiction to grant the order it will impose punishment upon those who wilfully disobey it for the purpose of vindicating its own power and maintaining its own dignity, and leave any error as to private rights to be redressed in the orderly manner provided for by the rules of practice.⁷⁶ And in a recent case

ter Co. v. Bissell, 78 Hun (N. Y.), 176.

76. People ex rel. Gaynor v. McKee, 78 Hun, 154, 28 N. Y. S. 938, per Brown, P. J.: "If the supreme court had jurisdiction of the subject-matter of the action brought against the appellants, and if Justice Barnard had jurisdiction to grant the preliminary injunction for disobeying or resisting which the appellants have been convicted, that order must be treated as a valid and binding order of the court, and as such was to be obeyed until it was revoked by a subsequent order made in the same action. People v. Sturtevant, 9 N. Y. 263; Erie R. Co. v. Ramsey, 45 N. Y. 644; Mayor, etc., v. N. Y. & S. I. Ferry Co., 64 N. Y. 624; People ex rel. Negus v. Dwyer, 90 N. Y. 402; People ex rel. Cauffman v. Van Buren, 136 N. Y. 252, 32 N. E. 775. The question whether the complaint contained facts calling for the equitable interference of the court, or, in other words, whether it set forth a valid cause of action in the plaintiff, did not arise upon the application to punish for a criminal contempt, and,

hence, is not before this court for review. This rule, which is applicable only to cases of criminal contempt, to which class the present proceeding belongs, is to be distinguished from the rule applied in cases of civil contempt. In the latter class it is essential to sustain a conviction that there shall exist, not only jurisdiction in the court or officer granting the order which has been disobeyed, but also a valid cause of action in the aggrieved party; and this results from the fact that a civil contempt is not an offense against the dignity of the court, but against the party in whose behalf the mandate of the court has been issued, and a fine is imposed solely as indemnity to the injured party. And as there can be no injury when there is no right to maintain the suit, it is essential that this right should exist in order to sustain a conviction, and that question is always open for examination on appeal. But it is otherwise in a case of criminal contempt. That offense involves no element of personal injury. It is of a public character, and indictable. It is directed against the dignity and authority of the court

decided by the Supreme Court of the District of Columbia, and which attracted attention throughout the country on account of the prominence in labor circles of the parties before the court for contempt, these general principles as to the duty of one enjoined to obey the order are strongly asserted.⁷⁷

alone. Hence, in proceedings to prosecute such an act the court will look only to the question of power, and if there was jurisdiction to grant the order, it will impose punishment upon those who willfully disobey it. And, obviously, no other rule could prevail and maintain the usefulness of the courts. It would be intolerable if any suitor could question and disregard the orders and decrees of the courts whenever he considered them erroneous. As well might the sheriff who is their executive officer, refuse to execute them. Under such a rule, the administration of the law would fail, and government would break down in one of its vital parts. The distinction between a civil and a criminal contempt is plainly stated in the code in sections 8 to 14, inclusive, and has recently been pointed out by the court of appeals in *People ex rel. Munsell v. Oyer & Terminer*, 101 N. Y. 245, 4 N. E. 259."

As to violations and punishment of, see Chap. VIII herein.

77. *Buck's Stove & Range Company v. American Federation of Labor*, 36 Wash. Law Rep. 822. The following extract is from the opinion of Mr. Justice Wright: "That the order was 'void,' according to the technical criteria by which the law determines 'voidness' no one has shown me a pretense; yet under technical 'voidness' alone can parties escape the duty and the necessity of obedience; were it concededly 'erro-

neous,' in the sense that the tribunal had fallen into an error in the determination of a cause which it was invested with jurisdiction to 'hear and determine,' the duty and necessity of obedience remains nevertheless the same. And I place the decision of the matter at bar distinctly on the proposition that were the order confessedly erroneous, yet it must have been obeyed. (*Worden v. Searls*, 121 U. S. 14, 8 S. Ct. 814.)

"It is between the supremacy of law over the rabble or its prostration under the feet of the disordered throng.

"The interpretation of the law of a matter by an appropriate judicial tribunal settles that matter between the parties; else there is not anywhere to be had a settlement which takes impartial account of both sides; even if it be said that tribunals now and then fall into error in particular matters, yet this error lies in the incomplete and finite nature of worldly things, and should not overturn the rule; for the rule being the best attainable by finite man, holds better results for the social fabric, more promotes the general welfare than would any other rule; for any other rule would be not the best rule, but somewhat worse. It is to the end that errors so falling may be minimized by possible correction, that tribunals for review are established for the advantage of a party who has such claim to make; but meanwhile the decree fixes

the law's seal upon the matter, there to remain until removed, if at all, in the manner of order; not by riotous hands.

"When, with the parties to this cause attending, their dispute heard, and the status of the subject of the controversy examined into, the inhibitory process of this tribunal issued forth, it was the law's command to 'Stand! Hands off! until justice for this matter can be ascertained.'

"Is not law wide enough, and its shield broad enough, to avert from annihilation that which its tribunals have taken in hand for the very sake of decreeing whether it shall not be saved?

"Yet everywhere; all over; within the court and out; utter, rampant, insolent defiance is heralded and proclaimed; unrefined insult, coarse affront, vulgar indignity measures the litigants' conception of the tribunal's due wherein his cause still pends.

"Before the injunction was granted these men announced that neither they nor the American Federation of Labor would obey it; since it issued they have refused to obey it; and through the American Federation of Labor disobedience has been successfully achieved and the law has been made to fail; not only has the law failed in its effort to arrest a widespread wrong, but the injury has grown more destructive since the injunction than it was before. There is a studied, determined, defiant conflict precipitated in the light of open day, between the decrees of a tribunal ordained by the government of the Federal Union and of the tribunals of another federation grown up in the land; one or the other must succumb, for those who would unlaw the land are public enemies.

"On the sociological aspect of the situation, some faith in the ultimate rightness of American men, whether in labor unions or out, is to be entertained; for I believe that the habit of the land saturates them with a readiness to abide by authority, as I believe that this very readiness to yield to authority has undone them before now, through the errors of misguiding leaders, swollen by pigmy power. It stands in the nature of things that the unlettered be most sensible of that authority which most often shows itself in their modest affairs, although a higher may exist to which their attention is not every moment directed by some interference with them, but to which they stand ready to adhere upon the moment that shows them that the lesser authority was in mistake, or leading them awrong. It is written in this record that the labor unions and its officers meddle into a member's daily affairs deeper than does the law; restrict him in matters that the law leaves free; and thus so continually crowd their authority upon his attention, that insensibly he comes to regard them as of first control in his affairs; the fact that he regards them as authority, leads him to heed them because of his readiness to yield to authority; his very respect for authority assumes that all authority is respectable; and so upon them he relies, by them he is led. What knows the worker in Texas, Florida, Maine and Oregon of the merits of the original controversy of 36 metal polishers in Missouri? What knows he of the refined distinctions about 'Boycott,' 'Conspiracy,' 'Injunction,' and the 'Voidness for Want of Jurisdiction,' of judicial decrees? In respect of each of these and of the original contro-

versy he has been betrayed; (App. A) hoodwinked into the stand of an enemy of law, and of social order. Announcing freedom to purchase what and where one will, they deny that right to him himself; proclaiming the right of all men to labor, they restrict it to the holders of a union 'card;' declaring the right to enjoy full earning capacity, they limit his daily earnings to a stated sum.

"Says the authority of law, 'I lead you by the truth;' says the other, 'I lead you by a lie;' says one, 'I stand for the obligations of contracts, including yours;' the other, 'I throw down contracts, even though yours;' says one, 'I am for law,' the other, 'I unlaw.' That the universal recog-

nition of the desirability of associations of craftsmen for the ascertainment and advancement of the welfare of their kind is so retarded is to be much deplored; yet it is in the history of man that some lessons must be unlearned; that systems which proceed in antagonism to rule, shatter themselves at length against the resistless barrier of public law.

"It would seem not inappropriate for such a penalty as will serve to deter others from following after such outlawed examples; will serve physically to impose obedience even though late; will serve to vindicate the orderly power of judicial tribunals, and to establish over this litigation the supremacy of law."

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